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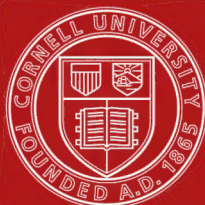
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Rights, remedies, and practice, at law,



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RIGHTS, REMEDIES, AND PRACTICE.

RIGHTS, REMEDIES,
AND
PRACTICE,
AT LAW, IN EQUITY, AND UNDER THE CODES.
A TREATISE ON
AMERICAN LAW
IN CIVIL CAUSES;
WITH
A DIGEST OF ILLUSTRATIVE CASES.

BY
JOHN D. LAWSON,
AUTHOR OF WORKS ON PRESUMPTIVE EVIDENCE, EXPERT EVIDENCE, CARRIERS,
USAGES AND CUSTOMS, DEFENSES TO CRIME, ETC.

IN SEVEN VOLUMES.

VOL. IV.

SAN FRANCISCO:
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LAW PUBLISHERS AND LAW BOOKSELLERS,
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THE FILMER-ROLLINS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.

PREFACE.

THIS volume continues the third division,—Property Rights and Remedies,—and includes the titles Negotiable Instruments, Copyrights, Trade-marks, Patents, Bailments, and Trusts.

Under the title Bailments will be found the important topics of Common Carriers, Pledges, Innkeepers, and Telegraph Companies.

J. D. L.

TABLE OF CONTENTS OF VOLUME IV.

TITLE XIX.—NEGOTIABLE INSTRUMENTS.

CHAPTER LXXVII.

THE CLASSES OF NEGOTIABLE INSTRUMENTS.

- § 1444. Negotiable instruments defined — Classes of.
- § 1445. Bills of exchange — Foreign bills.
- § 1446. Bills in a set.
- § 1447. Promissory notes.
- § 1448. Checks.
- § 1449. Bills of lading — Warehouse receipts.
- § 1450. Letters of credit.
- § 1451. Bonds.
- § 1452. Coupons.
- § 1453. Certificates of deposit — Of stock — Other certificates.
- § 1454. Treasury notes — Bank bills.

CHAPTER LXXVIII.

REQUISITES TO NEGOTIABILITY.

- § 1455. Requisites to negotiability — In general.
- § 1456. Requisites to negotiability — Sealing.
- § 1457. Order or promise must be certain and imperative.
- § 1458. I O U's and due bills.
- § 1459. Payment must be unconditional and certain.
- § 1460. Payment out of particular fund.
- § 1461. Amount must be certain.
- § 1462. Must be payable in money.
- § 1463. And must not include other matters.
- § 1464. Requisites of bills and notes — As to form in general.
- § 1465. As to signing.
- § 1466. Verbal or grammatical mistakes.

- § 1467. As to date.
- § 1468. As to sum payable.
- § 1469. Place of making.
- § 1470. Delivery essential.
- § 1471. Delivery in escrow.
- § 1472. The parties to a bill or note — In general.
- § 1473. The drawer.
- § 1474. The drawee — The maker.
- § 1475. The payee.
- § 1476. Parol evidence inadmissible to vary instrument.
- § 1477. Exceptions.
- § 1478. Contemporaneous written agreement.

CHAPTER LXXIX.

MATURITY OF INSTRUMENT.

- § 1479. Time of payment— On demand.
- § 1480. At sight.
- § 1481. At future day.
- § 1482. "Days of grace."
- § 1483. Usance.
- § 1484. Computation of time.
- § 1485. Dies non juridicus.
- § 1486. Place of payment.

CHAPTER LXXX.

PRESENTMENT, ACCEPTANCE, DEMAND, PROTEST, AND NOTICE.

- § 1487. Presentment for acceptance — When necessary.
- § 1488. Time.
- § 1489. Place.
- § 1490. By whom.
- § 1491. To whom.
- § 1492. Right of drawee to retain bill.
- § 1493. Presentment for acceptance, when excused.
- § 1494. Acceptance — Defined — In general.
- § 1495. Form of — Requisites as to.
- § 1496. Need not be dated.
- § 1497. General and absolute acceptance.
- § 1498. Qualified or conditional acceptance.
- § 1499. Time of acceptance.
- § 1500. Other requisites.
- § 1501. Who may accept.
- § 1502. Acceptance "supra protest."

- § 1503. Effect of non-acceptance.
- § 1504. Duty of drawee to accept — Liability before acceptance.
- § 1505. Refusal to accept — Damages, measure of.
- § 1506. No privity between drawee and holder.
- § 1507. Liability of acceptor after acceptance.
- § 1508. Effect of acceptance — Admissions and warranties of acceptor.
- § 1509. Presentment for payment — In general.
- § 1510. Mode of presentment.
- § 1511. Time.
- § 1512. Place.
- § 1513. By whom.
- § 1514. Liability of agents for neglect.
- § 1515. To whom.
- § 1516. Presentment for payment, when excused.
- § 1517. What will not excuse.
- § 1518. What will excuse delay in.
- § 1519. When necessary to charge parties.
- § 1520. Damages on refusal to pay — Measure of.
- § 1521. Liability of drawer.
- § 1522. Effect of drawing — What drawer admits and warrants.
- § 1523. When is instrument dishonored for non-payment.
- § 1524. Effect of dishonor.
- § 1525. Noting.
- § 1526. Protest — Requisites of — In general.
- § 1527. Necessary to charge parties.
- § 1528. Who may make.
- § 1529. Time.
- § 1530. Place.
- § 1531. What will excuse.
- § 1532. What will excuse delay.
- § 1533. Protest for better security.
- § 1534. Notice of dishonor essential — Proof of.
- § 1535. Effect of not giving notice.
- § 1536. Notice of dishonor — By whom given.
- § 1537. Mode of giving.
- § 1538. Time of giving.
- § 1539. Time of receiving.
- § 1540. Notice by post.
- § 1541. Party receiving notice transferring it to others — Principal and agent.
- § 1542. To whom given — Who entitled to — Guarantors.
- § 1543. Form and requisites of notice.
- § 1544. Cases in which notice is excused.
- § 1545. Cases in which notice is not excused.
- § 1546. Waiver of notice.
- § 1547. What excuses delay in giving notice.
- § 1548. To whose benefit it inures.
- § 1549. Usages as to demand and notice.

CHAPTER LXXXI.

TRANSFER AND INDORSEMENT OF NEGOTIABLE PAPER, AND
TITLE THERETO.

- § 1550. Transfer of — By assignment or sale.
- § 1551. Payable to order, without indorsement.
- § 1552. Transfer by delivery — Effect of.
- § 1553. What transferrer warrants.
- § 1554. Transfer by death — In general.
- § 1555. Transfer by negotiation — In general.
- § 1556. Who may negotiate.
- § 1557. Payee designated by wrong or misspelled name.
- § 1558. Several payees or indorsers.
- § 1559. To whom may instrument be negotiated.
- § 1560. Time of negotiation.
- § 1561. Negotiation by delivery.
- § 1562. Negotiation by indorsement — In general.
- § 1563. Requisites of indorsement — As to form.
- § 1564. Indorsements in blank or general indorsements.
- § 1565. Special indorsements.
- § 1566. Striking out indorsements.
- § 1567. Partial indorsements.
- § 1568. Qualified indorsements “without recourse.
- § 1569. Facultative indorsements.
- § 1570. Conditional indorsements.
- § 1571. Restrictive indorsements.
- § 1572. Indorsers — Who are — Liability in general.
- § 1573. What indorser warrants and admits.
- § 1574. Indorser of non-negotiable bill or note.
- § 1575. Liability of indorser not a party to instrument — Guarantors.
- § 1576. Liability of drawer and indorser on dishonor — Measure of damages.
- § 1577. Re-exchange and redraft.
- § 1578. Rights of de facto holder to give good title.
- § 1579. “Bona fide holder” — Negligence.
- § 1580. “For value.”
- § 1581. Note received for pre-existing debt.
- § 1582. “Before maturity.”
- § 1583. Overdue instrument subject to equities.
- § 1584. What are “equities.”
- § 1585. At what time is instrument overdue.
- § 1586. “In the usual course of business.”
- § 1587. “Without notice of any defense.”
- § 1588. Holder claiming under bona fide holder.
- § 1589. Holder presumed to be bona fide and for value.
- § 1590. Exceptions.
- § 1591. Absence of consideration.

- § 1592. Consideration in general.
- § 1593. Accommodation party — Liabilities of.
- § 1594. Rights of.
- § 1595. Partial failure of consideration.
- § 1596. Total failure of consideration.
- § 1597. Illegal consideration.
- § 1598. Forged signatures.
- § 1599. Fraud or duress.
- § 1600. Instrument or consideration void by statute.
- § 1601. Defects patent on face of instrument.
- § 1602. Fictitious payee or indorser.
- § 1603. Rights of bona fide holder to bring action.
- § 1604. Defenses.

CHAPTER LXXXII.

DISCHARGE OF INSTRUMENT.

- § 1605. Discharge of instrument — In general.
- § 1606. By payment.
- § 1607. Payment by whom made.
- § 1608. To whom made.
- § 1609. Payment "supra protest."
- § 1610. Payment by mistake to wrong party — Recovery.
- § 1611. Time.
- § 1612. Duty of holder on payment.
- § 1613. Discharge of instrument — Acceptor or payor becoming holder.
- § 1614. By waiver or cancellation.
- § 1615. By renewal.
- § 1616. By alterations.
- § 1617. Discharge of sureties (indorsers) by dealings with principal.

TITLE XX. — COPYRIGHTS, TRADE-MARKS,
AND PATENTS.

CHAPTER LXXXIII.

COPYRIGHTS.

- § 1618. Copyright at common law — Lost by publication.
- § 1619. What is a publication.
- § 1620. Stage representation — Playright.
- § 1621. Property in private letters.
- § 1622. Copyright by statute.

- § 1623. Mode of and requisites to obtaining statutory copyright.
- § 1624. Jurisdiction of courts in copyright.
- § 1625. Who has right to take out copyright.
- § 1626. What may and may not be copyrighted.
- § 1627. What is an infringement — Abridgments and compilations.
- § 1628. Right to make extracts — Reviewers.
- § 1629. Translations into another language.
- § 1630. Rules as to granting injunctions in cases of infringement.
- § 1631. Statutory penalties for infringements.
- § 1632. Contracts and licenses to print and publish — Assignment of copyright.

CHAPTER LXXXIV.

TRADE-MARKS.

- § 1633. What is a trade-mark — How acquired.
- § 1634. Ground on which law protects trade-marks.
- § 1635. What may be a trade-mark — In general.
- § 1636. Words not original — Words in common use.
- § 1637. Geographical names.
- § 1638. Generic names — Name descriptive of article of trade.
- § 1639. Symbols and numbers.
- § 1640. Right to trade-mark in one's own name.
- § 1641. Names of corporations — Business firm names.
- § 1642. Names of newspapers and books.
- § 1643. What is an infringement.
- § 1644. Trade-mark intended to deceive not protected.
- § 1645. What persons entitled to protection.
- § 1646. Relief — Damages — Injunction — Account of profits.
- § 1647. Delay and acquiescence.
- § 1648. Assignment of trade-mark — Conveyances of.
- § 1649. Statutory provisions as to registration.

CHAPTER LXXXV.

PATENTS.

- § 1650. Origin and nature of.
- § 1651. Former statutory provisions.
- § 1652. Consolidation act of 1870.
- § 1653. The patent-office and officers.
- § 1654. Printing of papers.
- § 1655. Copies as evidence.
- § 1656. Issuance of patents — Duration — Date.
- § 1657. What inventions patentable.
- § 1658. Patents for foreign inventions.

§ 1659.	Requisites of application.
§ 1660.	Drawings, when requisite.
§ 1661.	Specimens of ingredients — Models.
§ 1662.	Oath of applicant.
§ 1663.	Examination and issuance of patent.
§ 1664.	Time for completing application.
§ 1665.	Patent to assignee of inventor — To executor.
§ 1666.	Renewal of application.
§ 1667.	Assignment of patent.
§ 1668.	Rights of purchaser before application.
§ 1669.	Patented articles to be marked — Penalties.
§ 1670.	Caveats — Filing and effect of.
§ 1671.	Rejection of claim, notice of.
§ 1672.	Interferences.
§ 1673.	Affidavits and depositions — Subpœnas — Witness fees.
§ 1674.	Penalty for refusing to testify.
§ 1675.	Appeals.
§ 1676.	Proceedings on appeal from commissioner — Determination of.
§ 1677.	Suits in equity for patent.
§ 1678.	Reissue of defective patents.
§ 1679.	Disclaimer.
§ 1680.	Suits in interference.
§ 1681.	Infringement suits.
§ 1682.	Pleading in infringement suits.
§ 1683.	Infringement where specification too broad.
§ 1684.	Previous use in foreign country.
§ 1685.	Extension of patents granted prior to March 2, 1861.
§ 1686.	Proceedings — Operation of extension.
§ 1687.	Patents for designs.
§ 1688.	Penalty for using patented design without authority.
§ 1689.	Jurisdiction of the federal courts.
§ 1690.	Of the state courts.
§ 1691.	Injunctions to restrain infringement.

TITLE XXI.—BAILMENTS.

SECS.

PART I.	BAILMENTS IN GENERAL.....	1692-1750
PART II.	PAWNS AND PLEDGES.....	1751-1777
PART III.	INNKEEPERS.....	1778-1788
PART IV.	COMMON CARRIERS.....	1789-1954
PART V.	TELEGRAPH COMPANIES.....	1955-1973
PART VI.	PHYSICIANS AND SURGEONS.....	1974-1994

PART I.—BAILMENTS IN GENERAL.

CHAPTER LXXXVI.

GENERAL PRINCIPLES OF THE LAW.

- § 1692. Bailment defined.
- § 1693. Illustrations of bailment.
- § 1694. Mutual assent and knowledge essential.
- § 1695. But may be created without contract.
- § 1696. Identical thing must be returned.
- § 1697. Bailments by public officers.
- § 1698. The different kinds of bailments.
- § 1699. The degrees of negligence as affecting bailments.
- § 1700. Tortious bailee liable without regard to negligence — So where there is misuser.
- § 1701. Bailee cannot dispute owner's title.
- § 1702. Liability may be limited by contract — Negligence.
- § 1703. Liability may be enlarged by contract.
- § 1704. Contributory negligence of owner.
- § 1705. Burden of proof.

CHAPTER LXXXVII.

GRATUITOUS BAILMENTS.

(a) *Bailments for Sole Benefit of Bailor.*

- § 1706. These are the depositum and mandatum of the civil law.
- § 1707. Test of gratuitous bailment.
- § 1708. Liability of gratuitous bailee (depositum and mandatum).
- § 1709. Not liable on promise to perform gratuitous bailment.
- § 1710. Bailee of closed receptacle.
- § 1711. Bailee or bailor may sue for chattel.
- § 1712. Termination of bailment — By act of parties.
- § 1713. By redelivery.
- § 1714. By death.
- § 1715. Excuses for not delivering.
- § 1716. At what place bailee bound to redeliver.
- § 1717. After refusal or breach of contract — Bailee an insurer.
- § 1718. Bailee not entitled to use article bailed.
- § 1719. Bailee entitled to reimbursement for expenses.
- § 1720. Joint bailors and joint bailees.

(b) *Bailments for Sole Benefit of Bailee.*

- § 1721. This bailment is the gratuitous loan.
- § 1722. Borrower liable for slight neglect.
- § 1723. For what borrower not liable.
- § 1724. Rights, duties, and liabilities of lender.
- § 1725. Rights and duties of borrower.
- § 1726. Termination of bailment.

CHAPTER LXXXVIII.

MUTUAL-BENEFIT BAILMENTS.

(a) Hire of Labor and Services on Property.

- § 1727. Different classes of these bailees.
- § 1728. Requisites of these bailments—Chattels—Recompense—Mutual assent.
- § 1729. Bailees liable for ordinary negligence.
- § 1730. Not responsible when.
- § 1731. Exception—Negligence contributing to accidental loss.
- § 1732. Liability of warehouseman and wharfinger.
- § 1733. Rights of bailee—To bring action.
- § 1734. To compensation.
- § 1735. Completion of bailment interrupted.
- § 1736. Other rights and duties of bailee.
- § 1737. Duty of bailee to deliver property.

(b) Hire of Chattels.

- § 1738. This bailment how created.
- § 1739. Hirer liable for ordinary negligence.
- § 1740. Hirer may enlarge liability by contract.
- § 1741. Use by hirer beyond terms of hiring.
- § 1742. Hirer has no right to transfer thing.
- § 1743. Liable for injury to thing by servant or others.
- § 1744. Bailor liable for letting defective thing.
- § 1745. Bailment may be terminated how.
- § 1746. Hirer may sue for injury to thing.
- § 1747. Other rights of hirer.
- § 1748. Duty of hirer to restore thing.
- § 1749. To make compensation.
- § 1750. Bailor must pay for expenses when.

PART II.—PAWNS AND PLEDGES.

CHAPTER LXXXIX.

PAWNS AND PLEDGES.

- § 1751. Definition of pledge or pawn—“Collateral security.”
- § 1752. Title does not pass to pledgee.
- § 1753. Delivery of property pledged essential.
- § 1754. Actual manual possession not necessary.
- § 1755. Who may pledge.
- § 1756. What may be pledged.
- § 1757. Property not in existence.
- § 1758. What debts or engagements pledge may cover.
- § 1759. Extent of the security.

- § 1760. Right of pledgee to possession of pledge.
- § 1761. Right of pledgee to use thing.
- § 1762. Right of pledgee to sell pledge.
- § 1763. Demand and notice necessary.
- § 1764. Sale must be public.
- § 1765. Pledgee may not purchase.
- § 1766. Pledgee of several securities.
- § 1767. Pledgor may ratify irregular sale.
- § 1768. Pledgee not obliged to sell.
- § 1769. Pledgee may also sue personally.
- § 1770. Right of pledgee to transfer pledge—Rights of purchasers.
- § 1771. Pledgee must use ordinary care.
- § 1772. Special contract may enlarge or restrict.
- § 1773. Duty of pledgee to collect pledged negotiable paper.
- § 1774. Right of pledgor to redeem.
- § 1775. Duty of pledgee to return pledge.
- § 1776. Other duties of pledgor and pledgee.
- § 1777. Pledge how extinguished.

PART III.—INNKEEPERS.

CHAPTER XC.

INNKEEPERS.

- § 1778. Innkeepers defined.
- § 1779. Boarding and lodging house keepers.
- § 1780. Who are "guests."
- § 1781. Innkeeper bound to receive public.
- § 1782. Innkeeper an insurer.
- § 1783. Extent of liability as to time, place, and quantity.
- § 1784. Who may bring action.
- § 1785. Innkeeper not liable—Contributory negligence of guest.
- § 1786. Other cases.
- § 1787. Limitation of liability—By contract and notice.
- § 1788. By statute.

PART IV.—COMMON CARRIERS.

CHAPTER XCI.

CARRIERS OF GOODS.

- § 1789. Common carrier defined—Test—Private carrier.
- § 1790. Subject to public regulation and control.
- § 1791. Carriage must be for hire.
- § 1792. Who are common carriers.
- § 1793. Status of carriers of animals.

- § 1794. Status of carriers of passengers.
- § 1795. Status of sleeping-car companies.
- § 1796. Status of telegraph companies.
- § 1797. Carrier bound to carry for all — Action for refusal — Mandamus — Discriminations.
- § 1798. Exceptions — Payment in advance refused.
- § 1799. Nature of goods and place of destination outside carrier's business or route.
- § 1800. Goods tendered away from office or after business hours.
- § 1801. Goods exposed to violence.
- § 1802. Suspicious packages.
- § 1803. Property not properly packed.
- § 1804. Goods beyond his facilities.
- § 1805. Delivery to carrier — Delivery to agent.
- § 1806. Owner retaining control of goods.
- § 1807. Delivery must be for immediate carriage.
- § 1808. Place of delivery.
- § 1809. Common carrier an insurer.
- § 1810. Exceptions — Act of God.
- § 1811. Public enemies — Mobs — Strikes.
- § 1812. Wear and tear and deterioration of goods — Animals.
- § 1813. Act of the law.
- § 1814. Stoppage in transitu.
- § 1815. Act or neglect of owner.
- § 1816. Fraud of owner.
- § 1817. Effect of delay — Loss by act of God after delay.
- § 1818. Effect of delay on contracts limiting liability.
- § 1819. Loss after deviation.
- § 1820. Effect of deviation on contracts limiting liability.
- § 1821. Duty of carrier as to stowage of goods.
- § 1822. Duty of carrier to follow shipper's instructions.
- § 1823. Agreements to deliver within specified time.
- § 1824. Duty of carrier as to care of goods during transit.
- § 1825. Presumption of negligence from failure to deliver safely.
- § 1826. Delivery by carrier — Personal delivery, when required.
- § 1827. Delivery by carriers by water.
- § 1828. Delivery by railroads.
- § 1829. Delivery by express companies.
- § 1830. Delivery to wrong person.
- § 1831. Where consignee cannot be found, or does not receive, carrier holds goods as warehouseman.
- § 1832. Duty of carrier to notify consignor.
- § 1833. Right of consignee to inspect goods before delivery.
- § 1834. Carrier's right of action for injury or taking of goods by third person.
- § 1835. Right of carrier to sell goods.
- § 1836. Right of carrier to freight — Goods must be delivered.
- § 1837. Who liable for freight.
- § 1838. Who may sue.

CHAPTER XCII.

LIMITATION OF COMMON-LAW LIABILITY.

- § 1839. Power of carrier to limit his liability.
- § 1840. The American rule.
- § 1841. Rule in Pennsylvania and South Carolina.
- § 1842. Rule in New York and West Virginia.
- § 1843. Special consideration necessary to support restrictive contract.
- § 1844. Notice as to value and quality of goods.
- § 1845. Notices by advertisement and placard.
- § 1846. Conditions in notice do not bind shipper until assented to.
- § 1847. Presumption of assent to conditions in notice.
- § 1848. Notices in bills of lading and receipts.
- § 1849. Cases where assent of shipper was inferred.
- § 1850. Cases where assent of shipper was not inferred.
- § 1851. Bills of lading.
- § 1852. Bill of lading cannot be explained or contradicted by parol.
- § 1853. Exceptions to this rule.
- § 1854. Delivery of bill of lading after receipt of goods.
- § 1855. Conditions in contracts as to manner and time of making claim.
- § 1856. Other conditions and regulations contained in carrier's contracts.
- § 1857. Conditions in contracts as to carriage of live-stock.
- § 1858. Construction of special contracts.
- § 1859. Different words and phrases in carrier's contracts construed.
- § 1860. Presumption of liability from happening of loss or damage—Burden on carrier.
- § 1861. Burden of proof of restrictive contract on carrier.
- § 1862. Loss falling within exemption—Burden of proof of negligence.
- § 1863. Usage as to restrictive contracts.

CHAPTER XCIII.

CONNECTING CARRIERS.

- § 1864. Carriers may agree to carry beyond their own routes.
- § 1865. Or may stipulate for non-liability beyond their route.
- § 1866. Presumption from receipt of goods marked beyond route—The English rule—The American rule.
- § 1867. Construction of contracts as to liability beyond own route.
- § 1868. Rights and liabilities of connecting carrier—When connecting carrier may and may not have benefit of exemptions in contract with first carrier.

CHAPTER XCIV.

CARRIERS OF PASSENGERS.

- § 1869. Who are common carriers of passengers.
- § 1870. Carrier bound to carry all.
- § 1871. Exceptions — Persons previously ejected for cause.
- § 1872. Persons for whom he has no room.
- § 1873. Thieves—Drunken and disorderly persons.
- § 1874. Objects not carriage — Conflicting interests.
- § 1875. Wrong vehicles or wrong time.
- § 1876. Other cases.
- § 1877. Waiver by receiving passenger.
- § 1878. Who are passengers — Persons on conveyance by fraud.
- § 1879. Persons carrying on business on conveyances.
- § 1880. Employees of carrier, when passengers.
- § 1881. Persons temporarily absent from conveyance.
- § 1882. Persons meeting or leaving passengers.
- § 1883. Persons riding free.
- § 1884. At what time relation commences and ends.
- § 1885. Status of a ticket.
- § 1886. Duty to run trains according to time-tables — Delay.
- § 1887. Special contracts with passengers — Contract to carry to particular place
- § 1888. Limited tickets.
- § 1889. Continuous passage.
- § 1890. Passenger entitled to seat.
- § 1891. Must give time for refreshment.
- § 1892. Name of station must be announced.
- § 1893. Invitation to alight, express or implied.
- § 1894. Time must be given to alight or get aboard.
- § 1895. Car overshooting or falling short of platform.
- § 1896. Carrying passenger beyond destination.
- § 1897. Carrier may establish reasonable regulations — Right to eject passenger.
- § 1898. No right to imprison passenger.
- § 1899. At what place passenger may be ejected.
- § 1900. Excessive force must not be used.
- § 1901. Right of passenger to resist ejection.
- § 1902. Discrimination by carrier — As to sex, color, etc.
- § 1903. Passenger must have ticket, or pay fare.
- § 1904. Must purchase ticket before entering car.
- § 1905. Passenger must show ticket.
- § 1906. Power to eject drunken, disorderly, and dangerous passengers.
- § 1907. Carrier of passengers not an insurer.
- § 1908. Presumption of negligence from accident.
- § 1909. Duty as to vehicles and appliances.
- § 1910. Duty as to roadway.
- § 1911. Negligence of manufacturer or contractor.

- § 1912. Duty of carrier as to platforms, stations, etc.
- § 1913. To what persons this duty due.
- § 1914. Regulations as to admission to stations.
- § 1915. Passengers upon freight trains.
- § 1916. Injuries to passengers on tracks.
- § 1917. Liability of carrier for assault on passenger by fellow-passenger.
- § 1918. Carrier cannot release himself from liability for negligence.
- § 1919. Conflict as to free passengers.
- § 1920. Who not gratuitous passengers.
- § 1921. Conditions limiting liability in tickets.
- § 1922. Contributory negligence of passenger.
- § 1923. Arm or head out of window.
- § 1924. Riding in dangerous place— On platform.
- § 1925. Jumping from or upon train while in motion.
- § 1926. Exception— Escaping threatened danger.
- § 1927. Other instances of negligence.
- § 1928. Duty of carrier as to persons under physical or mental disability.
- § 1929. Imputed negligence — Negligence of person in charge of infant.
- § 1930. Negligence of carrier.
- § 1931. Concurrent negligence of carrier and third person.
- § 1932. Liability of carrier for acts of servant within scope of employment.
- § 1933. And for willful and malicious acts of servants.
- § 1934. Liability of carrier using another's line or means of transportation.
- § 1935. Liability for acts of another carrier using its line or appliances.
- § 1936. Connecting lines—Liability of first carrier.
- § 1937. Liability of carrier on whose line loss occurred.
- § 1938. Right to restrict liability to his own line.
- § 1939. Duties and liabilities of carriers by stage.
- § 1940. Street-car companies.
- § 1941. Carriers by water.
- § 1942. Receiving and landing passengers.
- § 1943. Authority of master over passengers.
- § 1944. Carriers by water—Duty as to treatment of passengers.
- § 1945. Duty as to accommodation of passengers.
- § 1946. United States statutes as to carriers by water.

CHAPTER XCV.

BAGGAGE.

- § 1947. Liability of carrier for baggage.
- § 1948. What is and is not baggage.
- § 1949. Extra baggage.
- § 1950. Delivery of baggage to carrier.
- § 1951. Effect of "checking."
- § 1952. Baggage taken by passenger into vehicle.
- § 1953. Delivery by carrier.
- § 1954. Passenger must remove baggage.

PART V.—TELEGRAPH COMPANIES.

CHAPTER KCVI.

TELEGRAPH COMPANIES.

- § 1955. Telegraph companies are public agencies — But not common carriers.
- § 1956. Must transmit for all who apply.
- § 1957. Exceptions.
- § 1958. Telephone companies.
- § 1959. Degree of care and diligence required in transmission of telegrams.
- § 1960. Presumption of negligence — Burden of proof.
- § 1961. Power to limit liability by contract or notice.
- § 1962. Power to contract against negligence.
- § 1963. Conditions as to repeating messages.
- § 1964. Other conditions in telegraph blanks.
- § 1965. Knowledge by sender of conditions essential.
- § 1966. Contributory negligence of sender — Illegality.
- § 1967. Measure of damages.
- § 1968. What damages not recoverable.
- § 1969. Knowledge by company of importance of message essential.
- § 1970. Injuries to feelings.
- § 1971. Connecting lines.
- § 1972. Who may bring action.

TITLE XXII.—TRUSTS.

CHAPTER XCVII.

TRUSTS.

- § 1973. Uses at common law.
- § 1974. The statute of uses.
- § 1975. Exceptions to statute — Chattels or chattel interests.
- § 1976. Use upon a use.
- § 1977. Active or special uses.
- § 1978. Married women.
- § 1979. Trusts defined — Express trusts — How created.
- § 1980. The statute of frauds.
- § 1981. Executed and executory trusts.
- § 1982. Voluntary trusts — When enforceable.
- § 1983. Deeds of trust to secure debts.
- § 1984. Powers, rights, and liabilities of trustee.
- § 1985. Assignments for benefit of creditors — In general.
- § 1986. Void when intended to delay or defraud creditors.
- § 1987. Giving preferences to creditors.
- § 1988. Illegal provisions in assignments — Reserving benefits to debtor.
- § 1989. Exacting release from creditor.

- § 1990. Other provisions held illegal.
- § 1991. Circumstances raising presumption of fraud.
- § 1992. Provisions in assignments held valid.
- § 1993. Secret agreement with creditor.
- § 1994. Who may avoid fraudulent assignment.
- § 1995. Assent of creditors.
- § 1996. What property passes to assignee.
- § 1997. What property does not pass to assignee.
- § 1998. Form of assignment.
- § 1999. Delivery of possession requisite.
- § 2000. Powers and duties of assignee — His liabilities.
- § 2001. The assignee's bond.
- § 2002. Assignment not revocable by debtor.
- § 2003. Effect of bankruptcy laws upon assignment.
- § 2004. Powers in nature of trusts.
- § 2005. What language will create a trust.
- § 2006. Precatory words.
- § 2007. Trusts of personalty may be created verbally.
- § 2008. Resulting trusts — In general.
- § 2009. To purchaser on conveyance to stranger.
- § 2010. Children and relatives — Presumption of advancement.
- § 2011. When trust fails or does not exhaust trust property.
- § 2012. Arising out of joint tenancies.
- § 2013. Constructive trusts — In general.
- § 2014. Money equitably belonging to another.
- § 2015. Trust property in hands of third person.
- § 2016. Fiduciary persons purchasing property with trust funds.
- § 2017. Renewal of leases by partners or fiduciary persons.
- § 2018. Money expended in improvements on estate.
- § 2019. Who may be trustee — Trustee de son tort.
- § 2020. Who may be cestui que trust.
- § 2021. Estate of trustee, and of cestui que trust.
- § 2022. Powers of trustee.
- § 2023. Powers of cestui que trust.
- § 2024. Acceptance of trust — Equity never wants a trustee.
- § 2025. Duties of trustee — To conform to directions of trust.
- § 2026. To account and keep accounts — Liabilities of trustees in general.
- § 2027. Not to delegate his authority.
- § 2028. As to care and diligence.
- § 2029. As to investments.
- § 2030. Not to deal with trust property to his own advantage — Not to take advantage of his fiduciary position.
- § 2031. Duties and liabilities of co-trustees.
- § 2032. Compensation of trustees.
- § 2033. Renunciation of trust.
- § 2034. Removal of trustees.
- § 2035. Acquiescence of cestui que trust — Release.
- § 2036. Lapse of time — Effect of on trust.

TITLE XIX.

NEGOTIABLE INSTRUMENTS.

TITLE XIX.

NEGOTIABLE INSTRUMENTS.

CHAPTER LXXVII.

THE CLASSES OF NEGOTIABLE INSTRUMENTS.

- § 1444. Negotiable instruments defined —Classes of.
- § 1445. Bills of exchange — Foreign bills.
- § 1446. Bills in a set.
- § 1447. Promissory notes.
- § 1448. Checks.
- § 1449. Bills of lading — Warehouse receipts.
- § 1450. Letters of credit.
- § 1451. Bonds.
- § 1452. Coupons.
- § 1453. Certificates of deposit — Of stock — Other certificates.
- § 1454. Treasury notes — Bank bills.

§ 1444. **Negotiable Instruments Defined — Classes of.**
— A negotiable instrument is one where the legal title to the instrument itself and the whole amount of money expressed upon its face may be transferred from one to another by indorsement and delivery by the holder, or by delivery only.¹ The negotiable instruments known to our law are bills of exchange, checks, and promissory notes, bills of lading, certificates of deposit, bonds and coupons, warehouse receipts, and bank bills.

§ 1445. **Bills of Exchange. — Foreign and Inland Bills.**
— A bill of exchange is an unconditional order in writing for the payment of a sum of money absolutely and at all

¹ Daniel on Negotiable Instruments, sec. 1. A note not negotiable under the general commercial law may be shown to be so by the custom of a particular locality: *Rindskoff v. Barrett*, 11 Iowa, 172; 14 Iowa, 102.

events.¹ A bill of exchange is also called a draft. A foreign bill is one drawn in one state or country, and made payable in another state or country; an inland bill is one drawn and made payable in the same state or country.² A bill is an inland bill which is dated within the state, all the parties being citizens thereof, though shown by parol to have been drawn in another state.³ A bill dated "East Fork, Ill.," but actually drawn in Wisconsin, is an Illinois inland bill.⁴ A bill drawn in one of the states of the Union, and payable in another, is a foreign bill.⁵ But the courts will not take judicial notice of the fact that a certain town or city at which the bill is dated is in a foreign state, as, for example, that a bill dated or drawn or made payable at "New Orleans" was made or payable in Louisiana,⁶ or that one dated "Philadelphia" was made in Pennsylvania.⁷ A foreign bill must be protested in order to charge the drawer; an inland bill need not be.

§ 1446. Bills in a Set.—A bill of exchange is sometimes drawn in a set, each part of the set being numbered, and containing a reference to the other parts. The whole, however, constitutes but one bill.⁸ In England a person who negotiates one of a set is bound to deliver up all the parts in his possession.⁹ An indorser

¹ *Rice v. Ragland*, 10 Humph. 545; 53 Am. Dec. 737. A bill of exchange is "an open letter of request from one person to another, desiring him to pay a sum of money therein named to a third person on his account": 2 Bla. Com. 466.

² *Freeman's Bank v. Perkins*, 18 Me. 792; *Bank v. Daniel*, 12 Pet. 32.

³ *Strawbridge v. Robinson*, 5 Gilm. 470; 50 Am. Dec. 420.

⁴ *Strawbridge v. Robinson*, 5 Gilm. 472; 50 Am. Dec. 420.

⁵ *Bank of United States v. Daniel*, 12 Pet. 32; *Ticonic Bank v. Stackpole*, 41 Me. 321; 66 Am. Dec. 246; *Buckney v. Finley*, 2 Pet. 586; *Wells v. Whitehead*, 15 Wend. 527; *Ocean*

Bank v. Williams, 102 Mass. 41; *Mason v. Dousay*, 35 Ill. 424; 85 Am. Dec. 368; *Brown v. Ferguson*, 4 Leigh, 37; 24 Am. Dec. 707; *Chenoweth v. Chamberlin*, 6 B. Mon. 60; 43 Am. Dec. 145. A certificate of deposit issued in one state and indorsed in another is, in its nature, a foreign bill of exchange: *Piner v. Clary*, 17 B. Mon. 645.

⁶ *Andrews v. Hoxie*, 5 Tex. 171; *Yale v. Ward*, 30 Tex. 17; *Riggin v. Collier*, 6 Mo. 568.

⁷ *Cook v. Crawford*, 4 Tex. 420.

⁸ *Societe Generale v. Bank*, 27 L. T., N. S., 849; *Downes v. Church*, 13 Pet. 205.

⁹ *Pinard v. Klockman*, 32 L. J. Q. B. 82.

should also indorse all the parts he holds, and is not bound to pay unless all the parts bearing his indorsement are given up to him or accounted for.¹ But in America it is held that in the case of an accepted bill it is *prima facie* sufficient if the accepted part be given up,² and in the case of an unaccepted bill if the protested part be given up, there being no presumption that the missing parts have been improperly negotiated.³ The acceptance may be written on any one of the set, but on one only,⁴ and any part of the set may be presented for acceptance.⁵

Payment of one of the set discharges the whole bill.⁶ If the drawee accepts two parts, and such parts get into the hands of different *bona fide* holders, he is liable to pay both.⁷ If the acceptor pay without requiring the part bearing his acceptance to be delivered up to him, and such part be at maturity outstanding in the hands of a *bona fide* holder, he is not discharged.⁸

§ 1447. **Promissory Notes.**—A promissory note is a written engagement by one person to pay another person therein named, unconditionally and absolutely, a certain sum of money at a time specified therein.⁹

§ 1448. **Checks.**—A check is a negotiable instrument.¹⁰

§ 1449. **Bills of Lading.**—Bills of lading do not possess the characteristics of bills of exchange, or other negotiable instruments placed upon the footing of bills of exchange. A bill of lading does not represent money, but property; it is only negotiable in the sense that its true owner may transfer it by indorsement or assignment

¹ *Societe Generale v. Bank*, 27 L. T., N. S., 849.

² *Johnson v. Offutt*, 4 Met. 19; *Commercial Bank v. Routh*, 7 La. Ann. 128.

³ *Downes v. Church*, 13 Pet. 205. But see *Wells v. Whitehead*, 15 Wend. 527; 3 Kent's Com. 109.

⁴ *Bank v. Neal*, 22 How. 96.

⁵ *Walsh v. Blatchley*, 6 Wis. 422; 70 Am. Dec. 469.

⁶ *Downes v. Church*, 13 Pet. 207; *Durkin v. Cranston*, 7 Johns. 442.

⁷ *Bank v. Neal*, 22 How. 96.

⁸ *Benjamin's Chalmers's Dig.*, art. 29.

⁹ Story on Notes, sec. 1.

¹⁰ As to the law relating to checks, see *ante*, Title Banks and Banking.

so as to vest the legal title in the indorsee;¹ and possession thereof is not *prima facie* evidence of ownership, as in the case of a bill of exchange or promissory note.² But bills of lading and warehouse receipts are negotiable in some states by statute.³

§ 1450. **Letters of Credit.**—A letter of credit is not negotiable, and the differences between it and a bill of exchange are many.⁴

§ 1451. **Bonds.**—Bonds issued by corporations, public, private, and municipal, are negotiable.⁵ The possession of negotiable bonds carries with it title to the holder; and where the purchaser of such paper pays a full and valuable consideration, the facts that the seller was an officer of the railroad which issued them, was not the owner of the bonds, but held them merely for the railroad company, and that the railroad company never received the proceeds of the sale, will not affect the position of a *bona fide* purchaser as innocent holder for value.⁶ The seller of negotiable bonds warrants their genuineness.⁷ Ordinary county orders are not negotiable;⁸ nor town warrants;⁹ nor warrants on the state treasury;¹⁰ nor

¹ *Douglas v. People's Bank of Kentucky*, 86 Ky. 176; 9 Am. St. Rep. 276.

² *Weyand v. Atchison etc. R'y Co.*, 75 Iowa, 573; 9 Am. St. Rep. 504.

³ See *Title Bailments — Carriers — Warehousemen*.

⁴ See note to *Wooley v. Sergeant*, in 14 Am. Dec. 421.

⁵ *White v. R. R. Co.*, 21 How. 575; *Delafield v. Illinois*, 2 Hill, 177; 8 Paige, 527; *Chapin v. R. R. Co.*, 8 Gray, 575; *Eastern R. R. Co. v. Hunt*, 20 Ind. 457; *Mercer Co. v. Hackett*, 1 Wall. 95; *Hotchkiss v. Nat. Bank*, 21 Wall. 354; *Clark v. Des Moines*, 19 Iowa, 213; *Morris Canal Co. v. Fisher*, 9 N. J. Eq. 667; 64 Am. Dec. 423; *Carr v. Leferre*, 27 Pa. St. 418; *Beaver Co. v. Armstrong*, 44 Pa. St. 69; *Michigan Bank v. R. R. Co.*, 13

N. Y. 625; *Graig v. Vicksburg*, 31 Miss. 216; *De Voss v. Richmond*, 18 Gratt. 352; 98 Am. Dec. 647; *National Express Bank v. R. R. Co.*, 8 R. I. 375; 5 Am. Rep. 582.

⁶ *R. R. Co. v. Sprague*, 103 U. S. 756.

⁷ *Smith v. McNair*, 19 Kan. 330; 27 Am. Rep. 117.

⁸ *Johnson v. People*, 8 Ill. App. 395.

⁹ *Mathis v. Cameron*, 62 Mo. 504; *Township of Snyder v. Bovaird*, 122 Pa. St. 442; 9 Am. St. Rep. 118; *Miner v. Vedder*, 66 Mich. 101.

¹⁰ *National Bank v. Herold*, 74 Cal. 603; 5 Am. St. Rep. 476; *State v. Dubuclet*, 23 La. Ann. 267. A holder who sells his warrant at a discount because of lack of funds to pay it cannot hold the state liable for his loss: *State v. Wilson*, 71 Tex. 291.

orders drawn by a president of a school board on the treasurer of the district;¹ nor a municipal bond payable to bearer on the completion of a specified railroad²

ILLUSTRATIONS.—Certain railroad mortgage bonds provided that in case of six months' default in paying an installment of interest, the principal should become due and payable without further demand or notice. After such a default had occurred, the bonds were stolen. *Held*, that they were overdue, and that a purchaser for value was not protected against the rightful owner, unless such purchaser could show that he succeeded to the rights of a *bona fide* purchaser before maturity, which he had the burden of proving: *Northampton Bank v. Kidder*, 106 N. Y. 221; 60 Am. Rep. 443. Negotiable bonds payable to order, and bearing the indorsement in blank of the payee, were lost or stolen. The finder or thief erased the indorsement and offered them for sale to the defendant, representing himself to be the person named in them as payee, and being identified as such by a person known to the defendant. The defendant agreeing to purchase, the offerer indorsed the bonds with the name of the payee, and received for them their market value. The erasure of the indorsements was so made as not readily to attract attention, and the defendant purchased in good faith and in the regular course of business. *Held*, that defendant acquired no title as against the owner: *Colson v. Arnot*, 57 N. Y. 253; 15 Am. Rep. 496. Action to recover the value of two negotiable United States bonds. The bonds, with others, were stolen from plaintiff, and purchased on the day after the theft, by defendant, a national bank. On the morning after the theft, notice thereof, with the number and description of the bonds, was left in defendant's bank, on a desk marked "cashier's desk." Evidence was then admitted in behalf of defendant, that the cashier did not in fact examine the notice. Defendant also offered to show, in effect, that it was impracticable for it, in the prosecution of its business, to regard notices of this character left at its banking-house, on account of the frequency and number of such notices, and the amount of business which defendant transacted in such bonds. This evidence was excluded. *Held*, error: *Seybel v. National Currency Bank*, 54 N. Y. 288; 13 Am. Rep. 583.

§ 1452. **Coupons.**—Coupons attached to bonds, and intended for the payment of interest, are negotiable even

¹ *Northumberland Bank v. Rush*, 81½ Pa. St. 307.

² *Blackman v. Lehman*, 63 Ala. 547; 35 Am. Rep. 57.

when detached from the bonds to which they belong.¹ They are still negotiable, though the bond has been paid.² An overdue coupon of a bond which has not matured is negotiable.³

§ 1453. Certificates of Deposit — Of Stock — Other Certificates. — A certificate of deposit is regarded as a negotiable promissory note.⁴ A certificate by the president and treasurer of a local board of trustees of a life insurance company, that he had on deposit with him \$1,723 in currency, was held to be, in legal effect, his promissory note, and subject to the defenses thereof.⁵ A national bank certificate of deposit is not a promissory note.⁶

Certificates of stock are not negotiable instruments;⁷ and this, notwithstanding a custom or usage among stock brokers to the contrary; and an innocent purchaser for value of such certificate, although indorsed in blank by the owner, obtains no better title to the stock than his vendor had, in the absence of all negligence on the part of the owner.⁸ But in New York they are held to have

¹ *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491; *Evertson v. Nat. Bank*, 66 N. Y. 14; 23 Am. Rep. 9; *Beaver Co. v. Armstrong*, 44 Pa. St. 63; *Nat. Bank v. R. R. Co.*, 8 R. I. 375; 5 Am. Rep. 582; *Clark v. Iowa City*, 20 Wall. 583.

² *Nat. Bank v. R. R. Co.*, 8 R. I. 375; 5 Am. Rep. 582; *Clark v. Iowa City*, 20 Wall. 583.

³ *Thompson v. Perrine*, 106 U. S. 589.

⁴ *Lynch v. Goldsmith*, 64 Ga. 42; *Maxwell v. Agnew*, 21 Fla. 154; *Pardee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176; *Tripp v. Curtenius*, 36 Mich. 494; 24 Am. Rep. 610; *Curran v. Witter*, 68 Wis. 16; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39; 4 Am. St. Rep. 527. See *ante*, Banks, Title Corporations. Provided they have the other requisites of negotiability set out in the next chapter: See § 1455, *post*, and see *Huse v.*

Hamblin, 29 Iowa, 501; 4 Am. Rep. 244. A certificate of deposit payable on its return, though in legal effect a promissory note, is not commercial paper under the Alabama statute, for the reason that the place of payment does not appear, even though the banker's name is written or printed in the heading, as well as signed: *Renfro v. Bank*, 83 Ala. 425.

⁵ *Hart v. Life Ass'n*, 54 Ala. 495.

⁶ *Shute v. Pacific Bank*, 136 Mass. 487.

⁷ *Winter v. Mining Co.*, 53 Cal. 428; *Sherwood v. Mining Co.*, 50 Cal. 412; *Hall v. R. R. Co.*, 70 Ill. 673; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. Rep. 115; *Sewall v. Water Power Co.*, 4 Allen, 282; 81 Am. Dec. 701; *Merchants' Bank v. R. R. Co.*, 13 N. Y. 627; *Weaver v. Barden*, 49 N. Y. 286.

⁸ *East Birmingham Land Co. v. Dennis*, 85 Ala. 665; 7 Am. St. Rep. 73.

some of the qualities of negotiable instruments.¹ Receivers' certificates are not negotiable.²

§ 1454. **Treasury Notes — Bank Bills.** — United States treasury notes are negotiable instruments,³ and so are bank bills generally.⁴ The government of the United States as a party to a draft or contract is like a private party, except so far as it regulates by law its liability. As a party to negotiable paper, the responsibility which it assumes is the same as that assumed by a private person.⁵ Scrip of a foreign government issued by its agents in England, and entitling the bearer to receive a bond of such government on payment of all installments due, is a negotiable instrument which by mere delivery becomes the property of a *bona fide* holder for value.⁶

¹ McNeil v. Bank, 46 N. Y. 325; 7 Am. Rep. 341; Merchants' Bank v. Livingston, 74 N. Y. 226; Bush v. Lathrop, 22 N. Y. 535.

² Turner v. R. R. Co., 95 Ill. 134; 35 Am. Rep. 144.

³ Dinsmore v. Duncan, 57 N. Y. 573; 15 Am. Rep. 534; Vermilye v. Express Co., 21 Wall. 138; Frazer v. D'In-

villiers, 2 Pa. St. 200; 44 Am. Dec. 190.

⁴ New Hope etc. Bridge Co. v. Perry, 11 Ill. 467; 54 Am. Dec. 443. See Title Banks and Banking.

⁵ McCann v. Randall, 147 Mass. 81; 9 Am. St. Rep. 666.

⁶ Goodwin v. Robarts, 24 Week. Rep. 989.

CHAPTER LXXVIII.

REQUISITES TO NEGOTIABILITY.

- § 1455. Requisites to negotiability — In general.
- § 1456. Requisites to negotiability — Sealing.
- § 1457. Order or promise must be certain and imperative.
- § 1458. I O U's and due bills.
- § 1459. Payment must be unconditional and certain.
- § 1460. Payment out of particular fund.
- § 1461. Amount must be certain.
- § 1462. Must be payable in money.
- § 1463. And must not include other matters.
- § 1464. Requisites of bills and notes — As to form in general.
- § 1465. As to signing.
- § 1466. Verbal or grammatical mistakes.
- § 1467. As to date.
- § 1468. As to sum payable.
- § 1469. Place of making.
- § 1470. Delivery essential.
- § 1471. Delivery in escrow.
- § 1472. The parties to a bill or note — In general.
- § 1473. The drawer.
- § 1474. The drawee — The maker.
- § 1475. The payee.
- § 1476. Parol evidence inadmissible to vary instrument.
- § 1477. Exceptions.
- § 1478. Contemporaneous written agreement.

§ 1455. Requisites to Negotiability — In General. —

It is essential to the negotiability of a bill or note that it shall be made payable to a person or order or bearer, or its equivalent. One payable to a particular person, without more, is not negotiable.¹ So it is not negotiable where it is payable to a certain person only,² or where it is payable to the order of one as "trustee."³ A guaranty

¹ *Gerard v. La Coste*, 1 Dall. 194; 1 Am. Dec. 236; *Noland v. Ringgold*, 3 Har. & J. 216; 5 Am. Dec. 435; *Louisville etc. R. R. Co. v. Caldwell*, 98 Ind. 245. "Holder" is equivalent to "bearer": *Putman v. Crymes*, 1 McMull. 9; 36 Am. Dec. 250. A note payable "to the order of the indorser's name" is negotiable: *U. S. v. White*,

2 Hill, 59; 37 Am. Dec. 375. A bill of exchange need not be payable to order of the payee: *Wells v. Brigham*, 6 Cush. 6; 52 Am. Dec. 750.

² *Smith v. Lawrence*, 1 Hayw. (N. C.) 175; 1 Am. Dec. 556.

³ *Third Nat. Bank of Baltimore v. Lange*, 51 Md. 138; 34 Am. Rep. 304.

is not negotiable when written under a negotiable instrument, but made payable to no person.¹ A bill or note payable to a person named or bearer is payable to bearer, and one coming into possession of it for a valuable consideration lawfully is not required to show any consideration between the maker and the person named.² A note payable to the order of A B is in law a note payable to A B or order, and may be sued on in the name of A B without indorsement.³ The words "negotiable and payable without defalcation or discount" do not impart negotiability to an instrument otherwise non-negotiable.⁴

§ 1456. Requisites to Negotiability—Sealing.—A bill or note must not be issued under seal; if it is, it thereby loses its negotiability, and becomes a covenant to pay money.⁵ But merely attaching a seal to the signature has been held mere surplusage, the sealing not being referred to in the body of the instrument.⁶ But where the maker of a promissory note used a printed form, and the only evidence that it was intended to be sealed were the printed letters "L. S.," contained in brackets opposite the signature, it was held that the note was under

¹ *Smith v. Dickinson*, 6 Humph. 261; 44 Am. Dec. 306.

² *Eddy v. Bond*, 19 Me. 461; 36 Am. Dec. 767.

³ *Durgin v. Bartol*, 64 Me. 473.

⁴ *Hosford v. Stone*, 6 Neb. 378.

⁵ Story on Bills, sec. 62; Story on Notes, sec. 55; Edwards on Bills, 208; Laidley v. Bright, 17 W. Va. 779; Frevall v. Fitch, 5 Whart. 325; 34 Am. Dec. 559; Sayre v. Lucas, 2 Stew. 259; 20 Am. Dec. 33; Conine v. R. R. Co., 3 Houst. 289; 89 Am. Dec. 230; Lewis v. Wilson, 5 Blackf. 370; Merritt v. Cole, 9 Hun, 98; Hopkins v. R. R. Co., 3 Watts & S. 410; Clegg v. Lemessurier, 15 Gratt. 108; Mann v. Sutton, 4 Rand. 253; Clark v. Farmers' Mfg. Co., 15 Wend. 256; Parks v. Duke, 2 McCord, 380; Helper v. Alden, 3 Minn. 332; Rawson v. Davidson, 49 Mich. 607; McCarley v. Supervisors, 58 Miss. 483; 38 Am. Rep. 135.

338; Hanger v. Dodge, 24 Ark. 205; Biery v. Haines, 5 Whart. 563. By statute in some of the states sealed instruments for the payment of money are made negotiable: Daniels on Negotiable Instruments, sec. 33; Pate v. Brown, 85 N. C. 166.

⁶ Peasley v. Boatwright, 2 Leigh, 196; Anderson v. Bullock, 4 Munf. 442; Cromwell v. Tate, 7 Leigh, 305; 30 Am. Dec. 506; Mackay v. St. Mary's Church, 15 R. I. 121; 2 Am. St. Rep. 881. *Contra*, Thrasher v. Everhart, 3 Gill & J. 246. An instrument in the form of a negotiable promissory note, but with the device "[Seal]" after and opposite the signature of the maker, is, though there be no reference to a seal in the body of the instrument, a sealed instrument, and not a negotiable promissory note: Brown v. Jordhal, 32 Minn.

seal;¹ and a promissory note which concluded, "witness my hand and seal," etc., but no seal was affixed, has been treated as a sealed instrument.² The note of a corporation, under its seal, is negotiable;³ and the negotiability of a note is not destroyed by the fact that the indorsement of a corporation thereon was made through its seal.⁴ The negotiability of a United States treasury note is not restrained or affected by the fact that it is under the treasury seal.⁵ Where by mistake and ignorance a seal had been attached to the firm name signed to a note given for value, it was held that equity would allow the plaintiff to recover as if there had been no seal.⁶

§ 1457. Order or Promise must be Certain and Imperative. — A bill must contain an imperative direction; a mere permission to the person or a precatory request is not sufficient.⁷ But the insertion of words of courtesy does not affect the bill, if the direction is nevertheless there.⁸ Thus the following have been held not to be valid bills, viz.: "We authorize you to pay C, or order";⁹ "Please let the bearer have seven pounds, and you will much oblige me";¹⁰ "Please credit J. W., or bearer, thirty dollars; I will pay you by April 10th, and you will oblige your friend, J. M."¹¹ In like manner, a promissory note must contain a certain or express promise to pay the amount; a mere acknowledgment of the debt is not enough.¹² The following have been held to be valid, viz.: "Mr. B will much oblige Mr. A by paying C, or order";¹³ "Please let the bearer have fifty dollars; I will arrange it with you this noon";¹⁴

¹ *Giles v. Mauldin*, 7 Rich. 11.

² *McCarley v. Board of Supervisors*, 58 Miss. 483; 38 Am. Rep. 338.

³ *Cent. Nat. Bank v. R. R. Co.*, 5 S. C. 156; 22 Am. Rep. 12.

⁴ *Rand v. Dovey*, 83 Pa. St. 280.

⁵ *Dismore v. Duncan*, 57 N. Y. 573; 15 Am. Rep. 534.

⁶ *Lynam v. Califer*, 64 N. C. 572.

⁷ *Daniel on Negotiable Instruments*, sec. 35; *Chalmers's Digest*, art. 10.

⁸ *Spurgin v. McPheeters*, 42 Ind. 527.

⁹ *Hamilton v. Spottiswoode*, 4 Ex. 200.

¹⁰ *Little v. Slackford*, 1 Moody & M. 371.

¹¹ *Woolley v. Sergeant*, 8 N. J. L. 262; 14 Am. Dec. 419.

¹² *Story on Notes*, sec. 14; *Byles on Bills*, 8; *Rice v. Rice*, 68 Ala. 216. But see *Johnson's School Township v. Citizens' Bank*, 81 Ind. 515.

¹³ *Ruff v. Webb*, 1 Esp. 129.

¹⁴ *Biesenthal v. Williams*, 1 Duvall,

"Cartage ticket, fifty cents. H. S. & Co."¹ While the following have been held to be invalid: "Mr. T. has left in my hands two hundred pounds";² "I have received the sum of twenty pounds, which I borrowed of you, and I have to be accountable for the said sum, with interest";³ "I hereby certify that C. S. Tarply has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent interest till due, per annum, three thousand six hundred and ninety-one dollars and sixty-three cents, for the use of R. Patterson & Co., and payable only to their order upon the return of this certificate."⁴

§ 1458. **I O U's and Due Bills.**—In England an ordinary I O U, or due bill, in which there is no promise to pay, does not amount to a promissory note, but is merely evidence of an account stated.⁵ The contrary is held in some of the states,⁶ while in others the English rule is adhered to.⁷ But it seems that if, to the mere acknowledgment of the debt, any words are added from which an intention to make also a promise to pay it can be gathered, the instrument will be regarded as a promissory note. Thus the following have been held to be promissory notes, viz.: "Due J. A. \$94.91 on demand";⁸ "Due J. W. \$400";⁹ "Due J. C. R., or order";¹⁰ "Good to R. C., or order";¹¹ "Due S., or bearer, for value received."¹²

¹ *Hibbard v. Holloway*, 13 Ill. App. 101.

² *Tomkins v. Ashby*, 6 Barn. & C. 541.

³ *Horne v. Redfearn*, 4 Bing. N. C. 334.

⁴ *Patterson v. Poindexter*, 6 Watts & S. 227; 40 Am. Dec. 554.

⁵ *Fisher v. Leslie*, 1 Esp. 425; *Tomkins v. Ashby*, 6 Barn. & C. 541.

⁶ *Fleming v. Burge*, 6 Ala. 373; *Brewer v. Brewer*, 6 Ga. 588; *Jacquin v. Warren*, 40 Ill. 459; *Brady v. Chandler*, 31 Mo. 28; *Marrigan v. Page*, 4 Humph. 247; *Cummings v. Freeman*, 2 Humph. 145.

⁷ *Currier v. Lockwood*, 40 Conn. 349; 16 Am. Rep. 40.

⁸ *Smith v. Allen*, 5 Day, 537; *Kimball v. Huntington*, 10 Wend. 675; 25 Am. Dec. 590; *Mitchell v. R. R. Co.*, 17 Ga. 574; *Pepoon v. Stagg*, 1 Nott & McC. 102; *Carver v. Hayes*, 47 Me. 257.

⁹ *McGowen v. West*, 7 Mo. 569; 38 Am. Dec. 468.

¹⁰ *Marrigan v. Page*, 4 Humph. 247.

¹¹ *Franklin v. March*, 6 N. H. 364; 25 Am. Dec. 462.

¹² *Sackett v. Spencer*, 29 Barb. 180; *Russell v. Whipple*, 2 Cow. 536; *Finney v. Shirley*, 7 Mo. 42; *Huyck v. Meador*, 24 Ark. 192. *Contra*, *Reed v. Wheeler*, 2 Yerg. 50; *Currier v. Lockwood*, 40 Conn. 348; 16 Am. Rep. 40.

§ 1459. Payment must be Unconditional and Certain.

—The instrument, to be a valid bill or note, must be payable unconditionally and at all events.¹ If the order or promise be subject to the happening of a future event, or provided a certain act be or be not done, it is not a bill or note.²

Thus the following have been held not valid, viz.: Where it was payable “when any dividends are declared” on certain stock;³ “when a certain suit is determined”;⁴ “when a certain sale is made”;⁵ “when a certain amount is collected”;⁶ “after the arrival and discharge of coal by brig G.”;⁷ when certain work is completed;⁸ when a railroad shall be built to a place named, on or before 20th of February, 1871;⁹ providing that the payee (maker) or his assigns may extend the time of payment indefinitely;¹⁰ promising to pay “J. & W. a given sum in one from the first of October following the date, in cattle, or in grain, the first of January following”;¹¹ “on condition that a certain receipt is produced”;¹² payable “on demand, or in three years from this date,” with interest “during said term, or for such further time as said principal sum or any part thereof shall remain unpaid”;¹³ stating that it is issued as collateral to the maker’s draft accepted by a third party;¹⁴ “provided the terms

¹ *Cook v. Satterlee*, 6 Cow. 108; 16 Am. Dec. 432; *Gillilan v. Myers*, 31 Ill. 525; *Eldred v. Malloy*, 2 Col. 320; 25 Am. Rep. 752; *Fralick v. Norton*, 2 Mich. 130; 55 Am. Dec. 56. A bill may not be drawn conditionally, and a note may not be made conditionally; but a bill may be accepted conditionally; therefore the liability of the principal debtor on a bill may be conditional, while the liability of the principal debtor on a note must be absolute. A bill absolute in form may be delivered conditionally: *Benjamin’s Chalmers’s Digest*, art. 10.

² *Id.*

³ *Brooks v. Hargreaves*, 21 Mich. 255.

⁴ *Shelton v. Bruce*, 9 Yerg. 24.

⁵ *De Forest v. Frary*, 6 Cow. 151.

⁶ *Corbett v. State*, 24 Ga. 287.

⁷ *Grant v. Wood*, 12 Gray, 220; *Coolidge v. Ruggles*, 15 Mass. 387.

⁸ *Chandler v. Carey*, 64 Mich. 237; 8 Am. St. Rep. 815.

⁹ *Eldred v. Malloy*, 2 Col. 320; 25 Am. Rep. 752.

¹⁰ *Woodbury v. Roberts*, 59 Iowa, 348; 44 Am. Rep. 685; *Smith v. Van Blarcom*, 45 Mich. 371.

¹¹ *Wainwright v. Straw*, 15 Vt. 215; 40 Am. Dec. 675.

¹² *Mason v. Metcalf*, 4 Baxt. 440.

¹³ *Mahoney v. Fitzpatrick*, 133 Mass. 151; 43 Am. Rep. 502.

¹⁴ *American Bank v. Sprague*, 14 R. I. 410.

mentioned in my letter be complied with";¹ "to stand as a set-off for the sum bequeathed to me above the share of X";² "to be held as collateral security for the payment of the money owed him by X, if he cannot realize the other securities";³ "in consideration that he will abandon the action now pending";⁴ "not to be demanded in the event of my death";⁵ "out of the net proceeds, after paying costs and expenses of ore to be raised and sold from" a certain bed;⁶ "when he is twenty-one years old";⁷ "as collateral security, with agreement";⁸ "not to be binding unless — note is paid";⁹ "when the estate of M. is settled up";¹⁰ "if the agent does not sell enough in one year, one more is granted";¹¹ "may be paid at any time before maturity, and that interest at eighteen per cent per annum shall be deducted till due";¹² "this note is subject to a contract made November 13, 1874";¹³ "payable on or before two years from date," but providing that if paid within one year there shall be no interest;¹⁴ reciting that it is given in consideration of and subject to a certain contract;¹⁵ providing for the payment of all taxes or charges that should be levied on the note;¹⁶ specifying that if the maker should pay a third person in three years the note should be given up, and that otherwise it should remain in full force;¹⁷ providing for payment of a sum certain at a specified date, coupled with a condition

¹ *Kingston v. Long*, 4 Dougl. 9; *Baird v. Underwood*, 74 Ill. 176.

² *Clarke v. Percival*, 2 Barn. & Adol. 660.

³ *Robins v. May*, 11 Ad. & E. 213; *Haskell v. Lambert*, 16 Gray, 592.

⁴ *Drury v. Macaulay*, 16 Mees. & W. 146.

⁵ *Richardson v. Martyr*, 25 L. T. Q. B. 64; or as long as the interest is paid: *Seacord v. Burling*, 5 Denio, 444.

⁶ *Worden v. Dodge*, 4 Denio, 159; 47 Am. Dec. 247.

⁷ *Kelley v. Hemmingway*, 13 Ill. 604; 56 Am. Dec. 474.

⁸ *Costello v. Crowell*, 127 Mass. 293; 34 Am. Rep. 367.

⁹ *Grimison v. Russell*, 14 Neb. 521; 45 Am. Rep. 126; *Hays v. Gwin*, 19 Ind. 19.

¹⁰ *Husband v. Epling*, 81 Ill. 172; 25 Am. Rep. 273.

¹¹ *Miller v. Poage*, 56 Iowa, 96; 41 Am. Rep. 82.

¹² *Way v. Smith*, 111 Mass. 523.

¹³ *Cushing v. Field*, 70 Me. 50; 35 Am. Rep. 293.

¹⁴ *Lamb v. Story*, 45 Mich. 488.

¹⁵ *McComas v. Haas*, 107 Ind. 512.

¹⁶ *Farquhar v. Fidelity Ins. etc. Co.*, 13 Phila. 473.

¹⁷ *Chapman v. Wight*, 79 Me. 595.

that the sale or removal of the property for a part of the purchase price of which it was given shall cause the debt to mature at once.¹

But although the particular day of payment is not expressed, yet if the time is certain to arrive the fact of payment is regarded as certain, and the instrument is negotiable.² So where a note is payable absolutely at a certain date, and earlier provided a certain event happens, it is negotiable.³ So where a note is payable "on or before" a certain date,⁴ or "one day after my death,"⁵ or "on demand after my decease."⁶ So where it is made payable twelve months after date, "or before if made out of the sale of" a certain article;⁷ or in such installments and at such times as the directors of the company may from time to time assess or require;⁸ providing for the payment of "interest at ten per cent per annum from date until paid,—seven if paid when due."⁹ Or in this form: "October 4, 1882. On March 1, 1883, for value received, I promise to pay A, or order, four hundred dollars, with interest from this date. This note shall become due immediately upon A delivering possession to me of the northwest quarter of section 12, township 6, range 6 east, in Gage County, Nebraska."¹⁰ Or in this: "The express condition of the sale and purchase of this Ohio reaper and mower No. — is such that the title, ownership, or possession does not pass from the said McDonald & Co.

¹ First National Bank of Port Huron v. Carson, 60 Mich. 432.

² Capron v. Capron, 44 Vt. 412; Ubsdell v. Cunningham, 22 Mo. 124; Jordan v. Tate, 19 Ohio St. 586; Walker v. Woolen, 54 Ind. 164; 23 Am. Rep. 639; Crooker v. Holmes, 65 Me. 195; 20 Am. Rep. 687; Gardner v. Barger, 4 Heisk. 669; Ernst v. Steckman, 74 Pa. St. 13; 15 Am. Rep. 542; Works v. Hershey, 35 Iowa, 340; Palmer v. Hummer, 10 Kan. 464; 15 Am. Rep. 353.

³ Gardner v. Barger, 4 Heisk. 669; Ernst v. Steckman, 74 Pa. St. 13; 15 Am. Rep. 542.

⁴ Mattison v. Marks, 31 Mich. 421; 18 Am. Rep. 197.

⁵ Price v. Jones, 105 Ind. 543; 55 Am. Rep. 230.

⁶ Bristol v. Warner, 19 Conn. 7.

⁷ Ernst v. Steckman, 74 Pa. St. 13; 15 Am. Rep. 542; Walker v. Woolen, 54 Ind. 164; 23 Am. Rep. 639; Charlton v. Reed, 61 Iowa, 166; 47 Am. Rep. 54.

⁸ White v. Smith, 76 Ill. 319; 77 Ill. 351; 20 Am. Rep. 251.

⁹ Smith v. Crane, 33 Minn. 144; 53 Am. Rep. 20.

¹⁰ Dobbins v. Oberman, 17 Neb. 163.

until the note and interest is paid in full; that the said McDonald & Co. have full power to declare this note due, and take possession of said machine, at any time they may deem themselves insecure, even before the maturity of the note."¹

§ 1460. Payment out of Particular Fund. — A bill or note payable, either expressly or impliedly, out of a particular fund is not negotiable.² In order to give bills and notes the character of commercial paper, they must be drawn or made upon the personal credit of the maker or drawer.³ Thus the following have been held invalid as bills or notes, viz.: Orders or promises to pay "out of the money in your hands belonging to the — company";⁴ "out of the money due from X, as soon as you receive it";⁵ "out of the money arising from my reversion when sold";⁶ "on the sale, or produce, when sold, of the X hotel";⁷ "and deduct the same from my share of the partnership profits";⁸ "the demand I have against the estate of deceased."⁹

But an absolute order to pay, coupled with a direction to the drawee to reimburse himself out of a particular fund, or merely reciting the transaction which gave rise to the bill, is a good bill.¹⁰ And so where the fund is cer-

¹ *Heard v. Bank*, 8 Neb. 10; 30 Am. Rep. 811.

² *Averett v. Booker*, 15 Gratt. 165; *Pitman v. Breckenridge*, 3 Gratt. 127; *Richardson v. Carpenter*, 46 N. Y. 661; *Worden v. Dodge*, 4 Denio, 159; 47 Am. Dec. 247; *West v. Forman*, 21 Ala. 400; *Munger v. Shannon*, 61 N. Y. 251; *Ehrichs v. De Mill*, 75 N. Y. 370; *Mills v. Kuykendall*, 2 Blackf. 47; *Harriman v. Sanborn*, 43 N. H. 128; *Kenny v. Hinds*, 44 How. Pr. 7; *Wadlington v. Covert*, 51 Miss. 631; *Corbett v. State*, 24 Ga. 287; *Reeside v. Knox*, 2 Whart. 233; 30 Am. Dec. 247; *Van Vacter v. Flack*, 1 Smedes & M. 393; 40 Am. Dec. 100.

³ *Andrews v. Harvey*, 39 Tex. 123.

⁴ *Jenney v. Herle*, 2 Ld. Raym. 1361;

Turner v. R. R. Co., 95 Ill. 134; 35 Am. Rep. 144.

⁵ *Dawkes v. De Lorane*, 3 Wils. 207; *Mills v. Kuykendall*, 2 Blackf. 47.

⁶ *Carlos v. Fancourt*, 5 Term Rep. 482; *Worden v. Dodge*, 4 Denio, 159; 47 Am. Dec. 247.

⁷ *Hill v. Halford*, 2 Bos. & P. 413.

⁸ *Munger v. Shannon*, 61 N. Y. 251; *Ehrichs v. De Mill*, 75 N. Y. 370.

⁹ *West v. Forman*, 21 Ala. 400; *Morton v. Naylor*, 1 Hill, 583.

¹⁰ *Redman v. Adams*, 51 Me. 433; *Wells v. Brigham*, 6 Cush. 6; 52 Am. Dec. 750; *Corbett v. Clark*, 45 Wis. 403; 30 Am. Rep. 763; *Towne v. Rice*, 122 Mass. 67; *Howry v. Eppinger*, 34 Mich. 29; *Newton etc. Co. v. Diers*, 10 Neb. 284; *Kelley v. Brooklyn*, 4

tain, and its mention is merely directory.¹ On this ground the following additions have been sustained, viz.: "As my quarterly half-pay due 1st February, by advance";² "and take the same out of our share of the grain";³ "being a portion of a value, as under, deposited in security for the payment hereof";⁴ "against cotton, per Swallow";⁵ "on account of moneys advanced by me for the X company";⁶ "against credit No. 20, and place it to account, as advised per X & Co."⁷

§ 1461. **Amount must be Certain.**—The amount must be certain on the face of the bill or note, or capable of being definitely ascertained, or it will not be negotiable.⁸

Hill, 263; *Littlefield v. Hodge*, 6 Mich. 326; *Ellet v. Britton*, 6 Tex. 229; *Preston v. Whitney*, 23 Mich. 260; *Hereth v. Meyer*, 33 Ind. 511. And see, as to notes, *Cota v. Buck*, 7 Met. 588; 41 Am. Dec. 464.

¹ *Bank of Kentucky v. Sanders*, 3 A. K. Marsh. 184; 13 Am. Dec. 149. The mere mention of a fund in a draft does not deprive it of the character of negotiable paper; it is only where there is a direction, express or implied, to pay it from the fund, and not otherwise, that it will have that effect: *Schmittler v. Simon*, 101 N. Y. 554; 54 Am. Dec. 737.

² *Macleed v. Snee*, 2 Strange, 762; *Wells v. Brigham*, 6 Cush. 6; 52 Am. Dec. 750.

³ *Corbett v. Clark*, 45 Wis. 403; 30 Am. Rep. 763; *Redman v. Adams*, 51 Me. 429.

⁴ *Haussoullier v. Hartsinck*, 7 Term Rep. 733; *Towne v. Rice*, 122 Mass. 67; *Howry v. Eppinger*, 34 Mich. 29; *Newton etc. Co. v. Diers*, 10 Neb. 284.

⁵ *Inman v. Clare*, Johns. 769.

⁶ *Griffin v. Weatherby*, L. R. 3 Q. B. 753.

⁷ *Banner v. Johnston*, L. R. 5 H. L. 157; *Kelley v. Brooklyn*, 4 Hill, 263.

⁸ *Jones v. Simpson*, 2 Barn. & C. 318; *Parsons v. Jackson*, 99 U. S. 434; *Fralick v. Norton*, 2 Mich. 130; 55 Am. Dec. 56; *Cushman v. Haynes*, 20 Pick. 132; *Gaar v. Bank*, 11 Bush, 180; 21 Am. Rep. 209; *Lime Rock etc. Ins. Co. v. Hewett*, 60 Me. 407, the court saying: "This instrument was not for

a sum certain. It was a promise to pay \$225, and such other sums as might arise as additional premium on an insurance policy. Such an instrument, although valid, and answering well the purpose for which it was made, is not a promissory note. To make a written instrument a valid promissory note, says Judge Story, it must be for a fixed and certain amount. Therefore, if it be for a certain sum of money, with all other sums that may be due the payee, it is not a valid promissory note, even for the sum which it specifies. So a promise to pay a specified sum of money and interest, and also the demands of the sick-list club, is not a valid promissory note: *Bolton v. Dugdale*, 4 Barn. & Adol. 619. So a written promise to pay a certain sum, first deducting thereout any interest or money which a third person might owe the maker, is not a good promissory note: *Clarke v. Percival*, 2 Barn. & Adol. 660. So a promise to pay a certain sum and all fines according to rule: *Aysey v. Fearnside*, 4 Mees. & W. 168; or a written promise to pay certain sums in installments, a part to go in as a set-off for an order of R. to G., and the remainder of his debt from D. to him; or a written promise to pay one thousand dollars, or what might be due after deducting all advances and expenses (*Cushman v. Haynes*, 20 Pick. 132) fall within the same principle, and are not valid as promissory notes."

Thus the following have been held invalid, viz.: "Sixty-five pounds, and all other sums which may be due to him";¹ "the proceeds of a shipment of goods, value two thousand pounds, consigned by me to you";² "the balance due to me for building the Baptist College chapel";³ "fifty or sixty dollars";⁴ "with interest the same as savings banks pay";⁵ "one thousand dollars, or what might be due after deducting all advances and expenses";⁶ certain sums in installment, a part "to go as a set-off for an order of R. to G., and the remainder of his debt from C. D. to him";⁷ a specific sum, "first deducting there-out any interest or money J. S. might owe the maker on any account";⁸ a certain sum, and "the demands of the sick-club at H., in part of interest and the remaining stock and interest to be paid on demand";⁹ "the payee or his indorsee has full power to declare this note due, and take full possession of said property, at any time they may deem themselves insecure, even before the maturity of this note, and sell the same where this note is payable, on five days' notice in writing";¹⁰ a stated sum, "on or before two years after date," with interest if not paid within a year.¹¹

Where a person promised in writing to pay \$1.50 an acre on a certain day for "every acre of land which lies north of W. creek," and subsequently indorsed on the note that the number of acres was sixty-five, it was held that this was a good promissory note for \$97.50. "This acknowledgment," said the court, "conferred upon it certainty as to the amount, the only requisite wanting to

¹ *Smith v. Nightingale*, 2 Stark. 375.

² *Jones v. Simpson*, 2 Barn. & C. 318.

³ *Crowfoot v. Gurney*, 9 Bing. 372.

⁴ *Fralick v. Norton*, 2 Mich. 130; 55 Am. Dec. 56; *Parsons v. Jackson*, 99 U. S. 434.

⁵ *Whitwell v. Winslow*, 134 Mass. 343.

⁶ *Cushman v. Haynes*, 20 Pick. 132.

⁷ *Davies v. Wilkinson*, 10 Ad. & E. 98; *Clarke v. Percival*, 2 Barn. & Adol. 660.

⁸ *Barlow v. Broadhurst*, 4 Moore, 471.

⁹ *Bolton v. Dugdale*, 4 Barn. & Adol. 619.

¹⁰ *Smith v. Marland*, 59 Iowa, 645.

¹¹ *Story v. Lamb*, 52 Mich. 525.

constitute it a commercial negotiable instrument.”¹ In an Iowa case² the action was brought upon the following instrument: “West Union, May 4, 1857. Forty days after date, I promise to pay S. S. Green, or bearer, the sum of one hundred dollars, value received, said sum being money due for building my flouring mill at Auburn, Fayette County, Iowa, with six per cent interest. This note being subject to diminution by any excess in certain bills of hardware allowed by me to S. S. Green, over the original bills as forwarded by J. H. Knight. James Austin.” This was held to be a promissory note for a sum certain and due absolutely, and that it was for the defendant, the maker, to show any deduction that should be made, failing in which plaintiff was entitled to judgment.

The addition to the sum payable of the words “with current exchange,” in another place, does not render the instrument non-negotiable.³ Nor the words, “with in-

¹ *Smith v. Clopton*, 4 Tex. 112.

² *Green v. Austin*, 7 Iowa, 521.

³ *Smith v. Kendall*, 9 Mich. 241; 80 Am. Dec. 83; *Bullock v. Taylor*, 39 Mich. 137; 33 Am. Rep. 356; *Legett v. Jones*, 10 Wis. 34; *Pollard v. Herries*, 3 Bos. & P. 335; *Price v. Teal*, 4 McLean, 201; *Johnson v. Frisbie*, 15 Mich. 286; *Hill v. Todd*, 29 Ill. 101; *Clauser v. Stone*, 29 Ill. 114; 81 Am. Dec. 299; *Bradley v. Lill*, 4 Biss. 473. In *Smith v. Kendall*, 9 Mich. 241, 80 Am. Dec. 83, the court say: “Is this fluctuation to which exchange is subject such a contingency or uncertainty as the rule requiring a note to be for a sum certain was intended to guard against? We think not. Bills of exchange and promissory notes are commercial instruments, and to facilitate commerce are subject to certain rules of law not applicable to other contracts. These rules should be liberally construed, and in such a way as to effect the object had in view. Exchange is an incident to bills for the transmission of money from one place to another. Its nature and effect are well understood in the commercial

world; and merchants having occasion to use their funds at their place of business sometimes make the currency at that point the standard of payments made to them by their customers at a different point. Such is the design of the instrument before us; and we believe such instruments are considered by commercial men to be promissory notes.” In *Bradley v. Lill, Drummond, J.*, says: “An instrument of writing by which A at Chicago promised to pay B within a certain time one thousand dollars, with the current rate of exchange on New York, at maturity, is a promissory note, notwithstanding the rate of exchange was not specified. I admit that under the general law a note must be payable absolutely in money. In the example given, a thousand dollars was the sum payable; the exchange, like interest, was an incident merely to the principal sum, and it was not the less on that account an agreement to pay a fixed sum. If a note be executed in England, payable ‘with interest,’ and a suit be brought on it here, the amount of the verdict or judgment is

terest" on or before a certain date.¹ As to whether a stipulation to pay attorney's fees, if not paid at maturity, or if suit is instituted, renders the note non-negotiable, the courts differ.²

§ 1462. Must be Payable in Money. — It is indispensably requisite that the order or promise require the payment to be in money.³ If it is payable in goods, wares, or merchandise,⁴ or in labor,⁵ it is not a valid note. A promise to pay "one ounce of gold" is not a negotiable

note a mere matter of computation, but proof must be introduced of the rate of interest in England, and the amount of the verdict or judgment, even after the proof is made, is greater or less, depending upon the fact whether the verdict is rendered to-day, next week, or next year, the amount of interest increasing regularly by efflux of time; but when the proof is in, and the time established, then the amount becomes a matter of computation. So when the proof as to exchange is in and the time fixed, then also the matter is a matter of computation. In the one case, the principal amount and the time and rate fixed by evidence control and determine the aggregate sum, and equally so in the other." *Contra*, *Lowe v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742; *Philadelphia Bank v. Newkirk*, 2 Miles, 442; *Read v. McNulty*, 12 Rich. 445; 78 Am. Dec. 467; *Russell v. Russell*, 1 McAr. 263. "The law seems clearly against the validity of a bill payable with current exchange, for two reasons: 1. The fluctuations in the rate of exchange make it impossible to ascertain the amount payable when the bill is issued; 2. If this were not so, evidence *dehors* the instrument would be necessary to ascertain the amount due at maturity. In the cases cited *contra*, the question is either not raised or not discussed, except in *Smith v. Kendall*, from which *Campbell, J.*, dissents, and *Christiancy, J.*, concurs, only on ground that the words 'with current exchange' were without significance, as in *Hill v. Todd*, 29 Ill. 101. See a statement of the practice as to the sale of foreign bills and the mode of fixing

the exchange, *Suse v. Pompe*, 8 Com. B., N. S., 542"; *Benjamin's Chalmers's Digest*, art. 13, note, p. 18.

¹ *Mattison v. Marks*, 31 Mich. 421; 18 Am. Rep. 197; *Helmer v. Krolick*, 36 Mich. 371; *Houghton v. Francis*, 29 Ill. 244; *Parker v. Plymell*, 23 Kan. 402; *Towne v. Rice*, 122 Mass. 67.

² See *post*, § 1463, And must not Include Other Matters.

³ *Black v. Ward*, 27 Mich. 191; 15 Am. Rep. 162; *Klauber v. Biggerstaff*, 47 Wis. 551; 32 Am. Rep. 773; *Thompson v. Sloan*, 23 Wend. 71; 35 Am. Dec. 546.

⁴ *Mathews v. Houghton*, 11 Me. 377; *Lawrence v. Dougherty*, 5 Yerg. 435; *Dixon v. Bovill*, 3 Macq. 1; *Auerbach v. Pritchett*, 58 Ala. 451; *McCartney v. Smalley*, 11 Iowa, 85; *Rhodes v. Lindley*, Ohio Cond. 465; *Hunter v. Spinlock*, 3 La. 97; 22 Am. Dec. 165; *Titbetts v. Gerrish*, 25 N. H. 41; 57 Am. Dec. 307. In Massachusetts and Vermont instruments payable in merchandise are not negotiable, but import a consideration: *Jones v. Fales*, 4 Mass. 254; *Dennison v. Tyson*, 17 Vt. 549; and have many of the features of negotiable paper: *Eastman v. Potter*, 4 Vt. 313; 24 Am. Dec. 609; and in same states they are made negotiable by statute: *Rankin v. Saunders*, 6 How. 52; 38 Am. Dec. 431; *Hardiman v. Cowan*, 10 Smedes & M. 501; *Pool v. McCrary*, 1 Ga. 319; 44 Am. Dec. 655. See, as to notes payable in specific articles, and not money, the case of *Roberts v. Beatty*, 2 Penr. & W. 63; 21 Am. Dec. 410, and note 422-426.

⁵ *Quimby v. Merritt*, 11 Humph. 439.

note, but a contract for the delivery of merchandise.¹ Nor is it a valid bill or note if payable in "good East India bonds";² or "in foreign bills";³ or in "current bank bills or notes";⁴ or in "office notes" of a bank;⁵ or in "currency";⁶ or in "Canada money";⁷ or in "New York funds";⁸ or in current notes of the state";⁹ or in "current funds."¹⁰ But a note for a certain number of pounds sterling is payable in a certain sum of money, and therefore is negotiable.¹¹

§ 1463. And must not Include Other Matters.—The order must not require the drawee to do any act in addition to the payment of money,¹² or it will not be a valid bill. The promise must be for the payment of money only, or it will not be a valid note.¹³ On this principle, the following have been held not negotiable, viz.: Where the instrument was for the payment of a certain sum of money, and to "take up a certain outstanding note,"¹⁴ or "to deliver up a wharf."¹⁵ So where the following words were added to the agreement to pay: "If any dispute should arise about the sale of goods for which the note is given, it is to be void";¹⁶ "only a security for all balances up to

¹ *Roberts v. Smith*, 58 Vt. 492; 56 Am. Rep. 567.

² *Smith v. Boehm*, Chit. 234; Bull. N. P. 272.

³ *Jones v. Fales*, 4 Mass. 245; *Young v. Adams*, 6 Mass. 182.

⁴ *McCormack v. Trotter*, 10 Serg. & R. 94. *Contra*, *Pardee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176.

⁵ *Irvine v. Lowery*, 14 Pet. 293.

⁶ *Lampton v. Haggard*, 3 T. B. Mon. 149; *Farwell v. Kennett*, 7 Mo. 595; *Huse v. Hamblin*, 29 Iowa, 501; 4 Am. Rep. 244. *Contra*, *Klauber v. Biggerstaff*, 47 Wis. 551; 32 Am. Rep. 773.

⁷ *Thompson v. Sloan*, 23 Wend. 71; 35 Am. Dec. 546. But a note payable in "Canada currency" was held negotiable in Michigan: *Black v. Ward*, 27 Mich. 193; 15 Am. Rep. 162.

⁸ *Hasbrook v. Palmer*, 2 McLean, 10.

⁹ *Warren v. Brown*, 64 N. C. 381.

¹⁰ *Haddock v. Woods*, 46 Iowa, 433.

Contra, *Butler v. Paine*, 8 Minn. 324; *Mitchell v. Hewitt*, 5 Smedes & M. 331; *Sweetland v. Creigh*, 15 Ohio, 118; *Hunt v. Devine*, 37 Ill. 137.

¹¹ *King v. Hamilton*, 8 Saw. 167.

¹² *Chalmers's Digest*, art. 10.

¹³ *Daniel on Negotiable Instruments*, sec. 59; *Ayrey v. Fearnside*, 4 Mees. & W. 169; *Fralick v. Norton*, 2 Mich. 130; 55 Am. Dec. 56.

¹⁴ *Cook v. Satterlee*, 6 Cow. 108; 16 Am. Dec. 432; see *Leonard v. Mason*, 1 Wend. 523.

¹⁵ *Martin v. Chantry*, 2 Strange, 1271.

¹⁶ *Hartley v. Wilkinson*, 4 Camp. 127.

its amount";¹ "and the said H. [the promisee] is to build a barn and fence, and the said P. [the promisor] is to have all the land back of the house";² reciting that it was given for the purchase of a machine, the title to which was not to pass till the note was paid, the payees reserving the right to declare the note due at any time when they should deem themselves insecure, and to take possession of the machine;³ a written provision to pay a certain sum of money at a certain time to the order of another, but joined with a stipulation concerning the title to property, and promises in respect to the same, and a warranty as to the pecuniary responsibility of the promisor.⁴

But it is laid down that "if the superadded agreement do not impair the certainty of the promise to pay the certain amount named, but only facilitates the means of its collection, it does not in any degree destroy the negotiability of the instrument, but is embodied in the contract of all the parties, and passes as an incident of the paper itself to every holder."⁵ On this ground the later cases support the negotiability of instruments appointing the payee or holder the attorney of the maker to confess judgment for him if the note is not paid, or waiving the benefit of exemption, appraisement, or homestead laws.⁶

¹ *Leeds v. Lancashire*, 2 Camp. 205.

² *Fletcher v. Thompson*, 55 N. H. 308.

³ *Deering v. Thom*, 29 Minn. 120.

⁴ *Killam v. Schoeps*, 26 Kan. 310; 40 Am. Rep. 313.

⁵ *Daniel on Negotiable Instruments*, sec. 60. A mere statement of the consideration on which it is given will not invalidate it: *Rice v. Ragland*, 10 Humph. 545; 53 Am. Dec. 737.

⁶ *Daniel on Negotiable Instruments*, 61; *Lyon v. Martin*, 31 Kan. 411; *Osborn v. Hawley*, 19 Ohio, 130; *Kemp v. Klaus*, 8 Neb. 24. In *Overton v. Tyler*, 3 Pa. St. 346, 45 Am. Dec. 645, the note authorized any attorney of any court of record to appear and confess judgment for the amount of the note, and also released all errors and waived execution and right of in-

quisition on real estate, and right of having property appraised which might be levied upon by virtue of any execution issued for such sum. It was held not a promissory note. "The warrant and stipulations," says Gibson, J., "incorporated with this note evince that the object of the parties was not a general but a special one. . . . Yet the negotiability of the note, if it had any, as well as its separate existence, was instantly liable to be merged in a judgment, and its circulation arrested by the debt being attached, as an encumbrance to the maker's land, and it was actually merged when it had nearly three months to run. Now, it is hard to conceive how the commercial properties of a bill or note can be extinguished before it comes to maturity."

As to stipulations in notes for the payment of attorney's fees if they are not paid at maturity, or if suit is instituted upon them, the courts differ.¹ In Maryland,² Minnesota,³ Missouri,⁴ North Carolina,⁵ Pennsylvania,⁶ and Wisconsin,⁷ it is held that a note otherwise negotiable loses its negotiability if it contain an agreement to pay an attorney's fee. But a contrary doctrine is laid down in Arkansas,⁸ Illinois,⁹ Indiana,¹⁰ Louisiana,¹¹ Iowa,¹² Kansas,¹³ Kentucky,¹⁴ and other jurisdictions.¹⁵

In a late case in Indiana it was held that a condition in a promissory note that "the drawers and indorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note, and further expressly agree that the payee or his assigns may extend the time of payment thereof, from time to time, indefinitely, as he or they may see fit, and receive interest in advance, or otherwise, from the maker or indorsers, for any extension or forbearance so made," destroys its negotiability: *Glidden v. Henry*, 104 Ind. 278; 54 Am. Rep. 316. A promissory note payable "ninety days after date," and containing on its face a power of attorney authorizing a confession of judgment "at any time hereafter," is not negotiable: *Richards v. Barlow*, 140 Mass. 218.

¹ It has been held that a stipulation for an attorney's fee in a note is void, on the ground that it is unconscionable and against public policy: *Witherspoon v. Musselman*, 14 Bush, 214; 29 Am. Rep. 404; *Martin v. Trustees*, 13 Ohio, 250; *Shelton v. Gill*, 11 Ohio, 417; *Bullock v. Taylor*, 39 Mich. 137; 33 Am. Rep. 356; *Merchants' Nat. Bk. v. Sevier*, 14 Fed. Rep. 662, *Caldwell, J.*, saying: "It is a significant fact that of all the forms of bills and notes given in the books not one contains such a provision. It is comparatively of modern origin. It is the invention of cunning shavers, and one of the methods by which they seek to fleece their victims. It is an exotic in commercial and banking circles, where business is conducted according to commercial usage and with that integrity and fairness usually characterizing the dealings of banks and busi-

ness men. This is the first instance that has come under our observation where this bad invention has found its way to the discount board of a national bank." *Contra*, *Garretson v. Purdy*, 3 Dak. 178; *Bowie v. Hall*, 69 Md. 433; 9 Am. St. Rep. 433; *Maryland Fertilizing Co. v. Newman*, 60 Md. 584; 45 Am. Rep. 750.

² *Maryland Fertilizing Co. v. Newman*, 60 Md. 584; 45 Am. Rep. 750.

³ *Jones v. Radatz*, 27 Minn. 240.

⁴ *First Nat. Bank v. Gay*, 63 Mo. 33; 21 Am. Rep. 430; *Samstag v. Conley*, 64 Mo. 476.

⁵ *First Nat. Bank v. Bynum*, 84 N. C. 24; 34 Am. Rep. 604.

⁶ *Overton v. Tyler*, 3 Pa. St. 346; 45 Am. Dec. 645; *Woods v. North*, 84 Pa. St. 407; 24 Am. Rep. 201; *Johnston v. Speer*, 92 Pa. St. 227; 37 Am. Rep. 675. See *Zimmerman v. Anderson*, 67 Pa. St. 421; 5 Am. Rep. 447.

⁷ *Morgan v. Edwards*, 53 Wis. 599; 40 Am. Rep. 781. "Collection expenses": *Morgan v. Edwards*, 53 Wis. 599; 40 Am. Rep. 781.

⁸ *Trader v. Chidester*, 41 Ark. 242; 48 Am. Rep. 38.

⁹ *Nickerson v. Sheldon*, 33 Ill. 372; 85 Am. Dec. 280.

¹⁰ *Stoneman v. Pyle*, 35 Ind. 103; 9 Am. Rep. 607; *Proctor v. Baldwin*, 82 Ind. 370; *Maynard v. Meier*, 85 Ind. 317. But see *Churchman v. Martin*, 54 Ind. 388.

¹¹ *Dietrich v. Baylie*, 23 La. Ann. 767.

¹² *Sperry v. Horr*, 32 Iowa, 184.

¹³ *Seaton v. Scovill*, 18 Kan. 433; 26 Am. Rep. 779.

¹⁴ *Gaar v. Louisville Banking Ass'n*, 11 Bush, 180; 21 Am. Rep. 212.

¹⁵ *Schlesinger v. Arline*, 31 Fed. Rep. 648; *Howenstein v. Barnes*, 5 Dill.

And in the following cases it was held that the negotiability of the instrument was not destroyed, viz.: Where at the end of the note there was a memorandum specifying that it might be discharged by the maker's releasing the payee as indorser on another note;¹ where to the note were added the words, "said promise made for a colt this day taken; said colt holden for the payment of said amount;"² where it bore on its face the words, "on policy No. 33,386";³ where it stated that its consideration was a policy of insurance;⁴ where it contained a statement that it was given "for a patent right";⁵ an instrument whereby A promises to pay to B's order seven dollars five days after date, and seven dollars on the first day of each succeeding month for twelve months from date, "for the privilege of advertising purposes for the term of one year from date";⁶ a draft payable to drawer or order for an amount stated, "for supplies, etc., furnished me to make my crops, this to be an advance to me under my mortgage."⁷ The character of a promissory note is not destroyed by an agreement appended to it authorizing the agent of the maker, upon non-payment of interest, to sell certain stock of the maker held as collateral;⁸ nor is an instrument the less a promissory note because it contains an additional agreement to remit cash and notes taken on the maker's sales as agent of the goods of his principal, the payee.⁹

§ 1464. Requisites of Bills and Notes — As to Form in General. — Subject to the rules mentioned in the fore-

452; *Adams v. Addington*, 16 Fed. Rep. 89. A clause authorizing the inclusion "of attorney's commissions of five per cent for collection" in the judgments to be confessed cannot be used to compel the debtor to pay such commissions when he does not dispute the claim, and pays at maturity: *Moore's Appeal*, 110 Pa. St. 433.

¹ *Pool v. McCrary*, 1 Ga. 319; 44 Am. Dec. 655; *Sanders v. Bacon*, 8 Johns. 485.

² *Collins v. Bradbury*, 64 Me. 37.

³ *Taylor v. Curry*, 109 Mass. 36; 12 Am. Rep. 661; *Union Insurance Co. v. Greenleaf*, 64 Me. 123.

⁴ *American Insurance Co. v. Gallahan*, 75 Ind. 168.

⁵ *Hereth v. Meyer*, 33 Ind. 511.

⁶ *Chase v. Behrman*, 10 Daly, 344.

⁷ *Patillo v. Mayer*, 70 Ga. 715.

⁸ *Ewing v. Clark*, 76 Mo. 545;

Charleston Bank v. Gary, 18 S. C. 282.

⁹ *Dowie v. Joyner*, 25 S. C. 123.

going sections, a bill or note may be in any form of words.¹ An instrument which explicitly promises to pay a certain sum to A or order, at a fixed date, is a promissory note, although its form is not that in which promissory notes usually are written.² A written order dated and signed, directing one person to pay to another a specified sum, and to charge the same to account of the drawer, is a bill of exchange, although it is neither made payable to order or bearer, nor contains the words "value received," nor is made payable on a day certain, nor at any particular place.³ Where an instrument is capable of being interpreted either as a bill of exchange or as a promissory note, the person who receives it may, at his own option, treat it as either.⁴ The following have been held valid negotiable instruments, viz.: "Credit C, or order, with five hundred pounds in cash";⁵ "Pay, or cause to be paid, to C, on demand, one hundred and thirty pounds";⁶ "N. O. W., Cr. By labor, sixty-seven dollars. Good to bearer";⁷ "Good to R. C., or order, for thirty dollars, borrowed money."⁸ But the following have been held not valid bills, viz.: "Mr. S., please credit to J. W., or bearer, thirty dollars, and I will pay you by April 10th next, and oblige";⁹ "A B, please pay the above bill," written under an itemized account.¹⁰

Writing placed on any part of the note or bill¹¹ when it

¹ Chalmers on Bills and Notes, art. 10. See *Dalcour v. McCan*, 37 La. Ann. 7.

² *Hubert v. Grady*, 59 Tex. 502.

³ *Kendall v. Galvin*, 15 Me. 131; 32 Am. Dec. 141.

⁴ *Brazelton v. McMurray*, 44 Ala. 323.

⁵ *Ellison v. Collingridge*, 9 Com. B. 570.

⁶ *Lovell v. Hill*, 6 Car. & P. 238.

⁷ *Hussey v. Winslow*, 59 Me. 170.

⁸ *Franklin v. March*, 6 N. H. 364; 25 Am. Dec. 462.

⁹ *Woolley v. Sergeant*, 8 N. J. L. 262.

¹⁰ *Hoyt v. Lynch*, 2 Sand. 328; *Platzer v. Norris*, 38 Tex. 1.

¹¹ *Tuckerman v. Hartwell*, 3 Me. 147; 14 Am. Dec. 225; *Johnson v. Heegan*, 23 Me. 329; *Springfield Bank v. Merrick*, 14 Mass. 322; *Jones v. Fales*, 4 Mass. 254; *Barnard v. Cushing*, 4 Met. 231; 38 Am. Dec. 362; *Shaw v. Meth. Soc.*, 8 Met. 223; *Fletcher v. Blodgett*, 16 Vt. 26; 42 Am. Dec. 487; *Henry v. Coleman*, 5 Vt. 403; *State v. Stratton*, 27 Iowa, 424; 1 Am. Rep. 282; *Wait v. Pomerooy*, 20 Mich. 425; 4 Am. Rep. 395; *Effinger v. Richards*, 35 Miss. 540; *Benedict v. Cowden*, 49 N. Y. 396; 10 Am. Rep. 382; *Dinsmore v. Duncan*, 57 N. Y. 579; 15 Am. Rep. 534; *Heywood v. Perrin*, 10 Pick. 228; 20 Am. Dec. 518; *Costello v. Crowell*, 127

is made forms a part of it, whether in the body or not, or on the back.¹

ILLUSTRATIONS. — The words "foreign bills," or "facilities," were written underneath and at the left hand of a note. *Held*, to be part of it, parol evidence of such intent being given, and to mean that it was payable in such bills or facilities: *Jones v. Fales*, 4 Mass. 245; *Springfield Bank v. Merrick*, 14 Mass. 322. A memorandum was made at the bottom of a note on demand, "One half payable in twelve months, the balance in twenty-four months." *Held*, to be part of the note, it being shown that it was written before delivery: *Heywood v. Perrin*, 10 Pick. 228; 20 Am. Dec. 518. Below the signatures to a note was written, "When due, to draw fifteen per cent." *Held*, that the memorandum was no part of the note, and that it furnished no defense thereto: *Knoles v. Hill*, 25 Ill. 288. On the back of a note was printed: "The indorsers waive presentment, protest, and notice of dishonor." The payee indorsed his name in another place, entirely disconnected from the memorandum, and the note was transferred. *Held*, that the memorandum was part of his contract: *Farmers' Bank of Kentucky v. Ewing*, 78 Ky. 264; 39 Am. Rep. 231. On the back of a promissory note the following memorandum was written at the time of the execution of the note: "This note to be paid in wheat at ninety-five cents per bushel." *Held*, that the memorandum was a part of the note: *Polo Manufacturing Co. v. Parr*, 8 Neb. 379; 30 Am. Rep. 830.

§ 1465. Requisites of Bills and Notes — As to Signing.

— It is immaterial on what part of the instrument the drawer or maker signs his name, provided he signs his name as such.² Though the usual form is to sign the

Mass. 294; 34 Am. Rep. 367; *Richardson v. Thomas*, 28 Ark. 390; *West. Trans. Co. v. Newhall*, 24 Ill. 467.

¹ *Dinsmore v. Duncan*, 57 N. Y. 578; 15 Am. Rep. 534; *Henry v. Coleman*, 5 Vt. 402; *Blake v. Coleman*, 22 Wis. 416; 99 Am. Dec. 53. If made before or at the time of the execution, it forms a part of it, and may control the obligation in some important particulars. But being disconnected from the body of the instrument to which the maker's name is signed, it forms no original part of it until shown to have been upon it when executed: *Bay v. Shrader*, 50 Miss. 326. Indorsements of payments made upon

promissory notes, whether of interest or principal, constitute, when made upon the note itself, no part of the note, but are to be considered the same as receipts executed by the holder to the maker of the note for the sums received; and parol evidence is admissible to explain them, or even to show that they were erroneously placed upon the note: *McDaniels v. Lapham*, 21 Vt. 222.

² *Hunt v. Adams*, 5 Mass. 359; 4 Am. Dec. 68; *Clason v. Bailey*, 14 Johns. 484; *Schmidt v. Schmaelter*, 45 Mo. 502; *Lincoln v. Hinzey*, 51 Ill. 435. The maker of a promissory note, which was in printed form, by mistake

name at the end of the paper, thus, "I promise," etc., "(signed) J. B.," yet "I, J. B., promise," etc., without a signature at the end, is sufficient.¹ Signing by initials is sufficient,² or by a mark, witnessed or unwitnessed,³ or made by another person, but attested by a mark,⁴ or made entirely by another at the maker's request.⁵ So even the name need not be signed. Thus a note signed "Steamboat Ben Lee and owners,"⁶ and a bill drawn on and accepted by "Steamer C. W. D. and owners,"⁷ have been held sufficient. In a New York case, a party who could write put on the back of the note with a lead-pencil the figures "1. 2. 8.," meaning at the time to bind himself as an indorser. This was held, on appeal, a good indorsement.⁸ The writing may be in pencil as well as in ink,⁹ or lithographed, or printed, or stamped.¹⁰

§ 1466. **Verbal or Grammatical Mistakes.** — A verbal mistake or a grammatical error as to amount, date, time, or place, or other matter, does not affect the instrument if on its face or by the aid of parol evidence the mistake may be corrected.¹¹ Thus "I promised to pay" has been read "I promise to pay";¹² "pound" has been read "pounds";¹³

signed his name above the printed line stating the bank at which the note was payable. Held, that the printed line below the signature was nevertheless part of the note, and that the note was therefore negotiable: *Turnbull v. Thomas*, 1 Hughes, 172.

¹ *Taylor v. Dobbin*, 1 Strange, 399; *Saunderson v. Jackson*, 2 Bos. & P. 238.

² *Merchants' Bank v. Spicer*, 6 Wend. 443; *Palmer v. Stephens*, 1 Denio, 471.

³ *Willoughby v. Moulton*, 47 N. H. 205; *Hilborn v. Alford*, 22 Cal. 482; *Flint v. Flint*, 6 Allen, 34; 83 Am. Dec. 615; *Shank v. Butsch*, 28 Ind. 19; *Flowers v. Bitting*, 45 Ala. 448.

⁴ *George v. Surrey*, *Moody & M.* 516; *Shank v. Butsch*, 28 Ind. 19.

⁵ *Haven v. Hobbs*, 1 Vt. 238; 18 Am. Dec. 678.

⁶ *Sanders v. Anderson*, 21 Mo. 402.

⁷ *Alabama Coal Co. v. Brainard*, 35 Ala. 478.

⁸ *Brown v. Butchers' Bank*, 6 Hill, 443; 41 Am. Dec. 755. "A person," say the court, "may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself."

⁹ *Geary v. Physic*, 5 Barn. & C. 234; *Read v. Roark*, 14 Tex. 329; *Closson v. Stearns*, 4 Vt. 11; 23 Am. Dec. 245; *Brown v. Butchers' Bank*, 6 Hill, 443; 41 Am. Dec. 755.

¹⁰ *Pennington v. Baehr*, 48 Cal. 567; *Brown v. Butchers' Bank*, 6 Hill, 443; 41 Am. Dec. 755; *Ex parte Banking Co.*, L. R. 3 Ch. 654.

¹¹ 1 Daniel on Negotiable Instruments, sec. 76.

¹² *Perkins v. Commonwealth*, 7 Gratt. 651; 56 Am. Dec. 123.

¹³ *Coles v. Hulme*, 8 Barn. & C. 568.

"four months after" has been read "four months after date";¹ "six — after date" and "twenty-four after date" have been read six months and twenty-four months after date respectively;² "one — after date" has been read "one year after date";³ "37.89" has been read "\$37.89";⁴ "eight —" has been read "eight hundred dollars";⁵ "at ten per cent after due" has been read "at ten per cent interest after due";⁶ "25th of December next" has been read "25th of December, instant";⁷ "fife hundret" has been read "five hundred";⁸ "thee hundred dollars" has been read "\$300";⁹ "seventy-five after date" has been read "seventy five days after date";¹⁰ a note dated in May, 1837, and made payable January 1, "one thousand forty," has been read "the first of January, 1840";¹¹ "on or by the first of March, eighteen and sixty-eight," has been read "on the first day of March, 1868."¹² A bill or note in which the dollar-mark to the figures in the margin, and also the word "dollars" in the body of the writing, is omitted by mistake, is nevertheless valid.¹³ A bill of exchange was drawn, payable "on the 6-9 January, 1852." It was held that the evidence of bankers and merchants showing that the figure "9" was thus placed after the figure "6" to show that the last day of grace would be the 9th of January was admissible.¹⁴

§ 1467. **As to Date.** — Though the date of a negotiable instrument is usually inserted, this is not absolutely

¹ *Pearson v. Stoddard*, 9 Gray, 199.

² *Nichols v. Frothingham*, 45 Me. 220; 71 Am. Dec. 539; *Conner v. Routh*, 7 How. (Miss.) 176; 40 Am. Dec. 59. In *Wainwright v. Straw*, 15 Vt. 215, 40 Am. Dec. 675, a note payable "one after date" was held void for uncertainty, and parol evidence to explain the time of payment intended inadmissible.

³ *Stowe v. Merrill*, 77 Me. 550.

⁴ *Northrop v. Sanborn*, 22 Vt. 433; 54 Am. Dec. 83.

⁵ *Boyd v. Brotherson*, 10 Wend. 93.

⁶ *Higley v. Newell*, 28 Iowa, 516;

Williams v. Baker, 67 Ill. 238; *Thompson v. Hoagland*, 65 Ill. 310; *Gramer v. Joder*, 65 Ill. 314.

⁷ *McCrary v. Caskey*, 27 Ga. 54.

⁸ *Ohm v. Yung*, 63 Ind. 412.

⁹ *Burnham v. Allen*, 1 Gray, 496.

¹⁰ *Boykin v. Bank of Mobile*, 72 Ala. 262; 47 Am. Rep. 408.

¹¹ *Evans v. Steel*, 2 Ala. 114.

¹² *Massie v. Belford*, 68 Ill. 290.

¹³ *Williamson v. Smith*, 1 Cold. 1; 78 Am. Dec. 478; *Sweetser v. French*, 13 Met. 262; *Murrill v. Handy*, 17 Mo. 406; *Northrop v. Sanborn*, 22 Vt. 433; 54 Am. Dec. 83.

¹⁴ *Kelsey v. Hibbs*, 13 Ohio St. 340.

essential.¹ And if a bill or note expressed to be payable a certain time after date is undated, evidence is admissible to show on what day it was issued, and it takes effect from that time.² Where a statute provided that promissory notes of a certain kind, made or issued after a given day, should be utterly void, it was held that evidence was admissible on behalf of the makers to prove that the notes were issued after the day, notwithstanding they bore a previous date.³ Where a bill is ante or post dated, the date of its issue determines the day from which it will mature; parol evidence is admissible to fix the day of issue, and it takes effect from that time only, except as against a *bona fide* holder for value.⁴

ILLUSTRATIONS. — A draws a bill on B, on May 4th, bearing date May 11th, payable to C's order. C indorses to D, who sues A. C dies May 5th. D may show that the bill was post-dated, and that C really indorsed it, and can then recover: *Pasmore v. North*, 13 East, 517. C sues B on a partnership note dated in 1842, and signed by his partner in the firm name. The partnership was dissolved in 1840. C may show that the bill was issued before dissolution, and post-dated, and can then recover: *Lansing v. Gaine*, 2 Johns. 300; 3 Am. Dec. 422. D sues B on a check. D may recover as a holder before maturity, although shown to have taken it a year after its date, if it was in fact post-dated one year when issued: *Cowing v. Altman*, 71 N. Y. 435; *Drake v. Rogers*, 32 Me. 524. C sues B on a note bearing date on a Sunday. He may recover if it appears to have been issued on Monday: *King v. Fleming*, 72 Ill. 21; 22 Am. Rep. 131. July 5th, C sues B on a note dated July 1st, payable one day after date without grace. C cannot recover if it appears to have been issued on July 4th, and antedated: *Raeffe v. Moore*, 58 Ga. 94. June 4th, D, a *bona fide* holder for value, sues B on a note dated May 1st, and payable one month after date. B cannot show that the note was issued June 1st, and dated May 1st by mistake: *Huston v. Young*, 33 Me. 85.

¹ *Mehlberg v. Fisher*, 24 Wis. 607; *Inglish v. Breneman*, 5 Ark. 377; 41 Am. Dec. 97.

² *Giles v. Bourne*, 6 Maule & S. 73; *Seldonridge v. Conable*, 32 Ind. 375.

³ *Bayley v. Taber*, 5 Mass. 286; 4 Am. Dec. 57.

⁴ *Bumples v. Timms*, 3 Sneed, 459; *Powell v. Waters*, 8 Cow. 669; *Knox*

v. Clifford, 38 Wis. 651; 20 Am. Rep. 28; *Trieber v. Bank*, 31 Ark. 128; *Lansing v. Gaine*, 2 Johns. 300; 3 Am. Dec. 422. The presumption is that a bill was issued on the day it bears date: *Anderson v. Weston*, 6 Bing. N. C. 301; unless the day was Sunday: *Begbie v. Levi*, 1 Cromp. & J. 180; *Dohoney v. Dohoney*, 7 Bush, 217.

§ 1468. **The Sum Payable.**—The instrument may be drawn for any sum, small or great.¹ But it is absolutely necessary that the sum be properly expressed on its face. There can be no recovery at law upon an instrument in the form of a promissory note, but stating no amount in the body of the note.² But, as we have seen,³ grammatical or verbal errors in expressing the amount will be disregarded, and if the sum payable can be gathered from any part of the instrument, whether from the figures or the writing in the body of the paper, it is valid.⁴ The sum may be stated in figures alone.⁵ Where there is a discrepancy between the written words and the figures in the margin, the former govern,⁶ and parol evidence is inadmissible to show that it was made for the latter amount.⁷

ILLUSTRATIONS.—An instrument is in this form, “Pay to my order \$——.” This cannot be shown by evidence to be a bill for one hundred dollars: *Norwich Bank v. Hyde*, 13 Conn. 279; *Saunderson v. Piper*, 5 Bing. N. C. 431; *Brown v. Bebee*, 1 D. Chip. 227. A bill is drawn, “Pay C, or order, one hundred.” In the margin is inserted “\$100.” This is a bill for one hundred dollars: *Sweetser v. French*, 13 Met. 262; *Corgan v. Frew*, 39 Ill. 31; 89 Am. Dec. 286. A bill is drawn, “Pay C, or order, two hundred dollars.” In the margin is superscribed “\$250.” This is a bill for two hundred dollars only: *Saunderson v. Piper*, 5 Bing. N. C. 432; *Mears v. Graham*, 8 Blackf. 144.

§ 1469. **Place of Making.**—The place where the bill or note is drawn or made need not be stated.⁸ A provision in a note that it is negotiable and payable at a certain place designated does not restrain or limit its negotiability elsewhere.⁹ When a bill is drawn in one

¹ In England, by statute 48 Geo. III., c. 88, a negotiable bill of exchange cannot be drawn for a less sum than twenty shillings.

² *Hollen v. Davis*, 59 Iowa, 444; 44 Am. Rep. 688.

³ *Ante*, § 1466.

⁴ Benjamin's Chalmers's Digest, art. 12.

⁵ Story on Promissory Notes, 20, 21;

Nugent v. Roland, 12 Mart. 659; 13 Am. Dec. 381.

⁶ *Riley v. Dickens*, 19 Ill. 29; *Burnham v. Allen*, 1 Gray, 496.

⁷ *Smith v. Smith*, 1 R. I. 398; 53 Am. Dec. 652.

⁸ Benjamin's Chalmers's Digest, art. 21; *Wexel v. Cameron*, 31 Tex. 614.

⁹ *Schoharie County Bank v. Bevard*, 51 Iowa, 257.

country and payable in another, and the amount payable is expressed in the currency of the former, it must be calculated according to the rate of exchange on the day the bill is payable.¹ When a bill is drawn in one country payable in another in the currency of the latter, and such currency is depreciated between the time of issue and of payment, the holder is entitled to be paid according to the former value.²

§ 1470. Delivery Essential.—Delivery is a requisite to every contract upon negotiable paper, whether drawing, making, accepting, or indorsing the instrument, and until delivery be made, the contract is inchoate and revocable.³ This is so, even where it has been placed in the hands of an agent for delivery. It may be recalled until it is actually delivered by him.⁴ A promissory note may be delivered to the party in whose favor it is drawn upon a condition; so that until performance of the condition he acquires no rights to enforce it.⁵ Leaving a check upon the desk of a clerk without his knowledge is not a delivery to the clerk's employer, unless it is actually received by the clerk or his employer. If the clerk for any reason does not consent to the delivery of the check, either from mental infirmity or lack of attention, or any physical incapacity, there is no delivery to him in law. Delivery is a thing in which both parties must join; the minds of both parties must concur.⁶ But delivery may

¹ *Hirschfield v. Smith*, L. R. 1 Com. P. 353.

² *Da Costa v. Cole*, Skin. 272. *Contra*, *Rouquette v. Overman*, L. R. 10 Q. B. 525.

³ *Abrey v. Cruz*, L. R. 5 Com. P. 42; *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525; *First National Bank v. Strong*, 72 Ill. 559; *Burson v. Huntington*, 21 Mich. 415; 4 Am. Rep. 497; *Bailey v. Taber*, 5 Mass. 286; *Marvin v. McCullum*, 20 Johns. 288; *Hopper v. Eiland*, 21 Ala. 714; *Richardson v. Darst*, 51 Ill. 141; *Howe v.*

Ould, 28 Gratt. 7; *Lansing v. Gaine*, 2 Johns. 300; 3 Am. Dec. 422; *Freeman v. Ellison*, 37 Mich. 459; *Woodford v. Dorwin*, 3 Vt. 82; 21 Am. Dec. 573. The note takes effect from the delivery, and not from the date: *Woodford v. Dorwin*, 3 Vt. 82; 21 Am. Dec. 573.

⁴ *Edwards on Bills*, 186; 1 *Daniel on Negotiable Instruments*, sec. 63.

⁵ *Seymour v. Cowing*, 4 Abb. App. 200; *Devries v. Shumate*, 53 Md. 211.

⁶ *Kinne v. Ford*, 52 Barb. 194.

be constructive as well as actual, as where the person in whose hands it is is directed to hold it subject to the payee's order.¹ And if the paper, even though not delivered, get into circulation through the negligence of the maker, he is liable on it.² Possession is *prima facie* evidence of delivery. And on the question of delivery, evidence of the surrounding circumstances may be given as bearing upon the question.³ And it is not essential that the paper shall pass into the personal possession of the payee; it may be made to a third person for him.⁴ If the maker or indorser die before delivery, the instrument becomes null, and cannot be delivered by his personal representative.⁵ But this rule applies only as between the parties to the instrument or those having notice; others, i. e., third parties, are protected.

ILLUSTRATIONS. — The holder of a note payable to bearer, in remitting it to a creditor in another city, cuts it in two and posts one half only to him. Before he sends the other half, he writes to the creditor demanding back the half he sent. *Held*, that he is entitled to it, as there has been no delivery of the note: *Smith v. Mundy*, 29 L. J. Q. B. 172. A bill being left with the drawee for acceptance, the latter writes his acceptance on it; but, mislaying it, is unable to hand it to the holder when he calls for it, but asks until the next day to find it. Before that time, he hears that the drawer has failed, cancels his acceptance on the note, and returns it to the holder. *Held*, that there had been no acceptance: *Bank v. Bank*, L. R. 3 P. C. 526; *Dunavan v. Flynn*, 118 Mass. 537. A, the holder of a bill, indorses it to D, but dies before delivering it. His executor delivers it to D. *Held*, that the indorsement is invalid, as the executor is not the agent of a testator: *Bromage v. Lloyd*, 1 Ex. 32; *Clark v. Sigourney*, 17 Conn. 511. B, who is indebted to C, makes a note for the amount payable to C. B dies, and the note is afterwards found among his papers. C has no right to this note, and if it be given to him, he cannot enforce it: *Bromage v. Lloyd*, 1 Ex. 32; *Clark v. Boyd*, 2 Ohio, 56. B makes a note in favor of C, and delivers it to a stake-holder (e. g., trustee

¹ *Howe v. Ould*, 28 Gratt. 7; *Fisher v. Bradford*, 7 Me. 28; *Richardson v. Lincoln*, 5 Met. 201. 637; *McFarland v. Sikes*, 54 Conn. 250; 1 Am. St. Rep. 111.

⁴ *Gordon v. Adams*, 127 Ill. 223.

² *Roberts v. McGrath*, 38 Wis. 52.

⁵ *Clark v. Boyd*, 2 Ohio, 56; *Clark v. Sigourney*, 17 Conn. 511.

³ *Hunter v. Harris*, 24 Ill. App.

under composition deed). C thereby acquires no property in the note: *Latter v. White*, L. R. 5 H. L. 578. C, the holder of a bill, specially indorses it to D; C transmits it by post to X, his own agent. X informs D that he has received the bill, but does not give it to him or undertake to hold it on his account. C can revoke the transaction and cancel his indorsement to D: *Brind v. Hampshire*, 1 Mees. & W. 365; *Muller v. Pondir*, 55 N. Y. 325; 14 Am. Rep. 259; *Richards v. Darst*, 51 Ill. 140. C, the holder of a bill, specially indorses it to D, and incloses it in a letter addressed to D. The letter, which is put in the office letter-box, is stolen by a clerk of C's, who forges D's indorsement and negotiates the bill. The property in the bill remains in C: *Arnold v. Cheque Bank*, L. R. 1 C. P. D. 584; *Ledwich v. McKim*, 53 N. Y. 307. By the regulations of the English post-office, a letter once posted cannot be reclaimed. *Held*, that if the indorsee of a bill authorize the indorser to transmit it to him by post, the property in the bill passes to the indorsee, and the indorsement becomes complete, as soon as the letter which contains the bill is posted; if not so authorized, then as soon as the indorsee accepts such transfer: *Ex parte Cote*, L. R. 9 Ch. 27; *Sichel v. Borch*, 2 Hurl. & C. 956; *Mitchell v. Byrne*, 6 Rich. 171; *Kirkman v. Bank*, 2 Cold. 397. The defendant wrote his negotiable promissory note and executed his mortgage securing the same, and deposited them in the safe of a third person, subject to his (the defendant's) orders. They were procured from the custodian by the payee through fraud, and were by the payee negotiated to an innocent purchaser. *Held*, that such purchaser could not recover if the note and mortgage got into circulation without the maker's negligence; that the protection which the law merchant extends to the *bona fide* holder of negotiable paper, who acquires it for value before maturity, does not extend to a case where the instrument never had an inception or lawful existence as such, and where the party sought to be charged is free from negligence: *Roberts v. McGrath*, 38 Wis. 52. A, expecting to consummate a land purchase the next day, signed a note for the broker's commissions. The broker, without permission and without objection, put the note in his pocket, saying, "I will take charge of this." The next morning the broker sold the note to a *bona fide* purchaser. The land trade fell through. *Held*, that the note was never delivered to the broker, and that the maker was without negligence: *Dodd v. Dunne*, 71 Wis. 578. A person by a false pretense procures another to draw a check in favor of a third party. The former delivers it to the third party, who receives it *bona fide* and for value. *Held*, that the drawer is liable to him: *Watson v. Russell*, 3 Best & S. 34; 5

Best & S. 918; *Fearing v. Clark*, 16 Gray, 74; 77 Am. Dec. 394; *Gould v. Segee*, 5 Duer, 260. A person signs a note as surety on condition that it shall not be delivered by the maker to the payee until signed by another surety. *Held*, that the surety is liable to a *bona fide* holder for value, although it was delivered contrary to the agreement: *Deardorff v. Foresman*, 24 Ind. 481; *Gage v. Sharp*, 24 Iowa, 15. A person draws a check payable to bearer, but before he delivers it it is stolen and negotiated to a third person for value, without notice. *Held*, that the drawer is liable on it: *Ingham v. Primrose*, 7 Com. B., N. S., 85; *Worcester Bank v. Bank*, 10 Cush. 488; 57 Am. Dec. 120; *Clarke v. Johnson*, 54 Ill. 296. In accordance with an agreement between a creditor and his debtor, the latter sent the former by mail four indorsed notes as collateral security, three of which were received and accepted by the creditor; the fourth was lost on the way. Before maturity of the last note, the creditor obtained a duplicate, and took steps at the proper time to have payment of it demanded, and protest made on failure to obtain payment. *Held*, that the delivery of the last note was complete when it was placed in the mail: *Kirkman v. Bank*, 2 Cold. 397. A left with B an envelope addressed to C and others, with directions to deliver it to himself, if he should call for it; otherwise, that it should not be opened in his lifetime. On the death of A, without having exercised his right of recall, B opened the envelope, and found it to contain three promissory notes signed by A, and payable to C, D, and E, to whom he accordingly sent them. *Held*, that this was a good delivery, and related back to the time of the deposit: *Giddings v. Giddings*, 51 Vt. 227; 31 Am. Rep. 682. Notes were executed by a person, with personal security, in compromise of a prior claim, and left with the payee's agent. He objected only to their form, and retained them, to see if the form could not be changed, but agreeing to accept them if this could not be effected. *Held*, a sufficient delivery: *Bodley v. Higgins*, 73 Ill. 375. A made a note payable to B, at the request of her father, his creditor, who promised to give it to her. It was then placed in his private papers, whence, without his consent, it was taken by B, who brought suit thereon. *Held*, that there was no delivery of the note to B: *Hatton v. Jones*, 78 Ind. 466. A executed a promissory note payable to B, or order, but did not deliver it. Subsequently B took the note from the possession of A, against his previous direction and without his knowledge, and put it into circulation. *Held*, that A was not liable thereon, even to a *bona fide* holder: *Burson v. Huntington*, 21 Mich. 415; 4 Am. Rep. 497; *Cline v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357.

§ 1471. **Delivery in Escrow.**—A bill or note, like a deed, may be delivered in escrow,¹ subject to this distinction, viz., a deed delivered as in escrow cannot become operative until the condition is fulfilled; a bill so delivered becomes absolute in the hands of a *bona fide* holder for value without notice, whether the condition is fulfilled or not.² A note placed in escrow takes effect the instant the conditions of the escrow are performed, even though the depository has not formally delivered it to the payee.³

§ 1472. **The Parties to a Bill or Note—In General.**—There must be, in its inception, three parties to a bill of exchange, and two of these must be different persons. These parties are: The party who gives the order, called the drawer; the party on whom the order is given, called the drawee,—if the drawee duly signify his assent thereto, he is called the acceptor, and becomes the principal debtor on the bill; the party in whose favor the order is given, called the payee. The “holder” is the person in possession of the bill, and entitled to enforce its payment. This term includes the payee, the indorsee, or the bearer. The drawer and payee may be the same person. Thus a bill may be drawn payable to the drawer or his order.⁴ But where a person draws a bill on himself payable to his own order, it is nullity until transferred.⁵ And a bill may be payable to the order of the drawee, if he act in two

¹ Taylor v. Thomas, 13 Kan. 217; Salmon v. Webb, 3 H. L. Cas. 510; Benton v. Martin, 52 N. Y. 574; Lovejoy v. Bank, 23 Kan. 331; Couch v. Meeker, 2 Conn. 302; 7 Am. Dec. 274. The delivery cannot be to the promisee; it must be to a third person: Massman v. Holscher, 49 Mo. 87; Jones v. Shaw, 67 Mo. 667; Badcock v. Steadman, 1 Root, 87; Foy v. Blackstone, 31 Ill. 538; 83 Am. Dec. 246. See Title Contracts—Deeds.

² Whitmore v. Nickerson, 125 Mass. 496; 28 Am. Rep. 257;

Kinyon v. Wohlford, 17 Minn. 239; 10 Am. Rep. 165. But see Chipman v. Tucker, 38 Wis. 43; 20 Am. Rep. 1; Stringer v. Adams, 98 Ind. 539.

³ Taylor v. Thomas, 13 Kan. 217.

⁴ Butler v. Crips, 1 Salk. 130; Miller v. Weeks, 22 Pa. St. 89. A party drawing a bill on himself, payable at the same place, is liable for damages, if the bill is dishonored: Randolph v. Parish, 9 Port. 76.

⁵ Randolph v. Parish, 9 Port. 76; Com. v. Butterick, 100 Mass. 12; 97 Am. Dec. 65.

different capacities.¹ If the drawer and drawee be the same person, or if the drawee be a fictitious person, the holder may treat the instrument, at his option, either as a bill of exchange duly accepted by him or as a note.² Two parties are necessary to a promissory note, viz., the person who makes the promise, called the maker, and the person to whom the promise is made, called the payee.³ A promissory note cannot be made payable to one of two persons in the alternative.⁴

ILLUSTRATIONS. — A & Co. carry on business in London and Liverpool. The London house draw a bill on the Liverpool house. The holder may treat it as a note made by the London house payable in Liverpool; and if it be not paid, the omission to give notice of dishonor to the London house is immaterial: *Miller v. Thomson*, 3 Man. & G. 576; *Fairchild v. R. R. Co.*, 15 N. Y. 337; 69 Am. Dec. 606; *Willans v. Ayers*, L. R. 3 App. C. 133. A draws a bill on B and negotiates it to C; B is a fictitious person. C may treat the bill as a note made by A. He need not prove presentment or give notice of dishonor: *Smith v. Bellamy*, 2 Stark. 323. The directors of a joint-stock company draw a bill in the name of the company addressed "to the cashier." The holder may treat it as a note by the company: *Allen v. Assurance Co.*, 9 Com. B. 574; *Chicago etc. R. R. Co. v. West*, 37 Ind. 216; *Hasey v. White Co.*, 1 Doug. (Mich.) 193. A principal draws on his agent in favor of a third party. The latter may treat the instrument as the note of the principal: *Wardens v. Moore*, 1 Ind. 289; *Hardy v. Pilcher*, 57 Miss. 18; 34 Am. Rep. 432.

§ 1473. **The Drawer.**—The bill must be signed by the drawer; until he signs it, it is inchoate, and not a valid bill.⁵ The drawer of a bill of exchange, like an in-

¹ *Holdsworth v. Hunter*, 10 Barn. & C. 449. B is in business on his own account. He is also agent for X. A bill is drawn on B as agent for X, payable to his order on his own account. He accepts and indorses it. This is a valid bill: *Benjamin's Chalmers's Digest*, art. 2.

² *Miller v. Thomson*, 3 Man. & G. 576; *Fairchild v. R. R. Co.*, 15 N. Y. 337; 69 Am. Dec. 606.

³ *Benjamin's Chalmers's Digest*, art. 272.

⁴ *Musselman v. Oakes*, 19 Ill. 81; 68 Am. Dec. 583.

⁵ *Tevis v. Young*, 1 Met. (Ky.) 199; 71 Am. Dec. 474; *McCall v. Taylor*, 34 L. J. Com. P. 365; *Hogarth v. Latham*, L. R. 3 Q. B. Div. 643. To hold one liable as the drawer of a bill, his name must be either inserted in it or subscribed to it: *May v. Miller*, 27 Ala. 515; *Thurston v. Mauro*, 1 G. Greene, 231; *Bolles v. Walton*, 2 E. D. Smith, 164. Where a bill is accepted and handed over for value, but at the time

dorser, may add to his signature restrictive or qualifying words to exempt himself from personal liability.¹

§ 1474. **The Drawee — The Maker.** — The drawee must be described in the bill with such reasonable certainty that he may be identified.² A bill may be drawn payable to the drawee.³ An indorser before utterance of the note is a joint maker.⁴ One who signs a note as if he were a principal maker is liable upon it, although, in fact, he was a mere surety, and the note expresses no consideration.⁵ The mere addition of the word "security" to the name of a joint maker of a note does not change the nature of his liability, nor is it, in itself, evidence that he stood in that relation to the other contracting parties.⁶ The drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder. It is for him to rely on his own knowledge and means of information on the subject, and not upon presumptions arising from the opinions of others.⁷

ILLUSTRATIONS. — An instrument is in form of a bill, but it is simply addressed "To —, Mobile, Ala." *Held*, not a bill of exchange: *Watrous v. Halbrook*, 39 Tex. 572. An instrument in the form of a bill payable to drawer's order, not containing the name of a drawee, is expressed to be payable "at No. 1 X Street, London." B, who lives there, accepts it. This is a bill, and B is liable as acceptor: *Gray v. Milner*, 8 Taunt. 739. Instrument in the form of a bill. Where the address to the drawee should be are the words "at Messrs. B & Co." This is a bill addressed to B & Co.: *Shuttleworth v. Stephens*, 1 Camp. 407.

§ 1475. **The Payee.** — A bill may be made payable to a person therein named as payee, or to the order of that

of acceptance there is no drawer's name on it, any *bona fide* holder for value is entitled to insert his own name as drawer, and to sue the acceptor for the amount of the bill: *Harvey v. Crane*, 3 Cent. L. J. 269.

¹ *Hicks v. Hinde*, 9 Barb. 528.

² *Peto v. Reynolds*, 9 Ex. 410; 11 Ex. 418; *Almy v. Winslow*, 126 Mass. 342; *Petillon v. Lorden*, 86 Ill. 361.

³ *Witte v. Williams*, 8 S. C. 290; 28 Am. Rep. 290.

⁴ *Herbage v. McEntee*, 40 Mich. 337; 29 Am. Rep. 536. See *Rickey v. Dameron*, 48 Mo. 61.

⁵ *Casey v. Brabason*, 10 Abb. Pr. 368.

⁶ *Stevens v. West*, 1 How. 308; 29 Am. Dec. 630.

⁷ *Howard v. Mississippi Valley Bank of Vicksburg*, 28 La. Ann. 727; 26 Am. Rep. 105.

person, or to bearer.¹ A bill payable to a particular person by name, without the addition of the words "or order," "or bearer," or the like, though valid between the parties, is not negotiable.² If payable to the order of a particular person, it is payable to him or his order.³ A note payable to the order of A B, or bearer, is in legal effect the same as if payable simply to bearer, and the title passes to whomsoever becomes the lawful holder.⁴ But one payable "to bearer, C" is not payable to "C or bearer," and is not negotiable.⁵ A note payable to A, cashier, is payable to the bank.⁶ A bill may be addressed to two or more drawees jointly, whether or not they are partners.⁷ The payee of a bill which is not payable to bearer must be an existing person capable of being ascertained and identified at the time it is issued.⁸ Parol evidence is admissible to identify the payee when misnamed, or when designated by a description only.⁹ But it is not admissible to explain an uncertainty patent on the face of the instrument.¹⁰ If a bill be made payable

¹ *In re Leeds Banking Co.*, L. R. 1 Eq. 1; *Storm v. Stirling*, 2 El. & B. 842; *Warren v. Scott*, 32 Iowa, 22; *Ellis v. Wheeler*, 3 Pick. 18; *Mechanics' Bank v. Straiton*, 3 Abb. App. 269; *Davega v. Moore*, 3 McCord, 482.

² *Plimley v. Westley*, 2 Bing. N. C. 251; *Wells v. Brigham*, 6 Cush. 6; 53 Am. Dec. 750; *Corbet v. Clark*, 45 Wis. 403; 30 Am. Rep. 763.

³ *Smith v. McClure*, 5 East, 476; *Harvey v. Cane*, 34 L. T., N. S., 64; *Durgin v. Bartol*, 64 Me. 473.

⁴ *Tescher v. Merea*, 118 Ind. 586.

⁵ *Warren v. Scott*, 32 Iowa, 22.

⁶ *Blair v. Mansfield Bank*, 2 Flip. 111.

⁷ *Harmer v. Steele*, 4 Ex. 13; *Ala. etc. Co. v. Brainerd*, 35 Ala. 476. Mr. Chalmers asks (*Digest*, Benjamin's ed., art. 6, note), "Can there be an alternative drawee? In *Anonymous*, 12 Mod. 446, a bill addressed to 'B, or in his absence, to X,' was accepted by B, and was held good. But as far as appears, X may have been an ordinary case of need. An alternative drawee seems to make the payor uncertain: See *Ferris v. Bond*, 4 Barn. & Ald.

679, as to construction of a note signed in alternative." The "case of need"—a practice not common in America, but prevalent in England and other parts of Europe, is where a bill of exchange designates one or more persons, in addition to the drawee, to be resorted to for acceptance or payment in case of need, i. e., in the event of the bill being dishonored by the drawee.

⁸ *Cowie v. Stirling*, 6 El. & B. 333; *Adams v. King*, 16 Ill. 169; 61 Am. Dec. 64; *Gibson v. Minet*, 1 H. Black. 608; *Rich v. Starbuck*, 51 Ind. 87; *Douglass v. Wilkeson*, 6 Wend. 637; *Gates v. Nash*, 29 L. J. Com. P. 306.

⁹ *Commercial Bank v. French*, 21 Pick. 486; 32 Am. Dec. 280; *Adams v. King*, 16 Ill. 169; 61 Am. Dec. 64; *Jacobs v. Benson*, 39 Me. 132; 63 Am. Dec. 609; *Patterson v. Greaves*, 5 Blackf. 593; *Willis v. Barrett*, 2 Stark. 29.

¹⁰ *R. v. Randall*, Russ. & R. C. C. 195; *Soares v. Glyn*, 8 Q. B. 24; *Muselman v. Oakes*, 19 Ill. 81; 68 Am. Dec. 583.

to a deceased person, in ignorance of his death, his executors or administrators may adopt the transaction.¹

So promissory notes should be made payable to some person specified; but this may be done without inserting the name, if the payee be so certainly described as to be easily ascertained by allegations and proofs.² Where a bill or note is payable otherwise than to the bearer, there being no blank left for the name of the payee, it must contain the name of the payee.³ A promissory note payable to "the trustees" of a church, "or their collector," is not negotiable; and an action thereon cannot be maintained by a part only of the trustees.⁴ A note payable to A, B, C, or D, is payable to the payees individually, and not to the first three jointly, or the fourth.⁵ A state may be the payee of a promissory note.⁶

§ 1476. Parol Evidence Inadmissible to Vary Instrument. — According to the general rule of law excluding parol evidence to vary or contradict a written contract, a bill or note absolute on its face cannot be shown to be qualified or altered by a verbal agreement made at the time between the parties.⁷ Thus where a note is payable on demand, it cannot be shown that there was a verbal agreement that it should not be paid until a certain time, or until a certain event had happened, nor, as a general rule, can the time of the payment be varied by parol evidence;⁸ nor is parol evidence admissible to vary the

¹ *Murray v. East India Co.*, 5 Barn. & Ald. 204.

² *Adams v. King*, 16 Ill. 169; 61 Am. Dec. 64.

³ *Rich v. Starbuck*, 51 Ind. 87.

⁴ *Noxon v. Smith*, 127 Mass. 485.

⁵ *Samuels v. Evans*, 1 McLean, 473.

⁶ *Indiana v. Woram*, 6 Hill, 33.

⁷ 1 Daniel on Negotiable Instruments, sec. 80; *Porter v. Pierce*, 22 N. H. 275; 54 Am. Dec. 151; *Smith v. Caro*, 9 Or. 278; *Ewing v. Clark*, 76 Mo. 545.

⁸ *Campbell v. Upshaw*, 7 Humph. 185; 46 Am. Dec. 75; *Litchfield v. Falconer*, 2 Ala. 280; *Kincaid v. Hig-*

gins, 1 Bibb, 396; *Graves v. Clark*, 6 Blackf. 183; *Heywood v. Perrin*, 10 Pick. 228; 20 Am. Dec. 518; *Strachan v. Muxlow*, 24 Wis. 21; *Eaton v. Emerson*, 14 Me. 335; *Walker v. Clay*, 21 Ala. 797; *Thompson v. Ketchum*, 8 Johns. 189; 5 Am. Dec. 332; *Brown v. Spofford*, 95 U. S. 480; *Penny v. Graves*, 12 Ill. 187; *Ely v. Kilburn*, 5 Denio, 514; *Brown v. Hull*, 1 Denio, 400; *Adams v. Wilson*, 12 Met. 138; 45 Am. Dec. 240; *Dow v. Tuttle*, 4 Mass. 414; 3 Am. Dec. 226; *Allen v. Kimball*, 23 Pick. 476; *Ferguson v. Hill*, 3 Stew. 45; 21 Am. Dec. 641;

amount payable;¹ nor to show that an indorsement of a promissory note was not intended to import a contract;² nor to show that a note payable in three months was given upon an agreement that it should be renewed when it became due;³ nor to prove a contemporaneous parol agreement that the liability of the drawer of a bill of exchange was not to be enforced;⁴ nor an agreement between the payee and his immediate indorsee that the former should not be held liable on his indorsement;⁵ nor that it was not to be in force as between the parties;⁶ nor to show that it was not intended as a note, but merely as a memorandum, or that certain certificates of stock, described in the note as collateral security, should pay the note at maturity, if it was not paid before;⁷ nor to show facts which, as between himself and the drawee, would relieve him from liability;⁸ nor to show that the payee, at the time of indorsing and transferring it, agreed to assume the payment of it absolutely.⁹

§ 1477. **Exceptions.**— But where a bill or note is expressed to be for value received, extrinsic evidence is admissible (as between the immediate parties) to prove the absence, the failure, or the illegality of the consideration.¹⁰ However, when a particular consideration is expressed, it seems that extrinsic evidence is not admissible to prove a different consideration.¹¹

Hatch v. Hyde, 14 Vt. 25; 39 Am. Dec. 203; *Heaverin v. Donnell*, 7 Smedes & M. 244; 45 Am. Dec. 302; *Farmer v. Perry*, 70 Iowa, 358.

¹ *Dawson v. Bank*, 4 Scam. 56; *Insurance Co. v. Homer*, 9 Met. 39; *Mahan v. Sherman*, 7 Blackf. 378; *Beard v. White*, 1 Ala. 436; *Eaves v. Henderson*, 17 Wend. 190; *Fetherstone v. Wilson*, 4 Ark. 154; *Noe v. Hodges*, 3 Humph. 162; *Cockrill v. Kirkpatrick*, 9 Mo. 688.

² *Geneser v. Wissner*, 69 Iowa, 119.

³ *Stiles v. Vandewater*, 48 N. J. L. 67; *Diercks v. Roberts*, 13 S. C. 338.

⁴ *Cummings v. Kent*, 44 Ohio St. 92; 58 Am. Rep. 796.

⁵ *Hill v. Shields*, 81 N. C. 250; 31 Am. Rep. 499.

⁶ *Davy v. Kelley*, 66 Wis. 452.

⁷ *Perry v. Bigelow*, 128 Mass. 129.

⁸ *Bedell v. Scarlett*, 75 Ga. 56.

⁹ *Rodney v. Wilson*, 67 Mo. 123; 29 Am. Rep. 499.

¹⁰ *Green v. Shepherd*, 5 Allen, 589; *Baker v. Collins*, 9 Allen, 253; *Aldrich v. Stockwell*, 9 Allen, 45; *Abbott v. Hendricks*, 1 Man. & G. 795; *Bis-senger v. Guileman*, 6 Heisk. 277.

¹¹ See *Ridout v. Bristow*, 1 Crompt. & J. 231; *Hill v. Wilson*, 42 L. J. Ch. 817; *Nelson v. Serle*, 4 Mees. & W. 795; *Knill v. Williams*, 10 East, 431; *Johnson v. Sutherland*, 39 Mich. 579; and

Parol evidence is admissible to show the intention of the parties regarding the indorser's liability;¹ or the circumstances of the indorsement;² or the order of indorsers on a note;³ or not only that the defendant indorsed upon the express agreement of the holder that he should not be liable, but of all the circumstances under which the indorsement was made, and that it was at the request and for the mere accommodation of the holder;⁴ or that, at the time a note was executed and put into the hands of a payee, an agreement was made that it should be returned to the maker upon a certain day, if he should then demand it;⁵ or that a note given by a son to a father was given as evidence of an advancement;⁶ or that an indorser in blank signed with the express understanding that he was not to be liable as a joint promisor, but collaterally only;⁷ or that at the time of the indorsement the indorser agreed that he would not have recourse upon it against the indorser, and that the note so indorsed was delivered upon that express condition;⁸ or that he indorsed merely to enable the plaintiff to collect the money of the drawer, and that it was agreed when the indorsement was made that he was not to be liable as indorser on the note;⁹ or that he (a partner) instructed his partner to sign the firm name in order to avoid attachment of the firm goods by the latter's creditors, and that plaintiff, the payee of the note, was aware of the purpose;¹⁰ or that when he so wrote his name the note was paid, and that he wrote it as evidence of that fact at plaintiff's request;¹¹ or to show who were intended

contra, *Blum v. Mitchell*, 59 Ala. 535; *Magruder v. McDonald*, 3 Cranch C. C. 292. See *Title Contracts*, *post*.

¹ *Bright v. Carpenter*, 9 Ohio, 139; 34 Am. Dec. 432; *Owings v. Baker*, 54 Md. 82; 39 Am. Rep. 353.

² *Bailey v. Stoneman*, 41 Ohio St. 148.

³ *Preston v. Gould*, 64 Iowa, 44.

⁴ *Breneman v. Furniss*, 90 Pa. St. 186; 35 Am. Rep. 651.

⁵ *McFarland v. Sikes*, 54 Conn. 250.

⁶ *Buscher v. Knapp*, 107 Ind. 340.

⁷ *Barrows v. Lane*, 5 Vt. 161; 26 Am. Dec. 293.

⁸ *Hill v. Ely*, 5 Serg. & R. 363; 9 Am. Dec. 376.

⁹ *Johnson v. Martinus*, 4 N. J. L. 144; 17 Am. Dec. 464.

¹⁰ *Guice v. Thornton*, 76 Ala. 466.

¹¹ *Spencer v. Sloan*, 108 Ind. 183; 58 Am. Rep. 35.

as payees by description in a promissory note;¹ or that the indorser of a note waived suit against the maker;² or that notes due at a specified time were, by agreement, not to bear interest after maturity.³

ILLUSTRATIONS. — C., the payee of a bill expressed to be for value received, sues the acceptor. *Held*, that the acceptor may show that the bill was drawn and accepted for C.'s accommodation: *Thompson v. Clublely*, 1 Mees. & W. 212; *Stephens v. Bank*, 88 Pa. St. 157; 32 Am. Rep. 438. A note is expressed to be given "for commission for business transacted." In an action by payee against maker, *held*, that evidence is admissible to show that the consideration wholly failed, and that the payee never earned his commission: *Abbott v. Hendricks*, 1 Man. & G. 791. A note is expressed to be given "for value received by my late husband." *Held*, evidence is not admissible to show that the note was given merely as an indemnity, and that the payee had not been damnified: *Ridout v. Bristow*, 1 Crompt. & J. 231.

§ 1478. **Contemporaneous Written Agreements.** — A contemporaneous written agreement controlling the terms or effect of a negotiable instrument is binding as between the immediate parties and those having notice of it.⁴

¹ *Newport Man. Co. v. Starbird*, 10 N. H. 123; 34 Am. Dec. 145.

² *Schmied v. Frank*, 86 Ind. 250.

³ *Elliott v. Elliott*, 79 Ky. 277.

⁴ *Goodwin v. Nickerson*, 51 Cal. 166; *Munro v. King*, 3 Col. 238; *Singer Mfg. Co. v. Haines*, 36 Mich. 385; *Fel-*

lows v. Carpenter, Kirby, 364; *Lovet v. Johnson*, 2 Root, 114; *Park v. Cooke*, 3 Bush, 168; *Davlin v. Hill*, 11 Me. 344; *Key v. Cross*, 23 Miss. 598; *Effinger v. Richards*, 35 Miss. 540; *Fletcher v. Blodget*, 16 Vt. 26; 42 Am. Dec. 487.

CHAPTER LXXIX.

MATURITY OF INSTRUMENT.

§ 1479. Time of payment—On demand.

§ 1480. At sight.

§ 1481. At future day.

§ 1482. "Days of grace."

§ 1483. Usance.

§ 1484. Computation of time.

§ 1485. Dies non juridicus.

§ 1486. Place of payment.

§ 1479. **Time of Payment—On Demand.**—A bill, note, or check is payable on demand when it is so expressed, or in which no time for payment is expressed.¹ A note payable "when demanded" is the same as payable on demand.² An option given to the holder of a note of having it become due at once in case of a default in payment of interest must be exercised within a reasonable time as against an indorser.³ A promissory note payable simply on the "first day of March" is payable on demand.⁴ So is an instrument in form thus: "Due A \$250, value received, with interest at ten per cent per annum after four months from date."⁵ But a note payable "on demand, with interest after four months," with the words "on demand" erased by drawing lines through them, is not due until four months from the date thereof, and such erased words, being still legible, may be resorted to in determining that such was the intention of the parties.⁶ A note payable

¹ *Whitlock v. Underwood*, 2 Barn. & C. 157; *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Tucker v. Tucker*, 119 Mass. 79; *Holmes v. West*, 17 Cal. 623; *Kingsbury v. Butler*, 4 Vt. 458; *White v. Smith*, 77 Ill. 351; 20 Am. Rep. 251; *Loring v. Gurney*, 5 Pick. 15; *Bowman v. McChesney*, 22 Gratt. 609; *Thompson v. Ketcham*, 8 Johns. 190; 5 Am. Dec. 332; *Smith v. Bythewood*, Rice, 245; 33 Am. Dec. 111; *Parker v. Red-*

dick, 65 Miss. 242; 7 Am. St. Rep. 646.

² *Kingsbury v. Butler*, 4 Vt. 458; *Brett v. Ming*, 1 Fla. 447.

³ *Crossmore v. Page*, 73 Cal. 213; 2 Am. St. Rep. 789.

⁴ *Collins v. Trotter*, 81 Mo. 275.

⁵ *Lee v. Balcom*, 9 Col. 216.

⁶ *Hobart v. Dodge*, 10 Me. 156; 25 Am. Dec. 214.

on demand is due from the date,¹ and no demand is essential prior to commencing an action on it.²

§ 1480. **At Sight.**—A bill is payable at sight which is so expressed, or which is payable “on presentation,” or on “demand at sight.”³ In a bill of exchange, “after sight” means after acceptance or protest for non-acceptance.⁴ In a promissory note, it means after exhibition to the maker.⁵

§ 1481. **Payment at Future Day.**—A bill or note may be payable at a fixed future time, or at a fixed period after date, or after sight.⁶ So it may be made payable at an indefinite future time, provided that time is certain to arrive.⁷ Thus the following expressions as to time of payment have been held valid: “One day after the death of X”;⁸ “two months after H. M. ship Swallow is paid off”;⁹ “on the 1st January, when he comes of age”;¹⁰ “one year after notice”;¹¹ “one year after my death”;¹² “two months after demand in writing.”¹³

And if the extreme limit of time is certain to arrive, the bill or note may be made payable earlier on the happening of a contingency.¹⁴ In the following cases the instrument has been sustained: Payable “on or before three

¹ *Smith v. Bythewood*, Rice, 245; 33 Am. Dec. 111.

² *Smith v. Bythewood*, Rice, 245; 33 Am. Dec. 111.

³ *Dixon v. Nuttall*, 1 Crompt. M. & R. 307.

⁴ *Campbell v. French*, 6 Term Rep. 200; *Mitchell v. Degrand*, 1 Mason, 176.

⁵ *Sturdy v. Henderson*, 4 Barn. & Ald. 592; *Dixon v. Nuttall*, 1 Crompt. M. & R. 307; *Cribbs v. Adams*, 13 Gray, 600.

⁶ Benjamin's Chalmers's Digest, art. 19.

⁷ *Cota v. Buck*, 7 Met. 588; 41 Am. Dec. 464; *Dixon v. Nuttall*, 1 Crompt. M. & R. 307.

⁸ *Washband v. Washband*, 24 Conn. 500.

⁹ *Andrews v. Franklin*, 1 Strange, 24; *Evans v. Underwood*, 1 Wils. 262. This on the ground that the government is considered sure to pay: *Daniel on Negotiable Instruments*, sec. 46; *Henry v. Hazen*, 5 Ark. 401.

¹⁰ *Goss v. Nelson*, 1 Burr. 228.

¹¹ *Clayton v. Gosling*, 5 Barn. & C. 360.

¹² *Roffey v. Greenwell*, 10 Ad. & E. 222; *Conn v. Thornton*, 46 Ala. 587.

¹³ *Price v. Taylor*, 5 Hurl. & N. 540; *Protection Insurance Co. v. Bill*, 31 Conn. 534.

¹⁴ *Ernst v. Steckman*, 74 Pa. St. 13; 15 Am. Rep. 542.

years from date";¹ "one year from date, or before if realized from the sale of a certain machine";² "December 25, 1819, or when he completes the building according to contract";³ "in six months, or as soon as I can make the money out of the said patent right."⁴ So a bill or note may be expressed to be payable by stated installments, and may provide that upon default in payment of one installment the whole is to become due.⁵ But an instrument expressed to be payable on a contingency which may never happen does not constitute a bill or note; and the happening of the event does not cure the defect.⁶ On this ground the following have been held to render the instrument invalid as a bill or note: "When B arrives at age";⁷ "thirty days after the arrival of the ship S.";⁸ "ninety days after the dissolution of the partnership between C and D, and the settling of the books";⁹ "on the expiration of a certain lease."¹⁰

A bill or note expressed to be payable at an uncertain time is often construed as payable absolutely within a reasonable time, and therefore valid.¹¹ Thus the following have been held payable within a reasonable time, and therefore valid: Where payable "when convenient";¹² "when I sell my place";¹³ "as soon as collected from my accounts at P."¹⁴

Filling a blank in the lower margin of a note naming

¹ *Helmer v. Krolick*, 36 Mich. 371; *Jordan v. Tate*, 19 Ohio St. 586.

² *Woolen v. Ulrich*, 64 Ind. 120; *Cisne v. Chidester*, 85 Ill. 523; *Cota v. Buck*, 7 Met. 588; 41 Am. Dec. 464.

³ *Stevens v. Blunt*, 7 Mass. 240.

⁴ *Palmer v. Hummer*, 10 Kan. 464; 15 Am. Rep. 353.

⁵ *Carlton v. Kenealy*, 12 Mees. & W. 139; *Cooke v. Horn*, 29 L. T., N. S., 369; *Sea v. Glover*, 1 Ill. App. 335; *Gaskin v. Davis*, 2 Fost. & F. 294.

⁶ *Colehan v. Cooke*, Willes, 393; *Carlos v. Fancourt*, 5 Term Rep. 492; *Miller v. Excelsior Co.*, 1 Ill. App. 273; *Kelley v. Hemmingway*, 13 Ill. 604; 56 Am. Dec. 474; *Shelton v. Bruce*, 9

Yerg. 24; *De Forest v. Frary*, 6 Cow. 151; *Corbett v. Georgia*, 24 Ga. 287.

⁷ *Kelley v. Hemmingway*, 13 Ill. 604; 56 Am. Dec. 474.

⁸ *Palmer v. Pratt*, 2 Bing. 185; *Grant v. Wood*, 12 Gray, 220.

⁹ *Sackett v. Palmer*, 25 Barb. 179; *Husband v. Epling*, 81 Ill. 172; 25 Am. Rep. 273.

¹⁰ *Downer v. Tucker*, 31 Vt. 204.

¹¹ *Capron v. Capron*, 44 Vt. 410.

¹² *Works v. Hershey*, 35 Iowa, 340; *Lewis v. Tipton*, 10 Ohio St. 88; 75 Am. Dec. 498.

¹³ *Crooker v. Holmes*, 65 Me. 195; 20 Am. Rep. 687.

¹⁴ *Ubsdell v. Cunningham*, 22 Mo. 124.

a date for its maturity does not make it payable on that date, where the latter and the date named in the body of the note conflict.¹

§ 1482. **Days of Grace.** — Bills and notes are payable three days after the time of payment expressed on their face; these days are called days of grace.² Under a statute allowing three days of grace on negotiable promissory notes, three entire days are meant, and a suit brought before the fourth day is prematurely brought.³ But no days of grace are allowed where the instrument expressly states that it is without grace,⁴ or where it is payable on demand,⁵ or on a certain day "fixed."⁶ On mere installments of interest due on a note, the debtor is not entitled to days of grace.⁷

§ 1483. **Usance.** — "Usance" means customary time; i. e., the time for payment as fixed by custom, having regard to the place where a bill is drawn and the place where it is payable. Thus the usance between London and Amsterdam being one month, a bill drawn in Amsterdam dated January 1, payable in London at double usance, falls due on March 4. Half-usance means fifteen days. Drawing bills at usance does not prevail in the United States, drawing after date being the customary method.

§ 1484. **Computation of Time.** — If a note is made payable a certain number of days after date, the day of

¹ *Fisk v. McNeal*, 23 Neb. 726; 8 Am. St. Rep. 162.

² *Reed v. Wilson*, 41 N. J. L. 29; *Wood v. Corl*, 4 Met. 203; *Craig v. Price*, 23 Ark. 633; *Webb v. Fairmaner*, 3 Mees. & W. 473; *Cribbs v. Adams*, 13 Gray, 597; *Lucas v. Ladew*, 28 Mo. 342. Where payable "at sight," they are entitled to grace: *Hart v. Smith*, 15 Ala. 807; 50 Am. Dec. 161. An insurance premium note when negotiable is entitled to grace: *Jarmin v. Ins. Co.*, 1 Flip. 548.

³ *Watkins v. Willis*, 58 Tex. 521.

⁴ *Durnford v. Patterson*, 7 Mart. 460; 12 Am. Dec. 514; *Roehner v. Ins. Co.*, 63 N. Y. 160.

⁵ *Andrew v. Blachly*, 11 Ohio St. 89; *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530. *Contra*, *Bell v. Sackett*, 33 Cal. 407.

⁶ *Durnford v. Patterson*, 7 Mart. 460; 12 Am. Dec. 514.

⁷ *Macloon v. Smith*, 49 Wis. 200.

the date is excluded in the computation.¹ The time of payment of a bill or note entitled to grace is determined by excluding the nominal day of payment and including the last of the three days of grace.² A note made payable a certain number of months after date, without grace, falls due on the same day of the month as that of its date.³

"Month" in a bill or note means a calendar month.⁴ A note dated December 4, 1820, and made payable the "25th of December next," does not become due until the 25th of December, 1821.⁵ A note payable on demand, with interest after six months, is due presently, the "six months" applying to the interest, and not to the principal.⁶

A note payable six months after date, or before if made out of "certain sales," becomes payable at the end of six months absolutely.⁷ A note promising to pay a sum of money in six months, "or as soon as I can with due diligence make the money out of said patent rights," is payable in six months.⁸ On a note made "payable when I sell my place where I now live," the maker is bound to sell his place within a reasonable time, and failing in that, the note is due.⁹ A note made payable on the settlement of accounts between the maker and a third party accrues to the payee in one year, that being a reasonable time.¹⁰ A note, "On demand, after date, I promise to pay to

¹ Woodbridge v. Brigham, 12 Mass. 402; 7 Am. Dec. 85; Avery v. Stewart, 2 Conn. 69; 7 Am. Dec. 240; Ammidown v. Woodman, 31 Me. 580; Roehner v. Ins. Co., 63 N. Y. 160; Bigelow v. Wilson, 1 Pick. 485; Henry v. Jones, 8 Mass. 453; Craft v. Bush, 7 Ind. 217.

² Campbell v. French, 6 Term Rep. 212; Ammidown v. Woodman, 31 Me. 580.

³ Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160.

⁴ McMurchy v. Robinson, 10 Ohio, 496; Webb v. Fairman, 3 Mees. & W.

473; Thomas v. Shoemaker, 6 Watts & S. 179; Leffingwell v. White, 1 Johns. Cas. 99; 1 Am. Dec. 97.

⁵ Wallace v. Hill, Minor, 70.

⁶ Rice v. West, 11 Me. 323; Newman v. Kettelle, 13 Pick. 419; Loring v. Gurney, 5 Pick. 15; Jillson v. Hill, 4 Gray, 316; Shaw v. Shaw, 43 N. H. 170.

⁷ Walker v. Woollen, 54 Ind. 164; 23 Am. Rep. 639.

⁸ Palmer v. Hummer, 10 Kan. 464; 15 Am. Rep. 353.

⁹ Crooker v. Holmes, 65 Me. 195; 20 Am. Rep. 687.

¹⁰ Scull v. Roane, Hemp. 103.

the order of Niles Works \$2,512.87, payable at Cincinnati when convenient," is payable within a reasonable time after the date of the note.¹ A note dated April 20, 1860, in which the maker promises to pay "when he receives it from the government for losses sustained in August, 1856, or as soon as otherwise convenient," a sum certain for labor mentioned therein to have been done, is not a conditional obligation, but is payable, in any event, in a reasonable time.² A note, "Feb. 18, 1873. For money received, I promise to pay A \$435 out of my estate, if she should outlive me; but if not, to her heirs as she shall direct, without use,"—is in no event payable except after the death of the maker, and from his estate.³ A note payable on the arrival of a ship will not become due on the loss of the vessel.⁴

The maker of a note cannot take advantage of a provision therein, that in case of failure to pay interest when due the note shall be due. The provision is for the benefit of the payee, and he may waive it if he chooses.⁵

ILLUSTRATIONS.—A note dated February 25, 1848 (leap year), was made payable ninety days after date. *Held*, not due till May 29th: *Craft v. State Bank*, 7 Ind. 219. A note for \$71.24 was made payable by the makers "when able." In a suit on the note it was shown that, at the date of the note, they had a stock of goods worth three thousand dollars. *Held*, that if the makers were able to pay the note at the moment it was made, the note matured the next moment: *Veasey v. Reeves*, 6 Ind. 406. A note, dated July 20th, was by its terms payable "one year, August 15th, after date." *Held*, that it was payable, not one year after its date, but one year from the fifteenth day of August after its date: *Washington etc. Bank v. Jerome*, 8 Mich. 490. The maker of a promissory note indorsed upon it: "I hereby renew the within note, and promise to pay it within two years from this date, the object being to prevent a bar within the next two years." *Held*, that an action upon the note within two years from the date of the foregoing indorsement was prematurely brought: *Koutz v. Vancleaf*, 55 Cal. 345.

¹ *Works v. Hershey*, 35 Iowa, 340.

² *Jones v. Eisler*, 3 Kan. 134.

³ *Kelsey v. Chamberlain*, 47 Mich. 241.

⁴ *Tucker v. Maxwell*, 11 Mass. 143.

⁵ *Wall v. Marsh*, 9 Baxt. 438.

§ 1485. **Dies non Juridicus.**—If a bill fall due on a legal holiday, it is, if entitled to grace, deemed to fall due on the preceding day;¹ but if not entitled to grace, it falls due on the day after.² This is the common-law rule, altered by statute in some states. A note made on Saturday, payable one day after date, is due on Monday.³ A demand of payment cannot be made on the fourth of July, where it is a public holiday, but may be made on the day preceding.⁴ Notice to an indorser is not invalid because given upon a legal holiday, though the indorser would not be bound to act upon the notice until the day following.⁵

§ 1486. **Place of Payment.**—A bill or note may be made payable at any place, or no place may be stated, or an alternative place may be indicated.⁶ A memorandum at the bottom of a note, or an addition to the acceptance of a bill, stating a particular place of payment, made with the assent of the holder, is a part of the contract.⁷ The drawer of a bill undertakes to pay the bill at the place where it is drawn, upon default of the drawee, and not at the place where it is payable.⁸

Notes setting forth no special place of payment are

¹ *Read v. Wilson*, 41 N. J. L. 39; *City Bank v. Cutter*, 3 Pick. 414; *Farnum v. Fowle*, 12 Mass. 89; 7 Am. Dec. 35; *Kuntz v. Temple*, 48 Mo. 75; *Com. Bank v. Varnum*, 49 N. Y. 279; *Sands v. Lyon*, 18 Conn. 17; *Sanders v. Ochiltree*, 5 Port. 73; 30 Am. Dec. 550; *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530; *West v. Lee*, 50 How. Pr. 314; *Sheldon v. Benham*, 4 Hill, 129; 40 Am. Dec. 271.

² *Campbell v. Life Ass'n*, 4 Bosw. 318; *Com. Bank v. Varnum*, 49 N. Y. 279; *Avery v. Stewart*, 2 Conn. 69; 7 Am. Dec. 240; *Salter v. Burt*, 20 Wend. 205; 32 Am. Dec. 530; *Barrett v. Allen*, 10 Ohio, 426; *Kuntz v. Temple*, 48 Mo. 71. *Contra* (due day before), *Barker v. Parker*, 6 Pick. 80; *Doremus v. Burton*, 5 Biss. 57; *Kilgour v. Miles*, 6 Gill & J. 268.

³ *Sanders v. Ochiltree*, 5 Port. 75; 30 Am. Dec. 551.

⁴ *Ransom v. Mack*, 2 Hill, 587; 38 Am. Dec. 602.

⁵ *Deblieux v. Bullard*, 1 Rob. 66; 36 Am. Dec. 684.

⁶ *Malden Bank v. Baldwin*, 13 Gray, 154; 74 Am. Dec. 627; *Pollard v. Hemes*, 3 Bos. & P. 335. A promissory note made payable in "California or Nevada," being payable at the maker's option in either state, cannot be construed as a contract to be performed in Nevada: *Wilcox v. Williams*, 5 Nev. 206.

⁷ *Tuckerman v. Hartwell*, 3 Greenl. 147; 14 Am. Dec. 225.

⁸ *Crawford v. Bank*, 6 Ala. 12; 41 Am. Dec. 33.

payable anywhere, and not exclusively at the office of the maker.¹ A note payable at any of the banks of a city in which there is a large number of banks is a contract to pay at any of such banks that the holder may select. Such note becomes one payable at a particular place from the time that the maker is notified at which of such banks it is, and his subsequent failure to pay it there is a dishonor, upon which the indorser will become liable on due notice being given to him.² A promissory note for the payment of money in work or cash after the maker's arrival in San Francisco does not necessarily make California the place for performance, as the maker may pay in work or cash, and the payee demand payment elsewhere; and the mere fact that the maker never had a chance to perform the contract in California, on account of the absence of the payee, does not discharge the note.³ Notes of a bank made payable at its branches may be presented for payment at the principal bank, if such branches have been discontinued.⁴

¹ *Engler v. Ellis*, 16 Ind. 475.

³ *Schuessler v. Watson*, 37 Ala. 98;

² *North Bank v. Abbot*, 13 Pick. 465; 25 Am. Dec. 334.

76 Am. Dec. 348.

⁴ *Nashville Bank v. Henderson*, 5 Yerg. 104; 26 Am. Dec. 257.

CHAPTER LXXX.

PRESENTMENT, ACCEPTANCE, DEMAND, PROTEST, AND NOTICE.

- § 1487. Presentment for acceptance — When necessary.
- § 1488. Time.
- § 1489. Place.
- § 1490. By whom.
- § 1491. To whom.
- § 1492. Right of drawee to retain bill.
- § 1493. Presentment for acceptance, when excused.
- § 1494. Acceptance — Defined — In general.
- § 1495. Form of — Requisites as to.
- § 1496. Need not be dated.
- § 1497. General and absolute acceptance.
- § 1498. Qualified or conditional acceptance.
- § 1499. Time of acceptance.
- § 1500. Other requisites.
- § 1501. Who may accept.
- § 1502. Acceptance “supra protest.”
- § 1503. Effect of non-acceptance.
- § 1504. Duty of drawee to accept — Liability before acceptance.
- § 1505. Refusal to accept — Damages, measure of.
- § 1506. No privity between drawee and holder.
- § 1507. Liability of acceptor after acceptance.
- § 1508. Effect of acceptance — Admissions and warranties of acceptor.
- § 1509. Presentment for payment — In general.
- § 1510. Mode of presentment.
- § 1511. Time.
- § 1512. Place.
- § 1513. By whom.
- § 1514. Liability of agents for neglect.
- § 1515. To whom.
- § 1516. Presentment for payment, when excused.
- § 1517. What will not excuse.
- § 1518. What will excuse delay in.
- § 1519. When necessary to charge parties.
- § 1520. Damages on refusal to pay — Measure of.
- § 1521. Liability of drawer.
- § 1522. Effect of drawing — What drawer admits and warrants.
- § 1523. When is instrument dishonored for non-payment.
- § 1524. Effect of dishonor.
- § 1525. Noting.
- § 1526. Protest — Requisites of — In general.
- § 1527. Necessary to charge parties.

- § 1528. Who may make.
- § 1529. Time.
- § 1530. Place.
- § 1531. What will excuse.
- § 1532. What will excuse delay.
- § 1533. Protest for better security.
- § 1534. Notice of dishonor essential — Proof of.
- § 1535. Effect of not giving notice.
- § 1536. Notice of dishonor — By whom given.
- § 1537. Mode of giving.
- § 1538. Time of giving.
- § 1539. Time of receiving.
- § 1540. Notice by post.
- § 1541. Party receiving notice transferring it to others — Principal and agent.
- § 1542. To whom given — Who entitled to — Guarantors.
- § 1543. Form and requisites of notice.
- § 1544. Cases in which notice is excused.
- § 1545. Cases in which notice is not excused.
- § 1546. Waiver of notice.
- § 1547. What excuses delay in giving notice.
- § 1548. To whose benefit it inures.
- § 1549. Usages as to demand and notice.

§ 1487. Presentment for Acceptance—When Necessary.

—In the case of a bill of exchange payable at or after sight, presentment for acceptance is necessary.¹ As to other bills, it is not necessary, unless expressly required.² Presentment means actual exhibition of the bill; and it is not duly presented if the holder merely informs drawee that he has it in his possession, but does not produce it, though the drawee says he will not accept it.³ 'But anything which amounts to a notification of the holding of a bill, with a request to accept accompanied by the bill, amounts to a presentment. No formality is required. So where bills were transmitted by letter to the drawee,

¹ *Ramchurn v. Radakissen*, 9 Moore P. C. C. 65; *Allen v. Suydam*, 20 Wend. 323; 32 Am. Dec. 555; *Cribbs v. Adams*, 13 Gray, 597; *Bank v. Triplett*, 1 Pet. 25.

² *Walker v. Stetson*, 19 Ohio St. 400; 2 Am. Rep. 405. "Although presentment for acceptance is unnecessary on date bills as between the holder and drawer or indorsers, an

agent for collection must use due diligence is presenting them for acceptance, or he will be liable to his principal for damage resulting from his negligence": *Benjamin's Chalmers's Digest*, art. 147, note.

³ *Fall River etc. Bank v. Willard*, 5 Met. 222. But see *Fisher v. Beckwith*, 19 Vt. 1; 46 Am. Dec. 174.

this was held a good presentment, and an answer by him that he had not accepted, a refusal.¹ Due presentment for acceptance is essential to the exercise of the holder of his rights which arise on the dishonor of the bill for non-acceptance. The question of due presentment is only material when acceptance cannot be obtained. If acceptance is obtained, the informality of the presentment is immaterial.

§ 1488. **Time.** — A bill payable at or after sight must be presented for acceptance within a reasonable time.² What is a reasonable time is a mixed question of law and fact.³ In determining what is a reasonable time, regard is to be had to the nature of the bill, the usage of trade with respect to similar bills, and the circumstances of the particular case, looking to the interests both of the holder and the drawer.⁴ Bank drafts issued for negotiable purposes are not required to be forwarded at once for acceptance and payment, and delay for a reasonable time will not discharge an indorser, although longer than might be held reasonable in regard to mere private drafts not meant to circulate.⁵ A bill payable otherwise than at or after sight may be presented for acceptance at any time before maturity.⁶ It must be made on a business day and at a reasonable hour; i. e., during ordinary business hours in the case of a trader.⁷

ILLUSTRATIONS. — A, in W., draws a bill on B, in London, payable one month after sight. The holder keeps it four days before presenting it for acceptance. It is then dishonored. This may not be an unreasonable delay: *Fry v. Hill*, 7 Taunt. 397; *Shute v. Robins*, 3 Car. & P. 80; *Gowan v. Jackson*, 20

¹ *Carmichael v. Bank*, 4 How. (Miss.) 567; 35 Am. Dec. 409.

² *Straker v. Graham*, 4 Mees. & W. 721; *Mellish v. Rawdon*, 9 Bing. 416; *Ramchurn v. Radakissen*, 9 Moore P. C. C. 46; *Wallace v. Agry*, 4 Mason, 336; *Strong v. King*, 35 Ill. 1; 85 Am. Dec. 336; *Goupy v. Harden*, 7 Taunt. 163.

³ *Prescott Bank v. Caverly*, 7

Gray, 221; 66 Am. Dec. 473; *Walsh v. Dart*, 23 Wis. 334; 99 Am. Dec. 177.

⁴ *Bolton v. Harrod*, 9 Mart. 326; 13 Am. Dec. 306.

⁵ *Nutting v. Burked*, 48 Mich. 241.

⁶ *O'Keefe v. Dunn*, 6 Taunt. 307; *Townsley v. Sumrall*, 2 Pet. 170.

⁷ *Nelson v. Fottrell*, 7 Leigh, 179.

Johns. 176. A, in L., draws a bill on B, in Rio, payable sixty days after sight. The payee holds it back for four months, during which time Rio bills are at a discount. He then negotiates it. This may not be an unreasonable delay: *Mellish v. Rawdon*, 9 Bing. 416. A, in Newfoundland, draws a bill (in a set) on B, in London, payable ninety days after sight. The payee holds it back for two months, and then forwards it for presentment. No reason for holding back is shown. This may be an unreasonable delay: *Straker v. Graham*, 4 Mees. & W. 721; *Dumont v. Pope*, 7 Blackf. 367.

§ 1489. **Place.**—Where a bill is drawn payable at the house or place of business of some person other than the drawee, presentment for acceptance at such house or place is not a presentment to the drawee.¹ But in Ohio, W. drew a bill of exchange on G., made payable to his own order on a day certain at the Ocean Bank, New York. At maturity the bill was presented at the bank for payment, and duly protested for non-payment. G. was in funds at the time, and would have paid the bill had he known of its existence, but he afterwards became insolvent. In an action by the indorser against the drawer, it was held that the holder of the bill was not bound to present it to the drawee for acceptance; that it was the duty of the drawer to have notified the drawee of the bill, and that presentment at the bank was sufficient to charge the antecedent parties.²

§ 1490. **By Whom.**—Any person in possession of a bill of exchange may present it for acceptance.³

§ 1491. **To Whom.**—The presentment for acceptance must be made to the drawee personally, or to some person having authority to accept or refuse on his behalf.⁴ If a bill is drawn on two or more persons, presentment for acceptance to one is sufficient, whether partners or not.⁵

¹ Chitty on Bills, 196.

⁴ Check v. Poper, 5 Esp. 175; Sharpe

² Walker v. Stetson, 19 Ohio St. 400; 2 Am. Rep. 405.

v. Drew, 9 Ind. 281.

³ Benjamin's Chalmers's Digest, art. 149.

⁵ Daniel on Negotiable Instruments, sec. 455.

When the drawee is dead, presentment must be made to his executor or administrator.¹

§ 1492. **Right of Drawee to Retain Bill.** — The person who presents a bill of exchange for acceptance must deliver it up to the drawee, if required so to do. The drawee is entitled to retain it for twenty-four hours, but after the expiration of this time he must redeliver it, accepted or unaccepted.² In reckoning the twenty-four hours, non-business days must be excluded.³ If after the expiration of the twenty-four hours the drawee refuses to redeliver the bill, it must be treated as dishonored, in order to preserve the holder's right of recourse against antecedent parties.⁴ The mere retention of a bill without the owner's demand for a return, and with his permission, is not a "refusal" to deliver it, making the same an acceptance of the bill within the New York statute.⁵

§ 1493. **Presentment for Acceptance, when Excused.** — The presentment for acceptance is excused and the bill treated as dishonored by non-acceptance in several cases, viz.: When the drawee is discovered to be a fictitious person,⁶ or a person not having capacity to contract;⁷ where after the exercise of reasonable diligence presentment cannot be effected;⁸ where the drawee is not in funds, and the drawer has no reasonable expectation that the bill will be accepted.⁹

ILLUSTRATIONS. — Defendants drew a bill of exchange against a cargo, and indorsed and delivered to plaintiffs the bill, and also the bill of lading of the cargo, as collateral security for the acceptance and payment of the bill, authorizing them, in

¹ See Benjamin's Chalmers's Digest, art. 153.

² Bank of Van Diemen's Land v. Bank, L. R. 3 P. C. 542; Case v. Bent, 15 Mich. 82; Overman v. Bank, 31 N. J. L. 565.

³ Bank of Van Diemen's Land v. Bank, L. R. 3 P. C. 542.

⁴ Id.

⁵ Matteson v. Moulton, 79 N. Y. 627.

⁶ Smith v. Bellamy, 2 Stark. 223.

⁷ See Benjamin's Chalmers's Digest, art. 155; citing Byles on Bills, 187.

⁸ Byles on Bills, 183.

⁹ Robinson v. Ames, 20 Johns. 146; 11 Am. Dec. 259.

case they thought it necessary, to sell the cargo and apply the proceeds to the payment of the bill. The drawee refused to accept the bill without a delivery of the bill of lading. *Held*, that presentment and notice of non-acceptance were excused: *Schuchardt v. Hall*, 36 Md. 590; 11 Am. Rep. 514.

§ 1494. **Acceptance — Defined — In General.** — Acceptance is the assent given in due form by the drawee of a bill of exchange to the order of the drawer. The acceptor's contract is, that he will pay it at its maturity upon due presentment.¹ An order drawn upon a third person cannot, until accepted, be the basis of an action by the payee against the drawee.²

§ 1495. **Form of—Requisites as to.**—The acceptance may be by writing on the bill itself,³ or on a separate paper.⁴ Any form of words from which an intention to accept can be gathered is sufficient,⁵ as writing one's name across the bill;⁶ or the words "accepted," or "seen," or "honored," or the like;⁷ or an order to a third person to pay it;⁸ or an indorsement by a drawee when the draft was presented for acceptance, "Protest waived, payment guaranteed."⁹ But the words, "I take notice of the above," written and signed upon an unnegotiable bill of exchange by the drawee, do not of themselves necessarily import an acceptance of it, and parol evidence of a refusal to accept by the drawee, at the time of its presentation, is admissible;¹⁰ and the words "Kiss my foot," written and signed on the back of a bill, do not constitute an

¹ *Parks v. Ingram*, 22 N. H. 283; 55 Am. Dec. 153.

² *Poole v. Carhart*, 71 Iowa, 37.

³ *Benjamin's Chalmers's Digest*, art. 31.

⁴ *Jones v. Bank*, 34 Ill. 313.

⁵ *Smith v. Vertue*, 30 L. J. Com. P. 60.

⁶ *Spear v. Pratt*, 2 Hill, 582; 38 Am. Dec. 600; *Wheeler v. Webster*, 1 E. D. Smith, 3; *Mechanics' Bank v. Yager*, 62 Miss. 529.

⁷ *Walker v. Bank*, 13 Barb. 638; ..

Miller v. Butler, 1 Cranch C. C. 470; *Spear v. Pratt*, 2 Hill, 582; 38 Am. Dec. 600; *Kaufman v. Barringer*, 20 La. Ann. 419. Or "excepted," when it is clear that "accepted" was meant: *Cortelyou v. Maben*, 22 Neb. 697; 3 Am. St. Rep. 284.

⁸ *Harper v. West*, 1 Cranch C. C. 192.

⁹ *Block v. Wilkerson*, 42 Ark. 253.

¹⁰ *Cook v. Baldwin*, 120 Mass. 317; 21 Am. Rep. 517.

acceptance.¹ But one who, in attempting to accept a draft, writes "excepted" instead of "accepted" is liable on his acceptance.²

The acceptance may be oral,³ where not required by statute to be in writing;⁴ or it may be implied from the acts of the drawee.⁵ Thus if a drawee in possession of the bill procures another to discount it, an acceptance is implied.⁶ Detention of the bill by the drawee may, under some circumstances, amount to an acceptance.⁷ But part payment of the bill by the drawee will not, of itself, amount to an acceptance.⁸

So the acceptance may be by a written or verbal

¹ *Norton v. Knapp*, 64 Iowa, 112.

² *Cortelyou v. Mahen*, 22 Neb. 697;

3 Am. St. Rep. 284.

³ *Pierce v. Kittredge*, 115 Mass. 374; *Sturges v. Bank*, 75 Ill. 595; *Miller v. Neihaus*, 51 Ind. 401; *Duel v. Bricker*, 76 Pa. St. 255; *Jarvis v. Wilson*, 46 Conn. 90; 33 Am. Rep. 18; *Ward v. Allen*, 2 Met. 53; 35 Am. Dec. 387; *Walker v. Lide*, 1 Rich. 249; 44 Am. Dec. 253; *Sproat v. Matthews*, 1 Term Rep. 182; *Grant v. Shaw*, 16 Mass. 341; 8 Am. Dec. 142; *Dunavan v. Flynn*, 118 Mass. 539; *Spaulding v. Andrews*, 48 Pa. St. 411; *Leonard v. Mason*, 1 Wend. 522; *Fisher v. Beckwith*, 19 Vt. 31; 46 Am. Dec. 174; *McCutchen v. Rice*, 56 Miss. 455; *Phelps v. Northup*, 56 Ill. 156; 8 Am. Rep. 681; *Nelson v. Bank*, 48 Ill. 35; *Bank v. Woodruff*, 34 Vt. 92; *Lannan v. Smith*, 7 Gray, 150; *Bird v. McElvaine*, 10 Ind. 40; *Hough v. Loring*, 24 Pick. 254; *Wells v. Brigham*, 6 Cush. 6; 52 Am. Dec. 750; *Neumann v. Schroeder*, 71 Tex. 81; *Scudder v. Bank*, 91 U. S. 406, the court saying: "It is a sound principle of morality, which is sustained by well-considered decisions, that one who promises another, either in writing or by parol, that he will accept a particular bill of exchange, and thereby induces him to advance his money upon such bill, in reliance upon his promise, shall be held to make good his promise. The party advances his money upon an original promise,

upon a valuable consideration, and the promisor is, upon principle, bound to carry out his undertaking. Whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of his promise to accept, or whether he shall be held to be estopped from impeaching his word, is a matter of form merely. The result in either event is to compel the promisor to pay the amount of the bill, with interest: *Townley v. Sumdel*, 2 Pet. 170; *Boyce v. Edwards*, 4 Pet. 111; *Goodrich v. Gordon*, 15 Johns. 6; *Scott v. Pilkinton*, 15 Abb. Pr. 280; *Williams v. Winans*, 14 N. J. L. 339."

⁴ This is a statutory requisite in Alabama, Arkansas, California, Kansas, Maine, Michigan, Minnesota, Missouri, Oregon, and Wisconsin. A parol promise to accept a future bill of exchange in consideration of money to be advanced thereon by the promisee will not sustain an action: *Flato v. Mulhall*, 4 Mo. App. 476.

⁵ *Cook v. Baldwin*, 120 Mass. 317; 21 Am. Rep. 517; *McCutchen v. Rice*, 56 Miss. 455.

⁶ *Bank v. Marsden*, 34 Vt. 89; *Swope v. Ross*, 40 Pa. St. 186; 80 Am. Dec. 567.

⁷ *Hough v. Loring*, 24 Pick. 254; *Hall v. Steel*, 68 Ill. 231.

⁸ *Cook v. Baldwin*, 120 Mass. 317; 21 Am. Rep. 517; *Bassett v. Haines*, 9 Cal. 260.

promise made before or after the bill was drawn,¹ provided the promise is made a reasonable time before or thereafter,² that it specifies the particular bill to be drawn so as to distinguish it from others,³ and that it is taken by the holder on the faith of such promise.⁴ Where a telegraphic dispatch authorized the drawing of a bill at three months, this was considered equivalent to its acceptance.⁵

ILLUSTRATIONS.—Defendants, having a note for collection, received an order from the owner requesting them to pay a portion of the proceeds when collected to plaintiffs. The order having been accepted by parol, defendants subsequently transferred the note to C., to whom it was paid. *Held*, that the parol acceptance was binding, and that defendants were liable to plaintiffs for the amount of the order: *Phelps v. Northup*, 56 Ill. 156; 8 Am. Rep. 681. The course of dealing between S., a contractor, and G., a subcontractor, was for G. to give orders on S., which he entered on his stoppage-book, and when the monthly estimates came in, their amounts would be withheld from G. and paid on the orders. *Held*, that the retention of such an order was not an acceptance thereof: *Hall v. Steel*, 68 Ill. 231. A indorsed on an order addressed to him the words, "I will see the within paid eventually." *Held*, that this was a good acceptance, and that he was liable to pay on and after the day of the date of the acceptance: *Brannin v. Henderson*, 12 B. Mon. 61. The drawee of an order declined to accept it unconditionally, but received and kept it on a promise "to try and save the amount for them" out of his then current dealings with the drawer. *Held*, not an acceptance: *McGowen v. Scott*, 49 Vt. 376. The drawee of an order for a seaman's share of the proceeds of a whaling voyage declined to accept it, but took the bill and promised to try to save the amount for the payee, if the drawer consented. The drawer, on his return,

¹ *Nelson v. Bank*, 48 Ill. 37; *Scudder v. Bank*, 91 U. S. 406; *Bank of Michigan v. Ely*, 17 Wend. 508; *Johnson v. Collings*, 1 East, 98; *Bank of Ireland v. Archer*, 11 Mees. & W. 383; *Coolidge v. Payson*, 2 Wheat. 66; *Parker v. Greele*, 2 Wend. 545; *Merchants' Bank v. Griswold*, 72 N. Y. 472; 28 Am. Rep. 159.

² *Boyce v. Edwards*, 4 Pet. 111.

³ *Nelson v. Bank*, 48 Ill. 36; *Bissell*

v. Lewis, 4 Mich. 450; *Carnegie v. Morrison*, 2 Met. 381.

⁴ *Coolidge v. Payson*, 2 Wheat. 66; *Pillans v. Van Mierop*, 3 Burr. 1663; *Steman v. Harrison*, 42 Pa. St. 49; 82 Am. Dec. 491; *Bank v. Pettit*, 41 Ill. 492; *Bank v. Rice*, 98 Mass. 288.

⁵ *Allentown Bank v. Kimes*, 12 Phila. 329; *Whilden v. Bank*, 64 Ala. 1; 38 Am. Rep. 1.

refused to assent. *Held*, that the bill had not been accepted: *Parkhurst v. Dickerson*, 21 Pick. 307. A check drawn upon the defendant, a bank in New Jersey, was deposited with a bank in the city of New York for collection, and transmitted by such bank to the defendant. The check was kept by the defendant for about twenty-four hours, and then returned dishonored. *Held*, that such delay did not constitute an acceptance: *Overman v. Hoboken City Bank*, 31 N. J. L. 563. Upon the presentation of an order for the payment of money, the drawee declined to accept it, alleging that the drawer had overdrawn, but retained the order, and subsequently said, "I think there will be money enough; it will be all right; I will pay it"; but there was no written acceptance. *Held*, an acceptance: *Short v. Blount*, 99 N. C. 49. A and B having an open account, an adjustment takes place between B and an agent of A, and the balance found due is paid over to the agent. A expresses dissatisfaction, whereupon B writes to him, "Re-peruse the accounts, make out a statement to suit yourself, and draw on me for the balance, which shall be duly honored." *Held*, B is not thereby liable as acceptor on a bill drawn two years afterwards: *Wilson v. Clements*, 3 Mass. 1. B writes to A, "I have no objection to accepting for you at three or four months for two thousand five hundred dollars." *Held*, B may be liable as acceptor on a bill for two thousand five hundred dollars, at four months, drawn in pursuance of the authority: *Parker v. Greele*, 2 Wend. 545; *Central Bank v. Richards*, 109 Mass. 413; *Coffman v. Campbell*, 87 Ill. 98. B writes to A, "I authorize you to draw on me at ninety days from time to time, for such amounts as you may require, whole amount not to exceed three thousand dollars." *Held*, B may be liable on a bill drawn in pursuance of the authority given: *Ulster Bank v. McFarlan*, 5 Hill, 432; 3 Denio, 553; *Barney v. Newcomb*, 9 Cush. 46. A draws a bill on B. After it is received by C, B writes to A that he will accept the draft, and the letter is shown to C. *Held*, C cannot hold B as acceptor: *Exchange Bank v. Rice*, 98 Mass. 288; *Worcester Bank v. Wells*, 8 Met. 107; *Ontario Bank v. Worthington*, 12 Wend. 593. *Aliter*, if before B receives the bill, A either shows him the letter or informs him of its contents: *Bank of Michigan v. Ely*, 17 Wend. 508; *Lewis v. Kramer*, 3 Md. 289. B promises C to accept a bill to be drawn by A in his favor. D discounts the bill so drawn, on the faith of B's promise to C to accept. B subsequently refuses to accept. *Held*, D cannot hold B as acceptor, since a promise to accept is a chose in action, and not assignable: *Worcester Bank v. Wells*, 8 Met. 107; *McEvers v. Mason*, 10 Johns. 207; *Carr v. Bank*, 107 Mass. 45, 48; 9 Am. Rep. 6.

§ 1496. **Need not be Dated.** — An acceptance need not be dated, and evidence is admissible to show on what day an undated acceptance was given.¹

§ 1497. **General and Absolute Acceptance.** — A general or absolute acceptance is one which assents without qualification to the drawer's order. The holder of a bill is entitled to this kind of an acceptance.²

§ 1498. **Qualified or Conditional.** — But an acceptance may be qualified, i. e., it may vary the effect of the bill as drawn.³ The holder of a bill of exchange is entitled to have it accepted generally. If a general acceptance be refused, and a qualified acceptance is offered or given, the bill may be treated as dishonored.⁴ If the holder of a bill of exchange elect to take a qualified acceptance, he must give notice of the qualification to antecedent parties.⁵

And an acceptance may be conditional, i. e., the payment by the acceptor may be conditional upon the happening or performance of an act;⁶ or it may be restricted as to amount,⁷ or as to time,⁸ or as to the place of payment,⁹ or as to some only of the drawees.¹⁰ In such cases, to charge the acceptors, proof of the happening of the

¹ *Kenner v. Creditors*, 1 La. 120.

² Benjamin's Chalmers's Digest, art. 39.

³ So a condition indorsed on the back of an order before its issue constitutes a part of the order: *Hughes v. Fisher*, 10 Col. 383.

⁴ *Boehm v. Garcias*, 1 Camp. 425; *Gammon v. Schmoll*, 5 Taunt. 350; *Ford v. Angelrodt*, 37 Mo. 50; 88 Am. Dec. 174.

⁵ *Sebag v. Abitbol*, 4 Maule & S. 466; *Whitehead v. Walker*, 9 Mees. & W. 509; *Walker v. Bank*, 9 N. Y. 582.

⁶ *Smith v. Vertue*, 30 L. J. Com. P. 56; *Julian v. Shobrooke*, 2 Wils. 9; *In re Howe*, L. R. 6 Ch. 838; *Lawson v. French*, 25 Wis. 37; *Winterrute v. Post*, 24 N. J. L. 423; *Pope v. Heath*,

14 Cal. 403; *Crowell v. Plant*, 53 Mo. 145. A promise to accept, on a shipment of fifty bales of cotton, was held good on shipment of forty-nine, on the ground that the order had been substantially executed: *Lathrop v. Harlow*, 23 Mo. 209. A conditional acceptance becomes absolute on the happening of the condition: *Hughes v. Fisher*, 10 Col. 383.

⁷ *Wegersloff v. Keene*, 1 Strange, 214; *Rowe v. Young*, 2 Bligh, 409.

⁸ *Russell v. Phillips*, 14 Q. B. 891; *Fanshawe v. Peet*, 26 L. J. Ex. 314; *Hatcher v. Stalworth*, 25 Miss. 376.

⁹ *Troy Bank v. Lauman*, 19 N. Y. 477; *Myers v. Standart*, 11 Ohio St. 314; *Brown v. Jones*, 113 Ind. 46; 3 Am. St. Rep. 623.

¹⁰ Byles on Bills, 186.

condition as well as demand and notice of non-payment must be made.¹ If a bill is accepted "to be paid when in funds," and the holder does not object to such acceptance, he cannot resort to the drawer till the acceptor refuses to pay after he has funds.² A firm agreeing "to pay your sight drafts on us which you advise us as having been drawn against particularly described shipments" is not liable on drafts purchased of the promisee, but not accompanied by bills of lading or advices of shipments, and concerning which no such advices are sent.³ Where A, who had agreed to deliver logs to B, drew on him, and B accepted, "payable according to a contract," it was held a conditional acceptance; and that A having failed to deliver logs, B was not liable on his acceptance.⁴ An acceptance of an order to pay a sum of money "out of the account to be advanced to me when the houses I am now erecting on your land are so far completed as to have the plastering done according to our contract," is conditional, the acceptor's liability depending upon the contingency of the work being completed to a certain stage agreeable to the contract; nor is such liability made absolute by a cancellation of the contract by the acceptor and the assignees of the drawer. If the acceptor should prohibit the drawer from proceeding with the contract, or should collude with him to put an end to it, the holder of the order would have a special action for damages against the acceptor, and in such action the burden of proof would be on the plaintiff to show the prevention of the completion of the contract to avoid the order.⁵ If one accepts a bill, agreeing to pay it so soon as he shall find himself in funds, it must be shown, in a suit against

¹ *Andrews v. Baggs, Minor*, 173; 12 Am. Dec. 47; *Campbell v. Pettengill*, 7 Me. 126; 20 Am. Dec. 349; *Commercial Bank v. Pfeiffer*, 22 Hun, 327.

² *Andrews v. Baggs, Minor*, 173; 12 Am. Dec. 47; *Campbell v. Pettengill*, 7 Me. 126; 20 Am. Dec. 349.

³ *Germania Bank v. Taaks*, 101 N. Y. 442; *Lacon Bank v. Bensley*, 9 Biss. 378.

⁴ *Haseltine v. Dunbar*, 62 Wis. 162.

⁵ *Newhall v. Clark*, 3 Cush. 376; 50 Am. Dec. 741.

him, that he was "in funds," and this is not shown by proof that he had property other than money worth more than enough to pay the bill.¹

But it is essential that the acceptance shall appear clearly on the face of the paper that it is qualified or conditional; otherwise, the liability of the acceptor will be absolute. "It is the duty of a party, under such circumstances, to express clearly the condition of his acceptance, if he designs to make it conditional, and the burden is upon him to show it, and not upon the holder of the bill."² If an acceptor does not desire to become absolutely liable, it is a very easy matter so to word the contract. It is his duty to express himself and his intentions in such terms as to leave no doubt his acceptance was conditional; and as it is his business so to express himself, the interpretation of the agreement must be against him on a familiar principle."³ "The rule is generally accepted and understood to be that, if a party proposes to make a conditional acceptance only, and commits that acceptance to writing, he must be careful to express fully the condition therein. He is not permitted to use general terms, and then exempt himself from liability by relying upon particular facts which may have some connection with the condition expressed, for the reason that the particular fact is of itself susceptible of being made a distinct condition."⁴ Acceptance of a bill is not made conditional by the drawee's saying he cannot pay it until he gets returns from certain goods, when he admits having accepted it.⁵ The words, "Paid on this order forty dollars," written across the face of a bill above the signature of the drawee, does not qualify his acceptance, or limit it to that sum.⁶ A promise, "I have no objection to accepting

¹ *Carlisle v. Hooks*, 58 Tex. 420.

² *Chitty on Bills*, 303.

³ *United States v. Bank of Metropolis*, 15 Pet. 396; *Topey v. Church*, 4 Watts & S. 346.

⁴ *Coffman v. Campbell*, 87 Ill. 98.

⁵ *Wells v. Brigham*, 6 Cush. 6; 52 Am. Dec. 750.

⁶ *Peterson v. Hubbard*, 28 Mich. 197.

for you at three and four months, on the terms you propose," contained in a letter, is an absolute, and not a conditional, promise, and warrants a single draft at four months.¹

A qualified acceptance is valid as regards the acceptor and all subsequent parties, and as regards prior parties who assent thereto. A prior party (drawer or indorser) who does not authorize or assent to it is, according to the weight of authority, discharged.² When a draft is given directing the drawee to pay absolutely a sum of money to the payee, if he takes a qualified acceptance he discharges the drawer.³

ILLUSTRATIONS. — A bill was accepted upon condition that the drawer should perform certain acts before he negotiated the same. He, however, negotiated it without performance of such acts. *Held*, that the acceptor and indorser were liable to a *bona fide* purchaser for value before maturity and without notice of the condition and its non-performance: *Merritt v. Duncan*, 7 Heisk. 156; 19 Am. Rep. 612. A, in consideration of a purchase made of B, gave to him his promissory notes therefor, and his own acceptance of a bill drawn on him by C, taking back a receipt reciting that the bill was to be given up on the payment of the notes of A. *Held*, that these facts did not make it conditional or payable on a contingency: *Goodwin v. McCoy*, 13 Ala. 271. D gave the following acceptance of an order, "We hereby agree to pay the within when due C, on the delivery of the Dakota maps." *Held*, that no other claims except those pertaining to the Dakota maps should be considered: *Everard*

¹ *Parker v. Greele*, 2 Wend. 545.

² *Rowe v. Young*, 2 Bligh. 391; *Whitehead v. Walker*, 9 Mees. & W. 509; *Walker v. Bank*, 13 Barb. 636; *Bridge v. Livingston*, 11 Iowa, 57. Mr. Chalmers says (Digest, art. 40, note): "In *Rowe v. Young* the judges differed in opinion as to the effect of taking a qualified acceptance without the consent or subsequent assent of prior parties, some thinking that prior parties would only be discharged if it could be shown that their rights were injuriously affected, others thinking that they would be *ipso facto* discharged. Suppose the holder takes a qualified acceptance. All admit that

he must give notice to the drawer. If the drawer, on receipt of the notice, assent, or perhaps do not express his dissent, well and good. But is he not entitled to say, 'You have altered my contract behind my back, I am no longer a party to it? *Non hæc in fœdora veni*. If the drawee do not in terms assent to my order, I am entitled to notice of dishonor, and notice of dishonor includes a demand of payment. This you cannot give.' Can the holder reply, 'The drawee is to some extent your agent, and the altered contract was entered into for your benefit'? Surely not."

³ *Gibson v. Smith*, 75 Ga. 33.

v. *Warner*, 36 Minn. 383. An acceptance was in these words: "Accepted for the full amount, provided there is this amount in my hands." *Held*, this was an absolute undertaking to pay the holder all the money the acceptor had of the drawer, not exceeding the amount of the order: *Ray v. Faulkner*, 73 Ill. 469. A, on whom an order was drawn, wrote on it that he accepted it when the house was finished according to contract, to be paid at a certain day, interest to commence when the house was delivered. *Held*, a conditional acceptance, on which an action could not be maintained until the house was finished according to the contract and delivered: *Myrick v. Merritt*, 22 Fla. 335.

§ 1499. **Time of Acceptance.** — A bill of exchange may be accepted before it is signed by the drawer,¹ or after it is overdue,² or after it has been dishonored by a previous refusal to accept it.³ Unless the contrary appear, a bill of exchange is *prima facie* deemed to have been accepted before maturity and within a reasonable time after its issue, but there is no presumption as to the exact time of acceptance.⁴

ILLUSTRATIONS. — A draws a bill on B, dated October 28th, payable one month after date. C, the holder, presents it for acceptance December 31st. B accepts. As regards B, this is a valid acceptance of a bill payable on demand: *Mutford v. Walcott*, 1 Ld. Raym. 574. The holder of a bill payable one month after sight presents it to the drawee for acceptance. Acceptance is refused. A week after it is re-presented and accepted. The acceptance is valid: *Wynne v. Raikes*, 5 East, 514; *Grant v. Shaw*, 16 Mass. 341; 8 Am. Dec. 142.

§ 1500. **Other Requisites of Acceptance.** — An acceptance must not express that the acceptor will perform his contract by any other means than the payment of money.⁵

§ 1501. **Who may Accept.** — A bill of exchange must be accepted by the drawee; if accepted by any other

¹ *Harvey v. Kane*, 34 L. T., N. S., 64.

² *Spaulding v. Andrews*, 48 Pa. St. 413; *Williams v. Winans*, 14 N. J. L. 339.

³ *Stockwell v. Bramble*, 3 Ind. 428.

⁴ *Roberts v. Bethell*, 12 Com. B. 778; *Mason v. Dousay*, 35 Ill. 433; 85 Am. Dec. 368.

⁵ *Russell v. Phillips*, 14 Q. B. 891.

person it is not a valid bill.¹ But it may be accepted *supra protest*.² A bill addressed to two or more may be accepted by any one of them so as to bind himself.³ A bill drawn upon a number of individuals associated together, but neither a copartnership nor a corporation, although it may be treated as dishonored if not accepted by all the drawees, if accepted by a part it is a good acceptance as to them.⁴

ILLUSTRATIONS. — A bill is addressed to B. His wife accepts it, signing her name, "Mary B." B promises to pay the bill. He is liable as acceptor: *Lindus v. Bradwell*, 5 Com. B. 591. Bill to B, a partner in the firm of X & Co. B accepts it in the firm name. B personally is liable as acceptor: *Nicholls v. Diamond*, 9 Ex. 154. *Contra*, *Markham v. Hazen*, 48 Ga. 570. A bill is addressed to the B. Company, Limited. Two of the directors accept it, signing thus, "X & Y, directors of the B. Co., Limited." This is an acceptance by the company: *Okell v. Charles*, 34 L. T., N. S., 822. A bill is addressed to "B, general agent of the X Company." He accepts it thus, "Accepted on behalf of the company — B." B is personally liable as acceptor: *Herald v. Connah*, 34 L. T., N. S., 885; *Mare v. Charles*, 5 El. & B. 978. A bill is addressed to "X & Co." The proper style of the firm is "B, X, & Co.," and it is accepted in that name. This is a valid acceptance: *Lloyd v. Ashby*, 2 Barn. & Adol. 23. B accepts a bill blank as to drawee. This is an admission that he was the person intended, and he is liable as acceptor: *Wheeler v. Webster*, 1 E. D. Smith, 51.

§ 1502. **Acceptance supra Protest.** — Any person not being a party already liable thereon may, with the consent of the holder, intervene and accept such bill after protest for the honor of the drawer or an indorser. This is called an acceptance *supra protest*.⁵ Such an acceptance may be given at any time after the bill has been pro-

¹ *Davis v. Clarke*, 6 Q. B. 16; *Jackson v. Hudson*, 2 Camp. 447; *Bult v. Morrell*, 12 Ad. & E. 745; *May v. Kelly*, 27 Ala. 497; *Smith v. Lockridge*, 8 Bush, 424; *Rice v. Ragland*, 10 Humph. 545; 53 Am. Dec. 737.

² See *post*, § 1502.

³ *Owen v. Van Ulster*, 10 Com. B.

318; *Heenan v. Nash*, 8 Minn. 411; 83 Am. Dec. 790; *Bank v. Dumell*, 5 Mason, 56.

⁴ *Smith v. Milton*, 133 Mass. 369.

⁵ *Byles on Bills*, 267; *Hoare v. Caze-nove*, 16 East, 391; *Desha v. Stewart*, 6 Ala. 852; *Swope v. Ross*, 40 Pa. St. 186; 80 Am. Dec. 567.

tested and before it is overdue.¹ It may be for part of the amount of the bill.² An acceptance *supra protest* must be in writing on the bill, signed by the acceptor, and duly attested by a notary.³ It should state for whose honor it is given. If it does not, it is deemed to be given for the honor of the drawer.⁴ The holder may accept or refuse such an acceptance, at his option.⁵ An acceptance *supra protest* suspends until non-payment the holder's right of action, which arises on non-acceptance.⁶ An acceptor *supra protest* engages that he will on presentment pay the bill according to its tenor, if not paid by the drawee, provided it is duly presented for payment, protested, and he is notified according to law.⁷ The acceptor *supra protest* is liable to the holder and to all parties subsequent to the party for whose honor he accepted.⁸ He is bound by the estoppels which bind an ordinary acceptor, and those which would have bound the person for whose honor he accepted.⁹ A bill of exchange must be duly presented for payment to the drawee or acceptor, and noted or protested for non-payment before it is presented for payment to the acceptor *supra protest*, or referee in case of need.¹⁰ When a bill of exchange is dishonored by the acceptor *supra protest*, it must be again protested in order to charge the other parties liable thereon.¹¹ An acceptor *supra protest* for the honor of the first indorser may require as a condition of payment that the holder shall indorse the bill to him.¹² If a person take up a bill for the honor of the drawer, he has no right of action

¹ Williams v. Germaine, 7 Barn. & C. 468.

² Benjamin's Chalmers's Digest, art. 46.

³ Byles on Bills, 265; Gazzam v. Armstrong, 3 Dana, 554.

⁴ Gazzam v. Armstrong, 3 Dana, 554.

⁵ Benjamin's Chalmers's Digest, art. 43.

⁶ Benjamin's Chalmers's Digest, art. 48.

⁷ Hoare v. Cazenove, 16 East, 391; Williams v. Germaine, 7 Barn. & C. 475.

⁸ Byles on Bills, 268.

⁹ Phillips v. Im Thurn, L. R. 1 Com. P. 471.

¹⁰ Hoare v. Cazenove, 16 East, 391; Williams v. Germaine, 7 Barn. & C. 475; Baring v. Clark, 19 Pick. 220.

¹¹ Chitty on Bills, 242.

¹² Freeman v. Perot, 2 Wash. 485.

against the acceptor, if he accepted it for the accommodation of the drawer.¹

§ 1503. Effect of Non-acceptance.—When a bill of exchange is dishonored by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, provided that the proper proceedings on dishonor be taken.²

§ 1504. Duty of Drawee to Accept—Liability of Drawee before Acceptance.—The drawee of an unaccepted bill of exchange is not bound to accept or pay it, unless he has for a valuable consideration expressly or impliedly agreed to do so, and his relation with the drawer is regulated by this contract.³ A promise to accept a bill is equivalent to an acceptance, not only as to the drawer, but as to every party who takes the bill on the faith of the promise.⁴ Where, read in the light of its surroundings, a letter clearly confers authority to draw, such authority is equivalent to an unconditional promise to accept and pay the draft.⁵ So a telegram in the words, "You may draw on me for seven hundred dollars," is not an acceptance, but it is an authority to draw at sight, and implies a promise to accept and pay.⁶ But though in a letter the drawee says, "I shall accept," yet this is not an acceptance, if from the whole letter it appears that an acceptance was not intended.⁷ A promise to "accord a credit" for three thousand pounds on the usual terms and conditions, which were to accept bills at ninety days' sight, does not amount to an acceptance.⁸ If one promises by telegraph to accept a draft for a specified sum, and the draft being afterwards drawn for a larger sum he refuses

¹ *McDowell v. Cook*, 6 Smedes & M. 420; 45 Am. Dec. 289.

² *Whitehead v. Walker*, 9 Mees. & W. 516; *Read v. Adams*, 6 Serg. & R. 356.

³ *Chitty on Bills*, 200; *Com. Bank v. Pfeiffer*, 108 N. Y. 242.

⁴ *Steman v. Harrison*, 42 Pa. St. 49; 82 Am. Dec. 491.

⁵ *Ruiz v. Renauld*, 100 N. Y. 256.

⁶ *Franklin Bank of Baltimore v. Lynch*, 52 Md. 270; 36 Am. Rep. 375.

⁷ *Musgrove v. Hudson*, 2 Stew. 464.

⁸ *Carnegie v. Morrison*, 2 Met. 381.

to accept, he is not liable on the draft to any extent, nor for breach of an agreement to accept.¹ But one who has telegraphed his promise to accept a bill of exchange is liable as acceptor to an indorsee who takes it on the faith of the dispatch, although the acceptance was, in reality, promised on the strength of the promisor's expectation to receive a consignment which he never received.² An acceptance of a bill of exchange may be made by letter, whether written before or after such bill is drawn, although the holder was not induced by such letter to take the bill.³ A letter written to the drawer within a reasonable time before or after the date of a bill of exchange, describing it and promising to accept it, is, if shown to the person who takes the bill on the credit of the letter, a virtual acceptance, and binds the person who makes the promise, even although there are no funds in his hands belonging to the drawer, if the bill be drawn payable at a fixed time, and not at or after sight.⁴

The promise to accept a bill to be drawn, to amount to an acceptance, must describe the bill or bills.⁵ A general authority to draw for a certain amount within a certain time does not constitute an acceptance of a bill afterwards drawn.⁶ An offer to accept a draft may be withdrawn by a letter received by the drawer before the draft has been actually presented for acceptance by him or his agent.⁷ In *Kennedy v. Geddes*,⁸ the court say: "It appears very clearly from the cases that it is now settled both in England and the United States that a promise in writing to accept a bill of exchange not *in esse* will be in law an acceptance, if the bill be taken on the faith of such promise.

¹ *Brinkman v. Hunter*, 72 Mo. 172; 39 Am. Rep. 492.

² *Central Savings Bank v. Richards*, 109 Mass. 413.

³ *Read v. Marsh*, 5 B. Mon. 8; 41 Am. Dec. 253.

⁴ *Nimocks v. Woody*, 97 N. C. 1; 2 Am. St. Rep. 268.

⁵ *Carrollton Bank v. Tayleur*, 16 La.

490; 35 Am. Dec. 219; *Von Phul v. Sloan*, 2 Rob. 148; 38 Am. Dec. 207; *Davidson v. Keyes*, 2 Rob. 254; 38 Am. Dec. 209.

⁶ *Carrollton Bank v. Tayleur*, 16 La. 490; 35 Am. Dec. 219; *Von Phul v. Sloan*, 2 Rob. 148; 38 Am. Dec. 209.

⁷ *Ilseley v. Jones*, 12 Gray, 260.

⁸ 8 Port, 263; 33 Am. Dec. 263.

It seems equally certain that a collateral, written, or a mere verbal promise to accept a bill, made after the bill is drawn, may amount to an acceptance. But will a mere verbal promise to accept a bill not yet drawn be an acceptance of the bill after it is drawn, even if, as in this case, it is made to the person in whose favor the bill is to be drawn? Waiving for the present the consideration of the question that in this case there was no promise to accept for any precise sum, and also waiving the influence which the statute of frauds might exert over it, as being a promise not in writing to 'answer for the debt, default, or miscarriage of another person,' we know of no case in which it has been determined that a promise to accept under such circumstances as the present has been held to be an acceptance of the bill when drawn."

ILLUSTRATIONS. — A, on being pressed by one of his creditors, showed him a letter of B two years after it was written, telling A to state his account to satisfy himself, and promising to honor A's draft for the balance, and drew on B in favor of such creditor. *Held*, that B was not bound to accept or pay the bill: *Wilson v. Clements*, 3 Mass. 1. A party promised in writing to accept drafts drawn upon him by the collector of internal revenue for the amount of taxes imposed upon him on account of cotton received. *Held*, that he was bound on such drafts, and could not be heard to urge that the laws of the United States prohibited tax collectors from collecting taxes in anything but lawful money: *Cook v. Miltenberger*, 23 La. Ann. 377. A planter had been accustomed for a series of years to draw time drafts upon his factor. The factor always accepted the drafts, and paid them at maturity, reimbursing himself from the proceeds of the crops consigned to him by the drawer. One of these drafts accepted by the drawee was dishonored, but no notice was given to the drawer. In an action by the holder against the drawer, *held*, that the planter had implied authority to draw: *Dunbar v. Tyler*, 44 Miss. 1. L., a banker, wrote to D., in another town: "B., of St. Louis, writes us to pay all your drafts for cattle purchases. We will furnish all funds for these purchases, taking your drafts for them. L." Afterwards D. drew a sight draft on L. in favor of a third party, and at the same time drew on B. in favor of L., to cover the amount at twenty days. L. refused acceptance. *Held*, that the holder could not maintain an action: *Lockwood v. Brownson*, 53 Tex.

523. A shipped wool to B. B telegraphed A to draw for fifteen hundred dollars. A asked if he might not draw for more, and B replied by telegraph that if A consented to a sale at a certain price he might draw for two thousand five hundred dollars; otherwise, for fifteen hundred dollars only. A authorized the sale, and got a bank to cash a draft for fifteen hundred dollars on the strength of the first dispatch, and a draft for two thousand five hundred dollars on the strength of the second one. *Held*, that B, having accepted the first draft, was under no obligation to accept the second one: *Nevada Bank v. Luce*, 139 Mass. 488. L., being indebted to the firm of J. M. S. & Co., gave to M., who acted for the firm, a draft for the amount on O., who was indebted to L. O. accepted the draft, but it was not paid. In an action on behalf of J. M. S. & Co. against L. on the draft, *held*, that parol evidence was not admissible to show that M. agreed, at the time of the giving of the draft, that if it was accepted it should be a discharge of all liability of L. on the debt or on the draft: *Martin's Ex'x v. Lewis's Ex'r*, 30 Gratt. 672; 32 Am. Rep. 682.

§ 1505. Damages on Refusal to Accept—Measure.—

When the drawee breaks his contract with the drawer by dishonoring his draft, the consequences reasonably resulting from the breach of contract constitute the measure of damage.¹ But where one by telegram authorizes a draft to be drawn on him, and it is so drawn and discounted on the faith of the telegram, but he subsequently countermands the authority by telegram, he cannot be held as an acceptor, nor for breach of a promise to accept.²

ILLUSTRATIONS.—A customer having a balance of two hundred dollars at his banker's, draws a check for one hundred dollars, or accepts a bill for one hundred dollars payable at his banker's. *Held*, if this check or bill is dishonored, he may recover substantial damages for the injury to his credit, without proving any actual loss: *Rolin v. Steward*, 23 L. J. Com. P. 148; *Cumming v. Shand*, 29 L. J. Ex. 129; *Summers v. City Bank*, L. R. 9 Com. P. 580; *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146. A, in a foreign country, draws on B, in England, under a letter of credit. B dishonors his draft. *Held*, A may recover the re-exchange and notarial expenses which he has had to pay to the holder: *Walker v. Hamilton*, 1 De Gex, F. & J. 602; *In*

¹ *Prehn v. Bank*, L. R. 5 Ex. 92; *Isley v. Jones*, 12 Gray, 260.

² *First Nat. Bank of Flora v. Clark*, 61 Md. 400; 48 Am. Rep. 114.

re General So. Am. Co., L. R. 7 Ch. Div. 637; and also the cost of telegrams, etc., consequent on the dishonor. B gives A an open letter of credit, authorizing him to draw to the extent of fifteen thousand pounds, and concluding, "Parties negotiating bills under it are requested to indorse particulars on the back hereof." A accordingly draws a bill for six thousand pounds in favor of C, who duly indorses the particulars on the credit. B becomes insolvent, and dishonors the bill on presentment. *Held*, C can prove for the amount due on the bills against B's estate: *In re Agra Bank*, L. R. 2 Ch. 391. A draws a bill on B in favor of C, and remits funds to meet it. B does not accept the bill, but he tells C that he has received the funds, and promises to pay the bill. B does not pay the bill. *Held*, no action on the bill can be maintained against B, the statute requiring acceptance to be in writing on the bill, but C can sue B for money received to his use: *Griffin v. Weatherby*, L. R. 3 Q. B. 753.

§ 1506. No Privity between Drawee and Holder.—The drawee incurs no liability to the holder by not accepting; there is no privity of contract between them. This rule applies both to bills of exchange and checks, according to the decisions in many states;¹ while in others it is held that holders of checks may maintain a suit against the banker before acceptance by him.² But a privity

¹ *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Hill v. Rhyds*, L. R. 8 Eq. 290; *Chapman v. White*, 6 N. Y. 412; 57 Am. Dec. 464; *Chase v. Alexander*, 6 Mo. App. 505; *Weinstock v. Bellwood*, 12 Bush, 139; *First National Bank v. R. R. Co.*, 52 Iowa, 378; 35 Am. Rep. 280; *Vaughan v. Halliday*, L. R. 9 Ch. 561; *Exchange Bank v. Rice*, 107 Mass. 37; 9 Am. Rep. 1; *Schroeder v. Bank*, 34 L. T., N. S., 735; *Carr v. Nat. Bank*, 107 Mass. 45; 9 Am. Rep. 6; *Bank v. Millard*, 10 Wall. 152; *First National Bank v. Whitman*, 94 U. S. 343; *In re Merrill*, 71 N. Y. 325; 27 Am. Rep. 25; *Griffin v. Kemp*, 46 Ind. 175; *Dana v. Bank*, 13 Allen, 445; 90 Am. Dec. 216; *Lloyd v. McCaffrey*, 46 Pa. St. 410; *Case v. Henderson*, 23 La. Ann. 49; 8 Am. Rep. 590; *Tyler v. Gould*, 48 N. Y. 682; *Dickinson v. Coates*, 79 Mo. 250; 49 Am. Rep. 228. A draft on a general fund in the drawer's hands not accepted is not an assignment of the fund: *First National Bank v. R.*

R. Co., 52 Iowa, 378; 35 Am. Rep. 280; *Bush v. Foote*, 58 Miss. 5; 33 Am. Rep. 310; *Jones v. Lumber Co.*, 13 Nev. 359; 29 Am. Rep. 308.

² *Fogarties v. State Bank*, 12 Rich. 518; 78 Am. Dec. 468; *Munn v. Burch*, 25 Ill. 35; *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146; *Lester v. Given*, 8 Bush, 357; *Zelle v. German Savings Bank*, 4 Mo. App. 401; *Senter v. Continental Bank*, 7 Mo. App. 532; *McGrade v. German Savings Bank*, 4 Mo. App. 330, the courts saying: "Nothing is more certain than that the understanding is clear and universal in the business world that a check will be paid on presentment, if the funds are to the drawer's credit in bank. On the faith of this universal custom he deposits, and on the faith of it his check passes freely from hand to hand. Such a usage of commerce will be sustained by the courts, unless intrinsically illegal. The undertaking of the bank is, that it will pay the depositor's

may be expressly created by a special contract between the parties.¹

§ 1507. Liability of Acceptor after Acceptance. — The drawee of a bill of exchange becomes by accepting it the principal debtor thereon.² As acceptor he undertakes that he will pay it according to the tenor of his acceptance.³ After a bill of exchange has been received, and the proceeds credited to the payee who presents it, the drawee cannot afterwards, by arrangement with the payee, revoke the acceptance and hold the drawer; and payment by the latter in ignorance of the fact of acceptance by the drawee will be considered involuntary, and the amount may be recovered from the drawee.⁴

§ 1508. Effect of Acceptance — Admissions and Warranty of Acceptor. — The acceptor by accepting a bill of exchange is held to admit and warrant the following things, and he is estopped from denying them as against a *bona fide* holder. They are: 1. The existence of the drawer;⁵

check to the holder, if it has funds of the depositor to meet the check when presented; and this promise and agreement, if such a promise exists, inures certainly to the benefit of the holder of the check, and does away with any difficulty as to an alleged want of privity between the check-holder and bank. One for whose benefit a promise was made may sue on it, though not privy to the contract in which the promise was made. . . . The depositor can countermand the check up to the moment of presentment and demand, because, up to that moment, no obligation from the bank to the check-holder can exist, since checks are to be paid only in the order of presentment, not in the order of date. The act of presentment and demand, by mercantile usage and the undertaking of all parties interested in the fund or in the check, creates the obligation to pay the check-holder, and is an absolute appropriation of the fund by the holder; as the mere drawing and

delivery is, in some respects, an appropriation of the funds by the drawer, since the funds after that cannot be honestly withdrawn by the drawer as a general thing, and ought to remain till called for; though the bank could not pay, if forbidden by the drawer, and circumstances may justify such countermanding of the check." See also Title Banks and Banking — Checks.

¹ Robey v. Ollier, L. R. 7 Ch. 695; Ranken v. Alfaro, L. R. 5 Ch. Div. 786.

² Philpot v. Brian, 4 Bing. 720; Corbett v. Clark, 45 Wis. 403; 30 Am. Rep. 763.

³ Smith v. Vertue, 30 L. J. Com. P. 59; Walton v. Mascall, 13 Mees. & W. 458; Richardson v. Carpenter, 46 N. Y. 660.

⁴ Adressen v. Northfield Bank, 1 McCrary, 252.

⁵ Benjamin's Chalmers's Digest, art. 212.

2. The capacity and authority of the drawer to draw,¹ and that the bill is drawn upon funds of the drawer in his hands;² 3. The genuineness of the drawer's signature,³—but this extends only to a holder who takes the bill after acceptance,⁴ and who has not been guilty of contributory negligence or misled the acceptor into believing the signature genuine;⁵ 4. In the case of a bill payable to a third person, the existence of the payee and his then capacity to indorse,⁶ though not the genuineness of his indorsement.⁷

§ 1509. Presentment for Payment—In General.—Presentment for payment is a condition precedent to the liability of the drawer or indorser of a bill, or the indorser of a note.⁸ A note payable to bearer must be presented and demand for payment made in the same manner as if payable to order.⁹ If there has been such a demand as will bind the maker, the indorser cannot object that the legal forms have not been complied with.¹⁰

¹ Benjamin's Chalmers's Digest, art. 212. Or the capacity of the drawer to indorse a bill payable to the drawer's order: *Braithwaite v. Gardner*, 8 Q. B. 473; *Smith v. Marcock*, 18 L. J. Com. P. 65. But not, it is said, his authority to indorse: *Robinson v. Yarrow*, 7 Taunt. 455; *Garland v. Jacomb*, L. R. 8 Ex. 216.

² *Gillilan v. Myers*, 31 Ill. 525; *Vaughan v. Dean*, 32 Ga. 502. The acceptor, in order to recover from the drawer the amount thereof after payment, must overcome the presumption arising from the acceptance that he has effects of the drawer in his hands: *Kendall v. Galvin*, 15 Me. 131; 32 Am. Dec. 141.

³ *Sanderson v. Collman*, 4 Man. & G. 209; *Goodard v. Bank*, 4 N. Y. 147; *Howard v. Bank*, 28 La. Ann. 727; 26 Am. Rep. 105; *Orr v. Bank*, 1 Macq. 513; *Peoria R. R. Co. v. Neill*, 16 Ill. 269; *Hortsman v. Henshaw*, 11 How. 177; *McCall v. Corning*, 3 La. Ann. 409; 48 Am. Dec. 454. But not the genuineness of his indorsement where drawn to his order: *Beeman v. Duck*, 11 Mees. & W. 251; *Canal Bank v.*

Bank, 1 Hill, 287; *Smith v. Chester*, 1 Term Rep. 564.

⁴ *Nat. Bank v. Bangs*, 106 Mass. 441; 8 Am. Rep. 349; *Ellis v. Ohio Trust*, 4 Ohio St. 628.

⁵ *McKleroy v. Bank*, 14 La. Ann. 458. The acceptor of a draft with forged bills of lading attached is liable to the bank discounting the draft: *Goetz v. Bank*, 119 U. S. 551.

⁶ *Bytes on Bills*, 199; *Daniel on Negotiable Instruments*, sec. 536.

⁷ *Holt v. Ross*, 54 N. Y. 472; *Roberts v. Tucker*, 16 Q. B. 560; *McCall v. Corning*, 3 La. Ann. 409; 48 Am. Dec. 454.

⁸ *Rowe v. Young*, 2 Bligh, 467; *Wood v. Surrells*, 89 Ill. 107; *Galpin v. Hard*, 3 McCord, 394; 15 Am. Dec. 640.

⁹ *Galpin v. Hard*, 3 McCord, 394; 15 Am. Dec. 640. Where a banker draws a draft for profit and in exchange for money, the rule as to presentment is not the same as in the case of a draft drawn by a private person: *Marbourg v. Brinkman*, 23 Mo. App. 511.

¹⁰ *Whitwell v. Johnson*, 17 Mass. 449; 9 Am. Dec. 165.

A demand on the maker when the note becomes due, and his failure to pay, are sufficient to charge the indorser. The holder need not exhaust all his remedies against the maker.¹

§ 1510. **Mode of Presentment.**—Payment can only be demanded according to the tenor of the bill.² Thus a holder presenting a bill legally payable in silver cannot demand payment in gold, and this would not be a legal presentment.³ Presentment may be made through the post.⁴ The bill or note must be produced, and the person presenting it be ready to deliver it up on payment being made.⁵ When the bill or note is not produced, but payment is refused on some other ground, the presentment is valid.⁶ A statement in writing, describing a bill of exchange by its date, amount, and the character each party on the bill bears in relation to it, and when and where payable, with the addition that the holder looks to the estate of a particular person for payment, is, if presented to the personal representative of the estate, a sufficient presentation, without producing the original bill.⁷ Actual presentment is unnecessary when the notary having the note in his possession demands payment of the drawer, and the latter answers that it will not be paid.⁸

§ 1511. **Time.**—A bill or note payable on demand must be presented for payment within a reasonable

¹ *Hunter v. Hempstead*, 1 Mo. 67; 13 Am. Dec. 468.

² *Simpson v. Ins. Co.*, 44 Cal. 139.

³ *Langenberger v. Kroeger*, 48 Cal. 147; 17 Am. Rep. 418.

⁴ *Heywood v. Pickering*, L. R. 9 Q. B. 432; *Pier v. Heinrichshoffen*, 67 Mo. 163; 29 Am. Rep. 501; *Windham Bank v. Norton*, 22 Conn. 214; 56 Am. Dec. 397.

⁵ *Hansard v. Robinson*, 7 Barn. & C. 94; *Griffin v. Weatherby*, L. R. 3 Q. B. 760; *Musson v. Lake*, 4 How. 262; *Arnold v. Dresser*, 8 Allen, 435. It is

not merely seeing a bill, or knowing of its existence, that constitutes a legal presentment to the drawee; it must be presented to him for acceptance: *Mitchell v. De Grand*, 1 Mason, 176; *Smith v. Gibbs*, 10 Miss. 479; *Draper v. Clemens*, 4 Mo. 52.

⁶ *Gilbert v. Dennis*, 3 Met. 495; 38 Am. Dec. 329; *King v. Crowell*, 61 Me. 244; 14 Am. Rep. 560.

⁷ *Posey v. Decatur Bank*, 12 Ala. 802.

⁸ *Union Bank v. Lea*, 7 Rob. 76; 41 Am. Dec. 275.

time.¹ Reasonable time is a question of law.² Where all the parties live in the same town, in the case of a note indorsed when long overdue, demand should be made upon the maker in a day or two at furthest after the indorsement, and if not paid, notice should be given to the indorser on the day of demand.³ Where a note payable on demand after date at a bank, with interest after maturity, was not presented for payment until the lapse of three years and a half, this was held too late;⁴ so, where a drawee promised to pay in ten or fifteen days, and the holder did not present the bill till eighty or ninety days had elapsed;⁵ so, where a note was payable on demand, and it was made eight months after date, the parties living in the same place;⁶ so, where a negotiable check payable on demand was drawn in New York upon one of the Mississippi banks, and not presented for payment until more than ten months after its date, the bank having suspended a few days before the presentment, and being at the time indebted to the drawer.⁷ A bill or note payable at or after sight, or at a future time, must be presented for payment on the day it falls due.⁸

¹ Byles on Bills, 209; Story on Bills, sec. 325; *Sice v. Cunningham*, 1 Cow. 397; *Keyes v. Fenstermaker*, 24 Cal. 329; *Seaver v. Lincoln*, 21 Pick. 267; *Chartered Bank v. Dickson*, L. R. 3 P. C. 574; *Haddock v. Murray*, 1 N. H. 140; 8 Am. Dec. 43; *Perry v. Green*, 19 N. J. L. 61; 38 Am. Dec. 537; *Jones v. Robinson*, 11 Ark. 504; 54 Am. Dec. 212; *Mudd v. Harper*, 1 Md. 110; 54 Am. Dec. 644; *Thielman v. Gueble*, 32 La. Ann. 260; 36 Am. Rep. 267; *Graul v. Strutzel*, 53 Iowa, 712; 36 Am. Rep. 250; *Sanborn v. Southard*, 25 Me. 409; 43 Am. Dec. 288; *Parker v. Reddick*, 65 Miss. 242; 7 Am. St. Rep. 646.

² *Alexander v. Parsons*, 3 Lans. 333; *Bank v. Dickson*, L. R. 3 P. C. 574; *Lockwood v. Crawford*, 18 Conn. 361; *Rhodes v. Seymour*, 36 Conn. 6; *Haddock v. Murray*, 1 N. H. 140; 8 Am. Dec. 43; *Jones v. Robinson*, 11 Ark. 504; 54 Am. Dec. 212; *Parker v. Red-*

dick, 65 Miss. 242; 7 Am. St. Rep. 646. In *Mudd v. Harper*, 1 Md. 110, 54 Am. Dec. 644, it is said to be a mixed question of law and fact. Reasonable diligence is held a question of fact in *Duggan v. King*, Rice, 239; 33 Am. Dec. 107.

³ *Nash v. Harrington*, 2 Aiken, 9; 16 Am. Dec. 673.

⁴ *Crim v. Starkweather*, 88 N. Y. 339; 42 Am. Rep. 250.

⁵ *Brower v. Jones*, 3 Johns. 230; *Eldridge v. Rogers*, Minor, 392.

⁶ *Field v. Nickerson*, 13 Mass. 131.

⁷ *Little v. Phenix Bank*, 7 Hill, 359.

⁸ *Philpot v. Briant*, 4 Bing. 720; *Windham Bank v. Norton*, 22 Conn. 213; 56 Am. Dec. 397; *Barnes v. Vaughan*, 6 R. I. 259. But see "reasonable time": *Robinson v. Ames*, 20 Johns. 146; 11 Am. Dec. 259; *Allen v. Suydam*, 20 Wend. 321; 32 Am. Dec. 555.

It must be made during reasonable hours.¹ Where the payor is a trader, and the bill is payable at his place of business, the presentment must be made during business hours.² The reasonableness of the hour must depend on whether the payor's place of business is also his residence. He is not bound to stay at his place of business after the usual hour. When a bill is payable at the payor's residence, probably a presentment up to bed-time would be sufficient.³ Thus, for example, if a bill is accepted payable at a bank, it must be presented during banking hours;⁴ or if it is drawn on a merchant and presented for payment at his counting-house at 6:30, this may be a reasonable hour;⁵ or if it is payable at the private residence of the payor, and presented for payment at eight, P. M., this is a reasonable hour;⁶ or if it is payable generally and presented for payment at eleven, P. M., at the acceptor's private residence, this is an unreasonable hour.⁷ A holder of a note payable at a bank is not compelled to deposit his note in such bank; if it is presented there for payment at the close of business, it will be a sufficient demand. This does not mean the very moment of closing the doors of the bank. The law does not prescribe impracticable rules, and a few minutes is regarded as of little consequence in the application of this rule.⁸ When presentment is made at an unreasonable hour, but payment is refused on some other ground, the bill is deemed to have been duly presented.⁹ Thus a demand made after the close of business

¹ *Wilkins v. Jadis*, 2 Barn. & Adol. 188.

² *Elford v. Teed*, 1 Maule & S. 28; *Startup v. Macdonald*, 6 Man. & G. 624; *Allen v. Edmundson*, 2 Ex. 723; *Wallace v. Gorin*, 15 La. 223; 35 Am. Dec. 202.

³ *Skelton v. Dustin*, 92 Ill. 49.

⁴ *Parker v. Gordon*, 7 East, 385; *Bank v. Carneal*, 2 Pet. 543; *Whitaker v. Bank*, 1 Crompt. M. & R. 750; *Cohea v. Hunt*, 2 Smedes & M. 227; 41 Am. Dec. 589.

⁵ *Morgan v. Davison*, 1 Stark. 114.

⁶ *Barclay v. Bailey*, 2 Camp. 527; *Triggs v. Newnham*, 10 Moore, 249; *Wilkins v. Jadis*, 2 Barn. & Adol. 188; *Farnsworth v. Allen*, 4 Gray, 453.

⁷ *Dana v. Sawyer*, 22 Me. 244; 39 Am. Dec. 574; *Lunt v. Adams*, 17 Me. 230.

⁸ *Harrison v. Crowder*, 6 Smedes & M. 464; 45 Am. Dec. 290.

⁹ *Henry v. Lee*, 2 Chit. 124; *Bank of Syracuse v. Hollister*, 17 N. Y. 46; 72 Am. Dec. 416; *Shepherd v. Chamberlain*, 8 Gray, 225; 69 Am. Dec. 248; *Reed v. Wilson*, 41 N. J. L. 29; *First Nat. Bank v. Owen*, 23 Iowa, 185.

hours at the bank at which the note is payable is sufficient, if the proper officer of the bank is found, and his refusal to pay is upon the ground that there are no funds in the bank to meet the note, and that there have not been at any time during business hours.¹

ILLUSTRATIONS.—A promissory note payable at a bank was presented for payment by the holder at eleven o'clock on the day it was due, but it was not then paid. The maker, between eleven and twelve o'clock of the same day, put funds in the bank, and gave instructions to have the note paid on presentation. After that it was not presented again, although it was the custom to allow until three o'clock for payment of such notes. The maker subsequently withdrew the funds from the bank. In an action by the holder against the maker, *held*, that the latter was liable: *Hills v. Place*, 48 N. Y. 520; 8 Am. Rep. 568. On the day on which a promissory note fell due, the indorser was ready to pay it, and sent the maker to the bank where it was payable several times during banking hours to see if the note was there, but it had not been presented. After banking hours on the same day, the holder obtained admittance to the bank, and demanded payment of the cashier, which was refused for want of funds. *Held*, that this was a sufficient demand to charge the indorser: *Salt Springs National Bank v. Burton*, 58 N. Y. 430; 17 Am. Rep. 265. A post-dated check was discounted for the holder a few days before it matured by a bank, which transmitted it at maturity to the bank upon which it was drawn through the usual channel. Each bank through which the check passed retained it a day, so that it did not reach the drawee until a week after it was payable, and until the bank had become insolvent. *Held*, that the drawer was discharged by the delay: *Taylor v. Sip*, 30 N. J. L. 284.

§ 1512. **Place.**—A bill or note payable at a particular place must be presented for payment at that place.² If the instrument contains no place of payment, but the address of the drawee or maker is given, it is payable at such address.³ Dating the note at a particular place does

¹ Commercial etc. Bank v. Hamer, 7 How. (Miss.) 444; 40 Am. Dec. 80.

² Gibb v. Mather, 2 Cramp. & J. 254; Bank v. Smith, 11 Wheat. 171; Shaw v. Read, 12 Pick. 132; Troy Bank v. Lauman, 19 N. Y. 477; Sullivan v. Mitchell, 1 Car. Law Rep. 482;

6 Am. Dec. 546; Smith v. McLean, N. C. Term Rep. 72; 7 Am. Dec. 693; Brown v. Jones, 113 Ind. 46; 3 Am. St. Rep. 623, under a statute.

³ Hine v. Allely, 1 Nev. & M. 433; Cox v. Bank, 100 U. S. 704.

not *per se* make that the place of demand.¹ But where no place of payment is specified, it may be presented at the place of date.² Where a bill is payable at a bank in a place where there is a clearing-house, presentment though the clearing-house is sufficient.³ Where it is payable at any bank in a city or town, a demand at either is sufficient,⁴ provided it is an incorporated bank,⁵ and without notice to the maker at which its payment will be demanded.⁶ If the maker of the note desired to render the terms "any bank" more definite, he should either have called upon the holder to make his election at what bank he would receive payment, or else have made his own election, and given notice thereof to the holder.⁷

When no place of payment is designated by a bill, presentment for payment should be made to the drawee or acceptor at his place of business or residence.⁸ Presentment at the acceptor's usual place of business is sufficient, the doors being closed, without going to the acceptor's residence, or making further effort to find him.⁹ It is not enough to present it at an office which he frequently visits.¹⁰ But a demand made at an office where the maker receives business calls, and directed them to be made (he having no other place of business in the city), is sufficient, although the same office was the place of business of other persons.¹¹ Where a note is payable at no particular place, and is presented for payment to the maker in person, the place of the presentation is immaterial.¹²

¹ *Anderson v. Drake*, 14 Johns. 114; 7 Am. Dec. 442; *Oxnard v. Varnum*, 111 Pa. St. 193; 56 Am. Rep. 255.

² *Wittkowski v. Smith*, 84 N. C. 671; 37 Am. Rep. 632.

³ *Reynolds v. Chettle*, 2 Camp. 596; *Harris v. Packer*, 3 Tyrw. 370.

⁴ *Langley v. Palmer*, 30 Me. 467; 50 Am. Dec. 635.

⁵ *Way v. Butterworth*, 108 Mass. 509.

⁶ *Brickett v. Spalding*, 33 Vt. 107; *Allen v. Avery*, 47 Me. 287.

⁷ *Brickett v. Spalding*, 33 Vt. 107.

⁸ *Mitchell v. Baring*, 10 Barn. & C. 9; *Barnes v. Vaughan*, 6 R. I. 259; *Anderson v. Drake*, 14 Johns. 114; 7 Am. Dec. 442; *Woodworth v. Bank*, 19 Johns. 391; 10 Am. Dec. 239; *Oxnard v. Varnum*, 111 Pa. St. 193; 56 Am. Rep. 255.

⁹ *Sulzbacher v. Charleston Bank*, 86 Tenn. 201; 6 Am. St. Rep. 828.

¹⁰ *Bigelow v. Kellar*, 6 La. Ann. 59; 54 Am. Dec. 555.

¹¹ *West v. Brown*, 6 Ohio St. 542.

¹² *Townsend v. Heer Dry Goods Co.*, 85 Mo. 503.

When demand on the acceptor personally is not made, the question is, not where it must be made, but at what place presentment for payment is sufficient, and excuses the holder from further inquiry. 1. If the acceptor has, at the time the bill matures, an established place of business, presentment there at the proper hour is sufficient, though the place is found closed.¹ 2. If the acceptor has no place of business, or it cannot be found on due inquiry, presentment at the then residence of the acceptor at a proper hour is sufficient, and no further search need be made.² 3. But if the acceptor has removed into another state or country from that in which he resided at the execution of the bill, presentment at his former residence or place of business will be sufficient.³ By some authorities, presentment is dispensed with in such case.⁴ If he has only removed to another locality in the same state or country, presentment must be made in accordance with rules 1 and 2.⁵ Where the maker resides out of the state, both when the note was made and when it matures, it has been held that demand may be made where it is dated.⁶ A note presented at the city residence of the indorser who has a city and country residence is well presented.⁷ The holder of a note payable at either of two

¹ *West v. Brown*, 6 Ohio St. 542; *Bank v. Mudgett*, 44 N. Y. 514; *Sussex Bank v. Baldwin*, 17 N. J. L. 487; *Wallace v. Crilley*, 46 Wis. 577.

² *Bank v. Orvis*, 42 Iowa, 691; *Packard v. Lyon*, 5 Duer, 82; *Brooks v. Blaney*, 62 Me. 456; *Chard v. Fox*, 14 Q. B. 230.

³ *McGruder v. Bank*, 9 Wheat. 598; *Taylor v. Snyder*, 3 Denio, 145; 45 Am. Dec. 457; *Grafton Bank v. Cox*, 13 Gray, 503; *Herrick v. Baldwin*, 17 Minn. 209; 10 Am. Rep. 161; *Hepburn v. Toledano*, 10 Mart. (La.) 643; 13 Am. Dec. 345; *Anderson v. Drake*, 14 Johns. 114; 7 Am. Dec. 442; *Wheeler v. Field*, 6 Met. 290. His residence must be inquired for: *Talbot v. Bank*, 129 Mass. 67; 37 Am. Rep. 302.

⁴ *Foster v. Julien*, 24 N. Y. 28; 80 Am. Dec. 320; *Gist v. Lybrand*, 3

Ohio, 308; 17 Am. Dec. 595; *Dennie v. Walker*, 17 N. H. 199; *Eaton v. McMahon*, 42 Wis. 487.

⁵ *Anderson v. Drake*, 14 Johns. 114; 7 Am. Dec. 442; *Reid v. Morrison*, 2 Watts & S. 401; *Galpin v. Hard*, 3 McCord, 394; 15 Am. Dec. 640.

⁶ *Hepburn v. Toledano*, 10 Mart. (La.) 643; 13 Am. Dec. 345; and see *Story on Promissory Notes*, sec. 236; *Ricketts v. Pendleton*, 14 Md. 320; *Selden v. Washington*, 17 Md. 379; 79 Am. Dec. 659; *Smith v. Philbrick*, 10 Gray, 252; 69 Am. Dec. 315. *Contra*, *Taylor v. Snyder*, 3 Denio, 145; 45 Am. Dec. 457; *Spies v. Gilmore*, 1 N. Y. 321; *Mason v. Pritchard*, 9 Heisk. 792.

⁷ *Stewart v. Eden*, 2 Caines, 121; 2 Am. Dec. 222.

places is not required to notify the maker at which of the places demand for payment will be made.¹

When presentment for payment of a bill payable generally is made at an improper place, but payment is refused on some other ground, the bill is deemed to have been duly presented.² A demand of a note payable at the dwelling-house of the makers is sufficient if it is made of both such makers at the barn-yard of one of them, and no objection is made by either as to the place where payment is thus demanded.³ A demand by the holder of a note payable generally may be made upon the maker in the street, the maker having no place of business, and raising no objection to the place where the demand is made.⁴ The same degree of diligence is not required in the case of presentment for payment as is required in the case of presentment for acceptance.⁵

ILLUSTRATIONS.—B accepts a bill “payable at No. 1 X Street, L.” B dies. Presentment at 1 X Street is sufficient, without making search for B’s executor: *Philpott v. Bryant*, 3 Car. & P. 244. A bill is addressed to “Mr. B, No. 1 X Street, L.” B accepts it generally. It is presented at No. 1 X Street, and the house is found shut up. *Held*, sufficient: *Hine v. Allely*, 4 Barn. & Adol. 624; *Struthers v. Kendall*, 41 Pa. St. 214; 80 Am. Dec. 610; *Cox v. Nat. Bank*, 100 U. S. 704. A bill is addressed to “Mr. B, No. 1 X Street, L.” B accepts it generally. The holder takes the bill to No. 1 X Street, and inquires for B. A woman living in the house informs him that B has left. *Held*, sufficient: *Buxton v. Jones*, 1 Man. & G. 83. B accepts a bill payable at the X Bank. At maturity the X Bank holds the bill, but B has no assets there. *Held*, sufficient. No presentment to B personally is necessary: *Bailey v. Porter*, 14 Mees. & W. 44; *North Bank v. Abbott*, 13 Pick. 465; 25 Am. Dec. 334; *Huffaker v. Bank*, 13 Bush, 644.⁶ B makes a note “payable at C.” If B has no place of business or residence

¹ *Page v. Webster*, 15 Me. 249; 33 Am. Dec. 608.

² *King v. Crowell*, 61 Me. 244; 14 Am. Rep. 560; *King v. Holmes*, 11 Pa. St. 456.

³ *Baldwin v. Farnsworth*, 10 Me. 414; 25 Am. Dec. 252.

⁴ *King v. Crowell*, 61 Me. 244; 14 Am. Rep. 560.

⁵ *Sulzbacher v. Bank of Charleston*, 86 Tenn. 201; 6 Am. St. Rep. 828.

⁶ But the mere physical presence of the bill in the bank without the knowledge of its officers would be insufficient: *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641.

in C, the presence of the holder with the note on the day of maturity anywhere in C will constitute due presentment: *Meyer v. Hibsher*, 47 N. Y. 265. The maker of a note, dated at Troy, New York, resided in Florida before the making of the note, and continued to reside there until after its maturity, which facts were well known to the indorsee. *Held*, that a demand upon the indorser, at his store in Troy, was not sufficient: *Taylor v. Snyder*, 3 Denio, 145; 45 Am. Dec. 457. A promissory note, dated at B, but expressing no place of payment, falling due at the end of August, was presented for payment at nine o'clock in the evening of the last day of grace, at the house of the maker ten miles from B, after he and his family had retired for the night. *Held*, sufficient: *Farnsworth v. Allen*, 4 Gray, 453. The maker of a note was a physician having a shop and a dwelling-house in different parts of the town; and when the note became due, the indorser informed the holder that the maker was fifty miles out of town, and would pay on his return. *Held*, that an application at the shop was sufficient: *Fields v. Mallett*, 3 Hawks, 465. A note being drawn payable at the house of R. Y., the notary did not inquire for the maker, or ask whether he had left funds to pay it, but demanded payment of R. Y. at his house. *Held*, that the demand was not sufficient: *Mechanics' Bank v. Lynn*, 2 Cranch C. C. 217. The notary who protested a promissory note payable at a bank certified that during business hours on the day the note was due he called at the bank to demand payment, but found it closed. *Held*, a sufficient demand: *Berg v. Abbott*, 83 Pa. St. 177; 24 Am. Rep. 158. Presentment of a promissory note of a firm was made at their last place of business, in Boston, which was then occupied by strangers, who stated that the firm had failed and the partners left the city without leaving any funds. No inquiry was made as to their whereabouts, except of such strangers. One of such partners lived in the city, and his address could have been obtained from the city directory. *Held*, not a sufficient demand: *Granite Bank v. Ayers*, 16 Pick. 392; 28 Am. Dec. 253. A note was dated at one place, made payable "at —," and had the name of another place appended to the maker's signature. *Held*, that demand of the banks at the place of date, with the fact that the defendant did not live or do business there, was insufficient to charge the indorser, in the absence of proof that the maker had absconded, or that inquiry had been made for him at the other place: *Nicholson v. Barnes*, 11 Neb. 452; 38 Am. Rep. 373.

§ 1513. **By Whom.**—The presentment for payment must be made by the holder of the bill or note, or some

one authorized to receive the money on his behalf.¹ One may be authorized by parol to make a presentment and demand.²

§ 1514. **Liability of Agents for Neglect.** — A collecting agent is, of course, liable to his principal if he does not use due diligence in presenting a bill for payment and take the proper proceedings on dishonor.³ The same rule applies to a pledgee or person holding a bill as collateral security.⁴ An agent is, as a rule, responsible for the default of a subagent whom he employs; and it is accordingly held that a bank receiving a bill for collection, whether payable at its counter or elsewhere, is liable for any default occurring in its collection, whether of the officers and immediate servants, or other agents of the bank or its correspondents, or agents employed by such correspondents, including the notary, at least in the absence of any usage or agreements to the contrary;⁵ but other authorities holding this rule admit an exception when the subagent is a notary, on the ground that he is a public officer and the agent of the holder.⁶ On the other hand, it is held by some courts that the duty of the collecting bank is discharged by the exercise of due care in the selection of suitable subagents.⁷ The damages re-

¹ *Lestley v. Mills*, 4 Term Rep. 175; *Walker v. Macdonald*, 2 Ex. 532; *Cole v. Jessup*, 10 N. Y. 100; *Shed v. Brett*, 1 Pick. 401; 11 Am. Dec. 209; *Glasgow v. Pratte*, 8 Mo. 336; 40 Am. Dec. 142.

² *Shed v. Brett*, 1 Pick. 401; 11 Am. Dec. 209; *Freeman v. Boynton*, 7 Mass. 483; *Hartford Bank v. Barry*, 17 Mass. 94; *Bank of Utica v. Smith*, 18 Johns. 230.

³ *Lysaght v. Bryant*, 19 L. J. Com. P. 160; *Mechanics' Bank v. Bank*, 6 Met. 13; *Com. Bank v. Hamer*, 7 How. (Miss.) 448; 40 Am. Dec. 80.

⁴ *Peacock v. Purcell*, 32 L. J. Com. P. 266; *Briggs v. Parsons*, 39 Mich. 400; *Mauney v. Coit*, 80 N. C. 300; 30 Am. Rep. 80.

⁵ *Ayrault v. Bank*, 47 N. Y. 570; 7

Am. Rep. 489; *Allen v. Merchants' Bank*, 22 Wend. 215; 34 Am. Dec. 289; *Reeves v. State Bank*, 8 Ohio St. 465; *Bird v. Bank*, 93 U. S. 96; *Dunford v. Patterson*, 7 Mart. (La.) 460; 12 Am. Dec. 514; *Miranda v. City Bank*, 6 La. 740; 26 Am. Dec. 493; *Thompson v. Bank*, 3 Hill (S. C.) 77; 30 Am. Dec. 354; *Gerhardt v. Sav. Inst.*, 38 Mo. 60; 90 Am. Dec. 407; and see note in 34 Am. Dec. 307-317. See Title Banks and Banking.

⁶ *Baldwin v. Bank*, 1 La. Ann. 13; 45 Am. Dec. 72; *Bowling v. Arthur*, 34 Miss. 41; *Stacy v. Bank*, 12 Wis. 629.

⁷ *Warren v. Bank*, 10 Cush. 582; *Bellemire v. Bank*, 4 Whart. 105; 33 Am. Dec. 46; *Daly v. Bank*, 56 Mo. 94; 17 Am. Rep. 663; *Stacy v. Bank*, 12 Wis. 629.

coverable of an agent for failing to present a bill or check for acceptance or payment do not extend beyond the actual loss occasioned by such failure. If none of the parties were released from liability by the neglect of the agent, nominal damages only are recoverable from him.¹

§ 1515. **To Whom.**—The presentment and demand of a bill must be made to the acceptor.² A bill accepted by two or more persons not partners, no place of payment being designated, must be presented to all.³ But demand made of one partner will charge the partnership,⁴ even after dissolution, if the note was made before.⁵ Where the drawee or acceptor is dead, and no place of payment is mentioned, presentment must be made to his executors or administrators, if they can be found.⁶

ILLUSTRATIONS. — A bill of exchange was presented for payment at the office of the drawees to a book-keeper of the latter. *Held*, to be a sufficient presentment, and it was unnecessary for the notary to certify that the drawees were not present at the time of presentment: *Wesson v. Garrison*, 8 La. Ann. 136; 58 Am. Dec. 674. Defendant was the indorser of a promissory note, made by a copartnership, in which no place of payment was designated. At maturity of the note the copartnership had been dissolved by its bankruptcy. *Held*, that a demand of one of the former copartners was sufficient to charge defendant: *Gates v. Beecher*, 60 N. Y. 518; 19 Am. Rep. 207. A, who held a power of attorney from B, a resident of another state, signed a negotiable promissory note in his own behalf and also in B's behalf. *Held*, that an indorser was liable although the note was not presented to B for payment: *Luning v. Wise*, 64 Cal. 410. A husband and wife executed their joint note, but before its maturity he deserted her, and his whereabouts could not be

¹ *Allen v. Suydam*, 20 Wend. 321; 32 Am. Dec. 555.

² *Rice v. Ragland*, 10 Humph. 545; 53 Am. Dec. 737.

³ *Union Bank v. Willis*, 8 Met. 504; 41 Am. Dec. 541; *Blake v. McMullen*, 33 Iowa, 150; *Gates v. Beecher*, 60 N. Y. 518; 19 Am. Rep. 207.

⁴ *Hunter v. Hempstead*, 1 Mo. 67; 13 Am. Dec. 468; *Branch Bank v.*

McLevan, 26 Iowa, 306; *Irwin v. Downs*, 15 N. Y. 375.

⁵ *Fourth Nat. Bank v. Henchuck*, 52 Mo. 207; *Crowley v. Barry*, 4 Gill, 494; *Hubbard v. Matthews*, 54 N. Y. 50; 13 Am. Rep. 562.

⁶ *Gower v. Moore*, 27 Me. 16; 43 Am. Dec. 247; *Frayzer v. Dameron*, 6 Mo. App. 153.

ascertained. *Held*, that demand on the wife was sufficient: *McClelland v. Bishop*, 42 Ohio St. 113.

§ 1516. **Presentment for Payment, when Excused.**—

Presentment for payment is excused in the following cases, viz.: Where the drawee is a fictitious person,¹ or a person not having capacity to contract;² as regards the drawer or an indorser, when such drawer or indorser is, as between the parties to the bill, the principal debtor, and has no reason to expect that the bill will be paid if presented to the drawee or acceptor;³ as regards the drawer or an indorser, when such drawer or indorser has received such an assignment of the property of the acceptor as will dispense with notice of dishonor;⁴ where no place of payment is mentioned, and before maturity the acceptor or maker absconds;⁵ where, after reasonable diligence, presentment cannot be effected,⁶ as where he has removed into another state, leaving no one to represent him,⁷ or the residence of the party is unknown or no place of payment is given;⁸ where the maker is dead

¹ *Smith v. Bellamy*, 2 Stark. 233.

² *Byles on Bills*, 187. *Contra* in the case of the maker of a note: *Wyman v. Adams*, 12 Cush. 210.

³ *Saul v. Jones*, 28 L. J. Q. B. 37; *Terry v. Parker*, 6 Ad. & E. 502; *Shriner v. Keller*, 25 Pa. St. 61; *Turner v. Sampson*, L. R. 2 Q. B. 23; *French v. Bank*, 4 Cranch, 141; *Shafer v. Madox*, 9 Neb. 205; *Mobley v. Clark*, 28 Barb. 370; *Miser v. Trovinger*, 7 Ohio St. 281.

⁴ *Benjamin's Chalmers's Dig.*, art. 161.

⁵ *Lehman v. Jones*, 1 Watts & S. 126; 37 Am. Dec. 455; *Spies v. Gilmore*, 1 N. Y. 826; *Sands v. Clarke*, 19 L. J. Com. P. 84; *Leffingwell v. White*, 1 Johns. Cas. 99; 1 Am. Dec. 97; *Putnam v. Sullivan*, 4 Mass. 45; 3 Am. Dec. 206; *Sullivan v. Mitchell*, 7 Car. Law Rep. 482; 6 Am. Dec. 547; *Taylor v. Snyder*, 3 Denio, 145; 45 Am. Dec. 457. *Contra*, *Pierce v. Cate*, 12 Cush. 190; 59 Am. Dec. 176. Where the bill or note is payable at a particular place, no demand is necessary at that place: *Conn v. Gano*, 1

Ohio, 483; 13 Am. Dec. 639; *State v. Comm'rs*, 6 Ohio St. 287; *Eastman v. Fifield*, 3 N. H. 333; 14 Am. Dec. 371; *Weed v. Van Houten*, 9 N. J. L. 189; 17 Am. Dec. 468; *McNairy v. Bell*, 1 Yerg. 502; 24 Am. Dec. 454; *Blair v. Bank*, 11 Humph. 88; *Washington v. Planters' Bank*, 1 How. (Miss.) 230; 28 Am. Dec. 333; *Allain v. Lazarus*, 14 La. 327; 33 Am. Dec. 583; *Brittain v. Doylestown Bank*, 5 Watts & S. 87; 39 Am. Dec. 110; *Gammon v. Everett*, 25 Me. 66; 43 Am. Dec. 255; *State Bank v. Napier*, 6 Humph. 270; 44 Am. Dec. 308; *Ripka v. Pope*, 5 La. Ann. 61; 52 Am. Dec. 579. *Contra*, *Mellon v. Croghan*, 3 Martin, N. S., 423; 15 Am. Dec. 163; *Glasgow v. Pratte*, 8 Mo. 336; 40 Am. Dec. 142.

⁶ *Stewart v. Eden*, 2 Caines, 121; 2 Am. Dec. 223; *Duggan v. King*, Rice, 239; 33 Am. Dec. 107.

⁷ *Gist v. Lybrand*, 3 Ohio, 307; 17 Am. Dec. 595; *Whitely v. Allen*, 56 Iowa, 224; 41 Am. Rep. 99.

⁸ *Godley v. Goodloe*, 6 Smedes & M. 255; 45 Am. Dec. 287; *Taylor v.*

at the time of its indorsement;¹ where the maker calls on the holder on the day it becomes due, and informs him that he is unable to pay it, and requests him to inform the indorser.² One is not in fault for not presenting an accepted draft to a bank wherein the acceptor has funds, if the acceptor has not directed the bank to pay.³ Where the drawer of a check stops payment, subsequent presentation by the holder at the place of payment is excused, and he may sue without presentation.⁴ Where an indorser, on the day the note matured, telegraphed to the holder to wait until the maker could be seen by the indorser, and the indorser afterwards promised to pay, it was held that a finding of a waiver of demand and notice was justified.⁵ So where the maker and the indorser, on the last hour of the day on which the note fell due, went to the holder and obtained a few days' indulgence, this was held to be a waiver of presentment and

Snyder, 3 Denio, 145; 45 Am. Dec. 457. In *Montross v. Doak*, 7 Rob. (La.) 170, 41 Am. Dec. 279, where the notes in question were dated and made payable at New Orleans, it is said: "The words 'place of payment' must receive a reasonable construction. They mean a house, bank, counting-room, store, or place of business, where the holder can present the note, where the maker can deposit or provide funds to meet it, and where a legal offer to pay can be made. The naming of a city at large is not such an indication of a place of payment as can make it incumbent on the holder to make a demand anywhere before he can entitle himself to recover from the impossibility of knowing at what particular place or spot within the limits of the city such a demand should be made. Were it shown that the makers had a domicile or place of business in New Orleans, it might perhaps be contended that under the terms used in the note a demand should have been made at such domicile or place of business; but the defendants are non-residents, and have no place of business in the city.

In relation to the liability of the drawer and indorsers of a bill drawn upon a person resident in A, but made payable in B, a large city, without specifying any particular place in B, it has been held to be sufficient for the holder either to present the bill to the drawer for payment at his place of residence, or to have the bill at the place where it is payable on the day of payment, and there to have it protested without making any inquiry for the drawer: *Byles on Bills*, 210; *Boot v. Franklin*, 3 Johns. 208; 3 Kent's Com. 96. As the notes sued on mention no particular or certain place of payment, no demand anywhere was in our opinion necessary to make the defendants liable."

¹ *Davis v. Francisco*, 11 Mo. 572; 49 Am. Dec. 98.

² *Gilbert v. Dennis*, 3 Met. 495; 38 Am. Dec. 329.

³ *Haines v. McFerren*, 19 Ill. App. 172.

⁴ *Wordin v. Frazie*, 38 N. Y. Sup. Ct. 190.

⁵ *Corner v. Pratt*, 138 Mass. 446.

demand at the maker's place of business.¹ Waiver, either express or implied, will excuse presentment.² A subsequent promise to pay, with full knowledge of all the facts, is a waiver.³ If the indorser of a note files with the trustee of the mortgage given to secure it a written waiver of demand and notice, the waiver inures to the benefit of the holder.⁴

Waiver of notice of dishonor does not include a waiver of presentment for payment.⁵ A waiver of protest includes a waiver of presentment for payment and notice.⁶ A waiver of notice and protest waives demand and notice.⁷ A waiver of demand is a waiver of notice of non-payment.⁸

§ 1517. What will not Excuse Presentment.—The fact that the holder has reason to believe that the instrument will, on presentation, be dishonored does not dispense with the necessity for presentment,⁹ or that the acceptor is insolvent.¹⁰ A note payable at a particular bank must be presented there and payment demanded at maturity to charge the indorser, though the maker informs the holder before maturity that a demand will be useless, as he cannot pay.¹¹ The fact that an action is pending upon a note at the time it falls due does not relieve the indorsee from

¹ *Heman v. French*, 2 Cin. Rep. 561.

² *Hopley v. Dufresne*, 15 East, 275; *Rindge v. Kimball*, 124 Mass. 209; *Pollard v. Bowen*, 57 Ind. 322; *Knapp v. Runals*, 37 Wis. 135; *Givens v. Bank*, 85 Ill. 442; *Ex parte Bignold*, 1 Deac. 737; *Leffingwell v. White*, 1 Johns. Cas. 99; 1 Am. Dec. 97; *Gove v. Vining*, 7 Met. 212; 39 Am. Dec. 770; *Dunnigan v. Stevens*, 122 Ill. 396; 3 Am. St. Rep. 496.

³ *Schmidt v. Radcliffe*, 4 Strob. 296; 53 Am. Dec. 678.

⁴ *Riker v. Man. Co.*, 14 R. I. 402; 51 Am. Rep. 413.

⁵ *Hill v. Heap, Dowl. & R.* 57; *Berkshire Bank v. Jones*, 6 Mass. 524; 4 Am. Dec. 175; *Voorhies v. Atlee*, 29 Iowa, 49; *Sprague v. Fletcher*, 8 Or. 367;

34 Am. Rep. 587. *Contra*, *Matthey v. Gally*, 4 Cal. 62; 60 Am. Dec. 595.

⁶ *Harvey v. Nelson*, 31 La. Ann. 434; 33 Am. Rep. 222; *Coddington v. Davis*, 1 N. Y. 186; *Hood v. Hallenbeck*, 7 Hun, 364; *Baker v. Scott*, 29 Kan. 136; 44 Am. Rep. 628; *Shaw v. McNeill*, 95 N. C. 535.

⁷ *Wolford v. Andrews*, 29 Minn. 250; 43 Am. Rep. 201.

⁸ *Dye v. Scott*, 35 Ohio St. 194; 35 Am. Rep. 604.

⁹ *In re East of Eng. Co.*, L. R. 4 Ch. 18.

¹⁰ *Hunt v. Wadleigh*, 26 Me. 271; 45 Am. Dec. 108.

¹¹ *Lee Bank v. Spencer*, 6 Met. 308; 39 Am. Dec. 734; *Applegarth v. Abbott*, 64 Cal. 459.

the necessity of demanding payment from the maker and giving notice of non-payment to the indorser in order to render the latter liable.¹ Where an indorser waives a right to notice it does not excuse a demand of payment at maturity. But where a note was made payable at a day and a place certain, and the indorsee was ready to receive payment, no further demand was held necessary.² A credit for part payment will not avoid the necessity of proving a demand on the drawee, if the defendant disclaims such credit and insists on the want of demand. But if the defendant acquiesces in such credit, and contends that the whole has been paid, and relies upon length of time and other circumstances to discharge him altogether, he thereby admits a part payment.³

ILLUSTRATIONS. — Bill drawn on B is accepted by an agent. At the time the bill matures B is abroad. This is no excuse; presentment should be made to the agent: *Philips v. Astling*, 2 Taunt. 206. B makes a note "payable at Guildford." B has no residence there. The note is presented at two banks, and then treated as dishonored. This is sufficient: *Hardy v. Woodrooffe*, 2 Stark. 319. The drawer of a bill orders the drawee not to pay it. The holder hears of this. Presentment is not dispensed with: *Hill v. Heap*, Dowl. & R. 57; *Nicholson v. Gouthit*, 2 H. Black. 609. *Contra*, *Lilley v. Miller*, 2 Nott & McC. 257. The acceptor of a bill informs the holder that he cannot, or will not, pay it when due. Presentment is not dispensed with: *Baker v. Birch*, 3 Camp. 107; *Ex parte Bignold*, 1 Deac. 712. The acceptor of a bill becomes bankrupt before it matures. Presentment is not excused; it should be made to the acceptor: *Esdaile v. Sowerby*, 11 East, 117; *Bowes v. Howe*, 5 Taunt. 30 Ex. Ch; *Barton v. Baker*, 1 Serg. & R. 334; *Howard Bank v. Carson*, 30 Md. 18.

§ 1518. **What will Excuse Delay in Presentment.** — Delay in presenting for payment is excused when the delay is unavoidable, and not imputable to the negli-

¹ *Graul v. Strutzel*, 53 Iowa, 712; 10 La. Ann. 324; *Webb v. Mears*, 45 36 Am. Rep. 250. Pa. St. 222.

² *Berkshire Bank v. Jones*, 6 Mass. 524; 4 Am. Dec. 175; *Denyre v. Milne*, ³ *Levy v. Peters*, 9 Serg. & R. 125; 11 Am. Dec. 679.

gence of the holder.¹ Twenty-nine days after date do not constitute unreasonable delay in presenting a bill payable three days after sight, where the payee, being the bearer, is at a distance of three hundred miles from the drawee, and is prevented by severe illness from presenting it sooner.² Where the holder of a draft transmits it by mail, which is the usual, legal, and proper mode, in season to reach the place where it is payable in time for presentment by the regular course of the mail, but by the mistake of the postmaster the mail in which it is forwarded is sent beyond its destination, and not returned thereto until the second day after it is due, when the draft is duly presented, failure to make presentment on the day on which it became due will be thereby excused.³ Where a banker makes use of the public mail in forwarding a note for collection, and through its interference or neglect the letter containing the note is not delivered to the receiving bank, it does not excuse the indorser, even though the interference was caused by the postmaster's knowledge that the receiving bank had failed, and the postmaster believed he was doing the forwarding bank a favor by returning the letter. Although a bank fails pending the forwarding of a letter containing a note, it is fair to presume that its business, in the way of presenting notes for payment, will continue, and the failure of such bank, although causing some fifteen days' delay in the presenting of a note, does not release the indorser.⁴ A delay of twenty-one days in presenting a draft is unreasonable, and is not excused by the fact that the draft was payable in "current funds," an unusual term, which the holder wrote to the maker to have

¹ *Windham Bank v. Norton*, 22 Conn. 214; 56 Am. Dec. 397; *White v. Stoddard*, 11 Gray, 258; 71 Am. Dec. 711; *Peters v. Hobbs*, 25 Ark. 67; 91 Am. Dec. 529; *Dunbar v. Tyler*, 44 Miss. 1.

² *Aymar v. Beers*, 7 Cow. 705; 17 Am. Dec. 538.

³ *Windham Bank v. Norton*, 22 Conn. 213; 56 Am. Dec. 397.

⁴ *Pier v. Heinrichshoffen*, 67 Mo. 163; 29 Am. Rep. 501.

explained, and in the mean time retained the draft.¹ A hard rain, not sufficient to make the roads impassable, is an insufficient excuse for delaying for two days a demand of payment on the maker, who lived twenty miles from the holder.²

ILLUSTRATIONS. — A draft drawn upon a bank in Chicago was mailed on the same day it bore date to the address of the payee, in Dakota territory, and was received by him after some delay in the mail. He, upon the first opportunity, put the same in circulation, and it was kept in circulation, and no delay was suffered other than that incident to the transaction of business in a sparsely populated territory, and the same was presented for payment thirty-five days after its date, and payment being refused, it was protested, and notice given by mail to the drawer. *Held*, that the drawer was liable: *Montelius v. Charles*, 76 Ill. 303. A draft was drawn on New York by a bank in Erie, Pennsylvania, in favor of a traveling agent, who, in pursuance of his business, did not return to his home in New Jersey, where he had the first opportunity to negotiate it, until ten days after its date. *Held*, that the delay was not unreasonable, considering the agent's business: *National New-ark Banking Co. v. Second Nat. Bank*, 63 Pa. St. 404. Upon a sale of property in New York, drafts for the price were given by the purchaser and received by the seller, who took them with him to Indiana, where he resided. By so doing, the presentation of the drafts was delayed several days beyond the time when, in the exercise of legal diligence, they should have been presented, in consequence of which delay they could not be collected. *Held*, that the knowledge by the purchaser that the seller was, at the time of the sale, about to depart immediately for his home in Indiana, and that he would probably take the drafts with him, did not imply such an agreement or consent that he should do so as would excuse his laches in presentation: *Darnall v. Morehouse*, 45 N. Y. 64. A check was drawn in March, 1800, and was not presented until October following. The drawer, after the date of the check, had drawn large sums from the bank, and when the check was presented, payment was refused, because there was no money to meet it. *Held*, that the drawer was liable, notwithstanding the delay in making presentment, it not appearing that any damage had been sustained by the delay: *Conroy v. Warren*, 3 Johns. Cas. 259; 2 Am. Dec. 156.

¹ *Phoenix Ins. Co. v. Gray*, 13 Mich. 191.

² *Barker v. Parker*, 6 Pick. 80.

§ 1519. **Presentment for Payment—When Necessary to Charge Parties.**—When a bill or note is payable generally, presentment for payment is not requisite in order to charge the acceptor;¹ nor is it even when the instrument is payable at a particular place.² But the acceptor may at the time of the acceptance make presentment to him for payment a condition precedent to his liability.³ When by the terms of an acceptance presentment is required, the acceptor, in the absence of express stipulation, is not discharged by the mere omission to present the bill for payment on the day it matures.⁴ When a bill is accepted payable at a particular place, and there only, the acceptor's position is analogous to that of the drawer of a check.⁵ If, then, he could show that he was damaged by the holder's negligence in omitting to present, he would probably be discharged.⁶

Presentment for payment is not a condition precedent to the liability of a person who has given a guaranty for the payment of a bill by the acceptor.⁷ A person not a party to a bill or note, but who is liable on the consideration for which it was given, is discharged by the holder's omission to present for payment.⁸ But the same diligence in making presentment is not required as in the case of an indorser.⁹ If the holder of a joint and several promissory note payable on demand, with interest, omits to make a demand on one of the makers until the statute of

¹ *Rowe v. Young*, 2 Bligh, 467.

² *Wallace v. McConnell*, 13 Pet. 136; *Yeaton v. Buney*, 62 Ill. 62; *Hills v. Place*, 48 N. Y. 520; 8 Am. Rep. 568; *Malden Bank v. Baldwin*, 13 Gray, 154; 74 Am. Dec. 627; *Howard v. Boorman*, 17 Wis. 459.

³ *Rowe v. Young*, 2 Bligh, 391; *Halstead v. Skelton*, 5 Q. B. 93.

⁴ *Smith v. Vertue*, 30 L. J. Com. P. 56.

⁵ *Bishop v. Chitty*, 2 Strange, 1195; *Ramchurn v. Radakissen*, 9 Moore P. C. 70.

⁶ *Benjamin's Chalmers's Digest*, art. 172.

⁷ *Walton v. Maxell*, 13 Mees. & W. 452; *Gage v. Lewis*, 68 Ill. 605; *Greene v. Thompson*, 33 Iowa, 293.

⁸ *Anderton v. Beck*, 16 East, 248; *Hopkins v. Ware*, L. R. 4 Ex. 268. R., being indebted to B., indorsed to him a draft on C., due in thirty days, to be credited on account when collected. The draft was not presented for payment, and C. became insolvent. Held, that B. had lost his remedy against R. on the draft and on the original demand. *Butterton v. Roope*, 3 Lea, 215; 31 Am. Rep. 633.

⁹ *Sands v. Clark*, 8 Com. B. 761.

limitations has run in favor of such maker, the indorser is discharged.¹

§ 1520. Damages on Refusal to Pay—Measure.—The acceptor of a bill of exchange who dishonors it is liable for the amount of the bill, with interest from the maturity thereof, if the bill be payable on a day certain,² or from the time of presentment for payment, if the bill be payable on demand.³ He is liable also for the expenses of the notary and protest.⁴ But not if there was no drawer or indorser whom protest was necessary to hold.⁵ And for the loss on re-exchange incurred by an indorser who has taken up or paid the bill.⁶

§ 1521. Liability of Drawer.—The drawer of a bill of exchange engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be not so accepted and paid he will indemnify the holder, provided due notice of dishonor be given.⁷ By statute in England, the drawer and indorsers of a bill are jointly and severally responsible to the holder for the due acceptance and payment thereof, and similar statutes allowing an action against all the parties jointly have been passed in many states.

§ 1522. Effect of Drawing—What Drawer Admits and Warrants.—The drawer of a bill of exchange payable to the order of another person admits and warrants to a

¹ *Shutts v. Fingar*, 100 N. Y. 539; 53 Am. Rep. 231.

² *Lithgow v. Lyon*, Coop. C. C. 29. *Laing v. Stone*, 2 Man. & R. 562; *Ayer v. Tilden*, 15 Gray, 183; 77 Am. Dec. 355.

³ *In re Banking Co.*, L. R. 4 Ch. 14; *Patrick v. Clay*, 4 Bibb, 246; *Reuss Factory v. Reid*, 6 Cow. 589.

⁴ *Tichnor v. Branch Bank*, 3 Ala. 135; *Bowen v. Stoddard*, 10 Met. 375; *Kendrick v. Lomax*, 2 Crompt. & J. 405.

⁵ *German v. Ritchie*, 9 Kan. 106; *Cramer v. Eagle Mfg. Co.*, 23 Kan. 399.

⁶ *In re General S. A. Co.*, L. R. 7 Ch. Div. 637; *Riggs v. Lindsay*, 7 Cranch, 500; *Bowen v. Stoddard*, 10 Met. 375; *Pothier on Obligations*, 117; *Story on Notes*, sec. 398. *Contra*, *Napier v. Schneider*, 12 East, 420; *Woolsey v. Crawford*, 2 Camp. 445; *Dawson v. Morgan*, 9 Barn. & C. 620; *Watt v. Riddle*, 8 Watts, 545; *Byles on Bills*, 412; *Roberts v. Bank*, 13 La. 528; 33 Am. Dec. 570.

⁷ *Benjamin's Chalmers's Digest*, art. 215.

bona fide holder,—1. The existence of the payee;¹ 2. His capacity to indorse.²

§ 1523. **When is Instrument Dishonored for Non-Payment.**—A bill is said to be dishonored by non-payment,—1. When it is duly presented for payment, and payment is refused or cannot be obtained;³ or 2. When presentment for payment is excused, and the bill is overdue and unpaid.⁴

§ 1524. **Effect of Dishonor.**—The holder of a bill which is dishonored by non-payment acquires an immediate right of recourse against all antecedent parties, provided he take the necessary proceedings on dishonor.⁵

§ 1525. **Noting.**—By “noting” is meant a minute made by a notary public on the dishonored bill or note at the time of its dishonor.⁶ If the protest is drawn very soon after the demand, the necessity of noting the bill at the moment is superseded.⁷

§ 1526. **Protest—Requisites in General—When Necessary.**—The protest is the formal notarial certificate attesting the dishonor of the instrument.⁸ It is the only competent evidence of the non-acceptance of a foreign bill of exchange.⁹ The protest should contain,—1. An exact copy of the bill, or the bill itself annexed, and a statement that it is in the notary’s hands;¹⁰ 2. A statement of the parties for whom and against whom the bill is protested;¹¹ 3. The date of protesting and the place

¹ Chalmers’s Digest, art. 216.

² Chalmers’s Digest, art. 216.

³ Mellish v. Simeon, 2 H. Black. 378; Butterworth v. Despencer, 3 Maule & S. 150.

⁴ Benjamin’s Chalmers’s Digest, art. 170.

⁶ Ex parte Moline, 1 Rose, 303; Siggers v. Lewis, 1 Crompt. M. & R. 370.

⁶ Brooks’s Notary, 80.

¹ Read v. Bank, 1 T. B. Mon. 91; 15 Am. Dec. 86.

⁸ Abbott’s Law Dict., tit. Protest.

⁹ Cullum v. Casey, 9 Port. 131; 33 Am. Dec. 304.

¹⁰ Dupre v. Richard, 11 Rob. (La.) 495; 43 Am. Dec. 214; Calms v. Bank, 4 Baxt. 422; Leigh v. Lightfoot, 11 Ala. 935.

¹¹ A misnomer is not fatal: Dennis-toun v. Stewart, 17 How. 606; Moor-man v. Bank, 3 Port. 353.

where protest is made;¹ 4. A statement that acceptance or payment was demanded by the notary, the terms of the answer, if any; or a statement that no answer was given, or that the drawee or acceptor could not be found;² 5. A reservation of rights against the parties liable; 6. The subscription and seal of the notary making the protest.³ The protest and certificate that he has given notice are *prima facie* evidence of demand and notice.⁴ No proof is required of the official character of a notary public resident in another state; his official acts are authenticated by his seal.⁵ A certificate of a notary stating that "due notice" has been served on the indorser is sufficient, without setting forth the contents of the notice.⁶ So his certificate that he "deposited in the post-office notices of the foregoing protest for Horace Janes, New York," is proof that the notice was directed to Horace Janes.⁷ A notary's protest is evidence of notice to the indorser of a note of non-payment by the maker.⁸

By the law merchant, independent of statute, both in this country and England, protest is necessary only in the case of foreign bills.⁹ Protest of checks is not necessary;¹⁰ nor of certificates of deposit;¹¹ nor of bank bills;¹² nor of inland bills of exchange;¹³ nor of promissory

¹ A mistake in the date is fatal: *Bank v. Hodges*, 9 Ala. 631; and the place must be specially stated: *People's Bank v. Brooks*, 31 Md. 7; 1 Am. Rep. 11.

² *Dupre v. Richard*, 11 Rob. (La.) 495; 43 Am. Dec. 214.

³ See generally, as to requisites, *Fulton v. Maccracken*, 18 Md. 528; 81 Am. Dec. 620; *Reapers' Bank v. Willard*, 24 Ill. 439; 76 Am. Dec. 755; *Tyree v. Rives*, 57 Ala. 173; *Burgess v. Vreeland*, 24 N. J. L. 71; 59 Am. Dec. 408. An unverified notarial protest is evidence of demand and refusal only, not of notice: *Faulkner v. Faulkner*, 73 Mo. 327.

⁴ *Smith v. McManus*, 7 Yerg. 477; 27 Am. Dec. 519.

⁶ *Dunn v. Adams*, 1 Ala. 527; 35 Am. Dec. 42.

⁶ *Seneca Bank v. Neass*, 3 N. Y. 445.

⁷ *Smith v. Janes*, 20 Wend. 192; 32 Am. Dec. 527; and see *Walsmley v. Rivers*, 34 Iowa, 463.

⁸ *Browne v. Bank*, 6 Serg. & R. 484; 9 Am. Dec. 463.

⁹ *Daniel on Negotiable Instruments*, sec. 926.

¹⁰ *Griffin v. Kemp*, 46 Ind. 172; *Jones v. Heiliger*, 36 Wis. 149; *Pollard v. Bowen*, 57 Ind. 232; *Mut. Bank v. Rotgé*, 28 La. Ann. 933; 26 Am. Rep. 126.

¹¹ *Ford v. Mitchell*, 15 Wis. 304.

¹² *Johnson v. Bank*, 29 Ga. 260.

¹³ *Borough v. Perkins*, 1 Salk. 131; 2 Ld. Raym. 992; *Windle v. Andrews*, 2 Barn. & Ald. 696; *Bailey v. Dozier*, 6 How. 23; *Leigh v. Lightfoot*, 11 Ala. 935; *Knott v. Venable*, 42 Ala. 186; *Turner v. Greenwood*, 4 Eng. 44; *Mc-*

notes,¹ even though the different parties reside in different states;² nor of instruments not negotiable.³ Notice of the non-payment of a promissory note, in an action against a resident indorser, cannot by the common law be proved by the protest.⁴ But by statute in many of the states, inland bills of exchange, promissory notes, and checks are made protestable.

§ 1527. Necessary to Charge Drawer and Indorsers.—

When a bill of exchange is dishonored it must be duly protested for non-acceptance or non-payment, as the case may be, in order that the holder may preserve his right of recourse against the drawer and indorsers.⁵ A bill protested for non-acceptance, and the indorser notified, he will not be discharged by a neglect to protest for non-payment.⁶ Where a bill is protested for non-payment, and suit is brought, a protest for non-acceptance must be proved.⁷ When a bill of exchange is dishonored by non-acceptance, and the holder, without lawful excuse, omits to protest it, the drawer and indorsers are discharged as regards such holder and all subsequent holders with notice

Cord v. Curlee, 59 Ill. 221; *Pannell v. Phillips*, 55 Ga. 618; *Bank of U. S. v. Leathers*, 10 B. Mon. 64; *Young v. Bennett*, 7 Bush, 474; *Gilman v. Lewis*, 15 Me. 452; *Brennan v. Lowry*, 4 Daly, 253; *Hubbard v. Troy*, 2 Ired. 134; *Thatcher v. Mills*, 14 Tex. 13; 65 Am. Dec. 95; *Strawbridge v. Robinson*, 5 Gilm. 470; 50 Am. Dec. 420.

¹ *Platt v. Drake*, 1 Doug. (Mich.) 296; *Bonar v. Mitchell*, 19 L. J. Ex. 302; *Young v. Bryan*, 6 Wheat. 146; *Union Bank v. Hyde*, 6 Wheat. 572; *Burke v. McKay*, 2 How. 66; *Evans v. Gordan*, 8 Port. 142; *McFarland v. Pico*, 8 Cal. 626; *Green v. Louthain*, 49 Ind. 139; *Smith v. Ralston*, 1 Morris, 87; *City Bank v. Cutter*, 3 Pick. 414; *Smith v. Gibbs*, 2 Smedes & M. 479; *Bowling v. Arthur*, 34 Miss. 41; *Hill v. Place*, 7 Robt. 389; *Parke v. Lowrie*, 6 Watts & S. 507; *Browne v. Bank*, 6 Serg. & R. 484; *Payne v. Winn*, 2 Bay, 374; *Hansbrough v. Gray*, 3 Gratt. 356; *Falk v.*

Lee, 22 Alb. L. J. 157; *Dunn v. Adams*, 35 Am. Dec. 42; *Sussex Bank v. Baldwin*, 14 N. J. L. 487.

² *Bay v. Church*, 15 Conn. 15; *Smith v. Little*, 10 N. H. 526; *Kirtland v. Wanzer*, 2 Duer, 278.

³ *Kampmann v. Williams*, 70 Tex. 568.

⁴ *Williams v. Putnam*, 14 N. H. 540; 40 Am. Dec. 204.

⁵ *Gale v. Walsh*, 5 Term Rep. 239; *Ocean Bank v. Williams*, 102 Mass. 141; *Read v. Bank*, 1 T. B. Mon. 91; 15 Am. Dec. 86.

⁶ *Morgan v. Towles*, 8 Mart. (La.) 730; 13 Am. Dec. 300; *Daniel on Negotiable Instruments*, 932.

⁷ *Orr v. Maginnis*, 7 East, 359; *Thompson v. Cumming*, 2 Leigh, 321; *Fleming v. McClure*, 1 Brev. 428; 2 Am. Dec. 671. *Contra*, *Read v. Adams*, 6 Serg. & R. 356; *Clarke v. Russel*, 3 Dall. 415; *Brown v. Barry*, 3 Dall. 365.

that the bill has been so dishonored; but the drawer and indorsers are not discharged as regards a subsequent holder for value who takes the bill before it is overdue, and without notice that it has been dishonored.¹

§ 1528. **Who may Make Protest.**—The protest must be made by a notary public or other person authorized by law,² provided he is not incompetent from interest, as where he is a stockholder in the bank which holds the note.³ When the services of a notary cannot be obtained at the place where a bill is dishonored, a protest may be made by any respectable inhabitant in the presence of two witnesses.⁴ In England the preliminary presentment of the bill to the drawee or acceptor is usually made by the notary's clerk.⁵ In America, a protest founded on such a presentment is invalid, unless authorized by statute or usage.⁶ But the certificate of protest may be signed by a clerk if authorized.⁷

§ 1529. **At What Time.**—A bill should be noted for protest on the day it is dishonored.⁸ When a bill has been duly noted, the formal protest may be extended at any time.⁹

¹ *Dunn v. O'Keeffe*, 5 Maule & S. 282.

² *Byles on Bills*, 60; *Burke v. McKay*, 49 Ala. 266; 2 How. 66.

³ *Herkimer Co. Bank v. Cox*, 21 Wend. 119; 34 Am. Dec. 220; *Bank v. Porter*, 2 Watts, 141. *Contra*, *Read v. Bank*, 1 T. B. Mon. 91; 15 Am. Dec. 86.

⁴ *Burke v. McKay*, 2 How. 66; *Read v. Bank*, 1 T. B. Mon. 91; 15 Am. Dec. 86; *Todd v. Neal*, 49 Ala. 266; *Bank v. Pursley*, 3 T. B. Mon. 238.

⁵ *Brooks's Notary*, 4th ed., pp. 78, 138; *Thomson on Bills*, 310.

⁶ *Commercial Bank v. Varnum*, 49 N. Y. 269; *Cribbs v. Adams*, 13 Gray, 597; *Sheldon v. Benham*, 4 Hill, 129; 40 Am. Dec. 271; *Scridder v. Brown*,

3 McLean, 481; *Donegan v. Wood*, 49 Ala. 242; 20 Am. Rep. 275; *Smith v. Gibbs*, 2 Smedes & M. 479; *Wamick v. Crane*, 4 Denio, 460; *Gawtry v. Doane*, 51 N. Y. 84; *Carter v. Bank*, 7 Humph. 548; 46 Am. Dec. 89; or a partner: *Com. Bank v. Barksdale*, 36 Mo. 563. ⁷ *Fulton v. Maccracken*, 18 Md. 528; 81 Am. Dec. 620.

⁸ *Benjamin's Chalmers's Digest*, 178; *Billingsley v. Bank*, 3 Ind. 375; *Grimball v. Marshall*, 3 Smedes & M. 359; *Com. Bank v. Barksdale*, 36 Mo. 563.

⁹ *Geralopulo v. Wieler*, 20 L. J. Com. P. 105; *Bailey v. Dozier*, 6 How. 23; *Dennistoun v. Stewart*, 17 How. 607; *Billingsley v. Bank*, 3 Ind. 375; *Com. Bank v. Barksdale*, 36 Mo. 563; *Grimball v. Marshall*, 3 Smedes & M. 359.

§ 1530. **At What Place.**—The instrument must be protested at the place where it is dishonored.¹ A note being payable at the “bank in Wheeling,” a notary’s certificate of presentment at the “Bank of Wheeling” is not sufficient; the certificate should also show presentment to and demand on some person at the bank.²

§ 1531. **What will Excuse Making Protest.**—Protest will be excused by the happening of circumstances which in the case of an inland bill would dispense with giving notice of dishonor.³

§ 1532. **What will Excuse Delay in Protest.**—Delay in protesting is excused by circumstances which would excuse delay in giving notice of dishonor.⁴

§ 1533. **Protest for Better Security.**—Where the acceptor of a bill of exchange becomes bankrupt before its maturity, it may be protested for better security.⁵

§ 1534. **Notice of Dishonor Essential — Proof of.**—When a bill or note is dishonored, due notice of dishonor is a condition precedent to the liability of the drawer or any indorser thereof.⁶ It is no excuse that the party was not injured by the want of notice.⁷ But the holder of negotiable paper is not obliged to go on and sue the maker.⁸ Notice of non-acceptance of a bill must be given to charge an indorser, although presentment for acceptance was unnecessary.⁹ Where a bill is payable after

¹ Mitchell v. Baring, 10 Barn. & C. 4; Daniel on Negotiable Instruments, 935; Mason v. Franklin, 3 Johns. 202; Cox v. Bank, 100 U. S. 704.

² Stix v. Matthews, 75 Mo. 96.

³ See *post*, §§ 1534 et seq.

⁴ See *post*, §§ 1534 et seq.

⁵ Daniel on Negotiable Instruments, sec. 530.

⁶ Carter v. Flower, 16 Mees. & W. 749; Burgh v. Legge, 5 Mees. & W. 422; Miers v. Brown, 11 Mees. & W. 372; East v. Smith, 16 L. J. Q. B. 292;

Lane v. Bank, 9 Heisk. 419; Juniata Bank v. Hale, 16 Serg. & R. 157; 16 Am. Dec. 558; Scarborough v. Harris, 1 Bay, 177; 1 Am. Dec. 609; Robinson v. Ames, 20 Johns. 146; 11 Am. Dec. 259.

⁷ Hill v. Martin, 12 Mart. 177; 13 Am. Dec. 372.

⁸ Bullit v. Thatcher, 5 How. (Miss.) 689; 37 Am. Dec. 175; Abercrombie v. Knox, 3 Ala. 728; 37 Am. Dec. 721.

⁹ Allen v. Bank, 22 Wend. 215; 34 Am. Dec. 289.

sight it should be presented for acceptance within a reasonable time, and immediate notice of non-acceptance should be given. It is not sufficient to give notice of non-acceptance and non-payment together after the bill becomes payable.¹

The certificate of the notary is evidence of the giving of the notice.² The general rule is, that when a notice of the non-acceptance or non-payment of a foreign bill of exchange is to be proved, a protest is indispensable, and the proof cannot be supplied in any other way.³ But books of a notary, after his death, are admissible.⁴ The oath of a notary that he protested the draft; that he was in the habit of giving notice on all protested instruments; that he presumes he gave the defendant notice, as he was requested to be particular about it; that he was in the habit of putting notices in the post-office in season for the first mail; but that having much business on hand at the time, he does not distinctly recollect notifying the defendant,—is not sufficient proof of notice.⁵ The production of a first bill of exchange duly protested for non-acceptance is sufficient *prima facie* evidence that neither the second nor third of the set were paid, and the party alleging that one of the latter was paid has the burden of proving it.⁶

§ 1535. **Effect of not Giving Notice.**—The omission, without lawful excuse, to give due notice of dishonor to the drawer or any indorser of a bill or note discharges such drawer or indorser from his liability on the instrument, and also from any liability on the consideration for which it was given.⁷ When any party to a bill is discharged from his liability thereon by reason of the holder's omis-

¹ Austin v. Rodman, 1 Hawks, 194; 9 Am. Dec. 630.

² Slaughters v. Farland, 31 Gratt. 134; Greffet v. Dowdall, 17 Mo. App. 280.

³ Joseph v. Salomon, 19 Fla. 623.

⁴ Spann v. Baltzell, 1 Fla. 301; 46 Am. Dec. 347.

⁵ Hoff v. Baldwin, 12 Mart. 699; 13 Am. Dec. 385.

⁶ Miller v. Palmer, 58 Md. 451.

⁷ Bridges v. Berry, 3 Taunt. 130; Peacock v. Pursell, 14 Com. B., N. S., 728; Phoenix Ins. Co. v. Allen, 11 Mich. 501; 83 Am. Dec. 756; Thompson v. Stewart, 3 Conn. 171; 8 Am. Dec. 168.

sion to perform his duties as to presentment for acceptance or payment, protest, or notice of dishonor, such party is also discharged from liability on the consideration for which the bill was given.¹ The omission of the holder of a note payable in installments to give notice of the non-payment of an installment discharges the indorser from liability for such installment only.² When a bill of exchange is dishonored by non-acceptance, and due notice of dishonor is not given to the drawer or an indorser thereof, such drawer or indorser is discharged as regards the holder at the time of dishonor, and all subsequent holders with notice thereof;³ but such drawer or indorser is not discharged as regards a subsequent holder for value who takes the bill before it is overdue and without notice that it has been dishonored.⁴

§ 1536. By Whom Given.—Notice of dishonor must be given by or on behalf of the holder,⁵ or by or on behalf of an indorser who, at the time of giving it, is liable on the bill, and who has a right of recourse against a party to whom notice is given.⁶ A party entitled to give notice may make the drawee or the acceptor his agent for the purpose;⁷ or the notice may be given by an agent generally;⁸ or the holder being dead, by his personal representative.⁹ In an action by the holder against the

¹ Byles on Bills, 215, 292; Soward v. Palmer, 8 Taunt. 277; Peacock v. Pursell, 32 L. J. Com. P. 266; Smith v. Miller, 43 N. Y. 171; 3 Am. Rep. 690; Adams v. Boyd, 33 Ark. 33; Austin v. Rodman, 1 Hawks, 194; 9 Am. Dec. 630.

² Fitchburg Ins. Co. v. Davis, 121 Mass. 121.

³ Roscow v. Hardy, 12 East, 434; Bartlett v. Benson, 14 Mees. & W. 733; Smith v. Roach, 7 B. Mon. 17.

⁴ Dunn v. O'Keeffe, 5 Maule & S. 282.

⁵ Brower v. Wooten, N. C. Term Rep. 70; 7 Am. Dec. 692; Cromer v. Platt, 37 Mich. 132; 26 Am. Rep. 503; Firth v. Thrush, 8 Barn. & C. 387;

Viale v. Michael, 30 L. T., N. S., 463; Bank of Utica v. Smith, 18 Johns. 230; Bank v. Vaughan, 36 Mo. 90; Martin v. Ingersoll, 8 Pick. 6.

⁶ Chapman v. Keane, 3 Ad. & E. 193; Chanoine v. Fowler, 3 Wend. 173; Story on Notes, sec. 304; Burgh v. Legge, 5 Mees. & W. 420; Harrison v. Ruscoe, 15 Mees. & W. 231.

⁷ Rosher v. Kiernan, 4 Camp. 86; Glasgow v. Pratt, 8 Mo. 336; 40 Am. Dec. 142; First Nat. Bank v. Ryerson, 23 Iowa, 508.

⁸ Harrison v. Ruscoe, 15 Mees. & W. 231; Shed v. Brett, 1 Pick. 401; 11 Am. Dec. 209.

⁹ White v. Stoddard, 11 Gray, 258; 71 Am. Dec. 711.

drawer of a bill for non-acceptance by the drawee, notice by the drawee is insufficient, unless authorized by the holder.¹

ILLUSTRATIONS.—A bill indorsed by C and held by D is dishonored. X, who was at one time employed by the drawer to get the bill discounted, but is not in any way acting on D's behalf, informs C that the bill has been dishonored. This is not sufficient; C is discharged: *Stewart v. Kennett*, 2 Camp. 177; *East v. Smith*, 16 L. J. Q. B. 292. C is the first indorser of a dishonored bill held by D. D gives notice to C one day late. C, on the same day, gives notice to the drawer; thus, as it were, making up for the lost day. This notice is ineffectual; for C, having been discharged by the holder's delay, is a mere stranger: *Turner v. Leech*, 4 Barn. & Ald. 451. A bill indorsed by C is held by D. D's attorney gives notice of dishonor to the drawer, but by mistake gives it in C's name instead of D's. The notice is sufficient, provided C is liable to D, and has a right of recourse against the drawer: *Harrison v. Ruscoe*, 15 Mees. & W. 231. C, the indorser of a bill, holds it as agent for the indorsee. C presents it for payment, and it is dishonored. Notice of dishonor given by C in his own name is sufficient: *Lysaght v. Bryant*, 19 L. J. Com. P. 160.

§ 1537. **Mode of Giving Notice.**—The notice may be given by the holder or party personally,² or by a messenger³ sent to the dwelling-house or place of business of the person to be notified.⁴ If the holder is ignorant of the place where the indorser resided at the time of protest, and could not ascertain it after diligent inquiry, notice sent to the place where the note bears date will be sufficient.⁵ The name of a place annexed to the name of an indorser on a foreign bill is deemed a part of the indorsement, and notice of dishonor may be directed to the indorser at such place.⁶ If the indorser is absent from his place of busi-

¹ *Stanton v. Blossom*, 14 Mass. 116; 7 Am. Dec. 198.

² *Wilcox v. McNutt*, 2 How. (Miss.) 776; 32 Am. Dec. 304.

³ *Pearson v. Crallan*, 2 J. P. Smith, 404; *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Fish v. Jackman*, 19 Me. 467; 36 Am. Dec. 769.

⁴ *Wilcox v. McNutt*, 2 How. (Miss.) 776; 32 Am. Dec. 304. The word

"Memphis" written by an indorser under his name is an implied direction to give notice through the post-office at Memphis; *Tomeny v. German Nat. Bank*, 9 Heisk. 493.

⁵ *Goodloe v. Godley*, 13 Smedes & M. 233; 51 Am. Dec. 159.

⁶ *Carter v. Union Bank*, 7 Humph. 548; 46 Am. Dec. 89.

ness during business hours, a notice left there will bind him; but it must appear that the indorser was sought at his place of business during business hours, and that he was not found.¹ If the indorser of a note made and dated in New York have a house there, and also one at a short distance in the country, notice of non-payment left at his house in New York is good.² Where, on the day when notice should be given, an indorser lay sick at the place where the note was payable, in the house of the notary who protested the note for non-payment, and the notary left the notice in his room on the mantel, saying at the time that it was a notice of protest on a note on which he was indorser, without describing it, the notice was deemed sufficient, although it did not appear that the indorser heard the remark of the notary.³ An indorser being a member of the legislature, and the legislature being in session when the note falls due, notice of demand and non-payment left at his room in the capital of the state is sufficient, although it does not appear that the indorser was in the capital at the time.⁴ But a notice of protest to bind the indorser must be left at his usual place of business, and not merely in the building where he does his business.⁵ It is not sufficient to charge an indorser to leave a notice of protest at a building in a city, corresponding in number with that written under his indorsement, without proving that such building was at the time the indorser's place of residence or business, and was left with some proper person therein.⁶

It is always sufficient if the party receives the notice within the time prescribed by law. In such case it is immaterial in what mode it has been communicated,⁷ or

¹ *Stephenson v. Primrose*, 8 Port. 155; 33 Am. Dec. 281.

² *Stewart v. Eden*, 2 Caines, 121; 2 Am. Dec. 222.

³ *Miles v. Hall*, 20 Miss. 332.

⁴ *Graham v. Sangston*, 1 Md. 59.

⁵ *Kleinman v. Boernstein*, 32 Mo. 311.

⁶ *Davenport v. Gilbert*, 4 Bosw. 532; 6 Bosw. 179.

⁷ *Hyslop v. Jones*, 3 McLean, 96; *Manchester Bank v. Fellows*, 28 N. H. 302; *Cabot Bank v. Warner*, 10 Allen, 96; *Whiteford v. Burckmyer*, 1 Gill, 127; 39 Am. Dec. 640.

to what place it has been sent.¹ Where an indorser is absent from home, and notice is sent him by mail without any previous direction, and he actually receives it as soon or sooner than if left at his place of business, and he is not in any way prejudiced thereby, such notice binds him, and is also good as to a prior indorser who is not prejudiced by the delay.²

ILLUSTRATIONS. — The indorser of a note lived at the time of his indorsement in a town where he had lived for forty years. He was the maker's father-in-law, and lived with him. *Held*, that a notice sent there was sufficient to charge the indorser, though in point of fact he had moved before the note matured to an adjoining city, the holder having no knowledge of the fact of removal: *Rowland v. Rowe*, 48 Conn. 432. An indorser of a note resided a mile and a half from the town in which the note was payable, but kept an office in town, where he was to be found during a portion of the year, and generally kept a clerk, and the post-office in the town was the one through which he was in the habit of receiving letters. *Held*, that he was entitled to personal notice, and notice by post was not sufficient: *Patrick v. Beazley*, 6 How. (Miss.) 609; 38 Am. Dec. 456. The makers were both absent from the city where the note was dated and signed, but had families residing there. The notary made some general inquiry, but did not find any one to pay the note; and thereupon served notice of protest without inquiring of the indorser for the makers. *Held*, a want of diligence: *Mitchell v. Young*, 21 La. Ann. 279. A notary had been informed, some fifteen months before the day of protest, by the indorser, that he resided at A, and without further inquiry transmitted a notice to the indorser at A. The indorser had removed from A some five months before the protest, under circumstances of peculiar notoriety. *Held*, that due diligence had not been used. *Planters' Bank v. Bradford*, 4 Humph. 39. The next day after presentment and demand of payment of a note payable at a place in the city of New York, the clerk of the notary examined the city directory to find the address of an indorser whose address was not upon the note. Not finding it, he inquired of the maker, who gave him a wrong address, to which he mailed notice. *Held*, due diligence sufficient to charge the indorser: *Gawtry v. Doane*, 51 N. Y. 84. The holder of a promissory note not knowing the residence of an indorser thereof inquired of an

¹ *Bank of U. S. v. Corcoran*, 2 Pet. Nat. Bank v. Wood, 51 Vt. 473; 31 121; *Mathewson v. Bank*, 45 N. H. 104; Am. Rep. 692.

Bradley v. Davis, 26 Me. 45; First

² *Dicken v. Hall*, 87 Pa. St. 379.

assistant internal revenue assessor of the district within the bounds of which such residence was. The assessor said he knew the indorser, and that he resided at P. Notice of demand of payment, refusal, and protest of the note was sent by mail to the indorser at P. He did not live at P., but at A., five miles distant, to which place the notice was forwarded, and he received it nine days after it was sent. *Held*, due diligence, and the indorser was liable: *Harger v. Bemis*, 1 Thomp. & C. 460. B, who was member of Congress from Virginia, rented a house in Washington, and resided there during the sessions of Congress, at the same time keeping open his dwelling-house in Virginia, where he had an agent for taking care of his business. Immediately after the adjournment of Congress he was accustomed to leave Washington, and not return until the commencement of the next session. In 1854, after the adjournment and after he left Washington, a notice of protest of a negotiable note was left at his dwelling-house there. *Held*, not sufficient: *Bayly v. Chubb*, 16 Gratt. 284. An indorser became insolvent and absconded before the note matured. The holder did not know that he had ceased to do business, and sent the notice of non-payment to the store where he had done business. The indorser did not receive the notice, because he had instructed his confidential agent not to send such notices to him. The indorser had a domicile in an adjoining city. *Held*, due diligence: *America Bank v. Shaw*, 142 Mass. 290. A notary after a note became due called at the house of an indorser, which he found locked, and a neighbor said he was with his family out of town on a visit, but he did not know for how long, and the notary left a notice for the indorser at the next door, with a request that they would hand it to him on his return. *Held*, sufficient: *Williams v. Bank of United States*, 2 Pet. 96.

§ 1538. Time of Giving.—The notice of dishonor must be given at once or within a reasonable time after dishonor,¹ or it may be given immediately upon the refusal to pay at maturity.² What is a reasonable time is a mixed question of law and fact.³ Ordinarily, a notice of non-payment mailed to an indorser on the second day

¹ *Burbridge v. Manners*, 3 Camp. 193; *Ex parte Moline*, 1 Rose, 303; *Farmers' Bank v. Duvall*, 7 Gill & J. 78; *King v. Crowell*, 61 Me. 244; 14 Am. Rep. 560; *Jackson v. Richards*, 2 Caines, 343; *Burkhalter v. Bank*, 42 N. Y. 538; *Brown v. Turner*, 11 Ala. 752.
² *Shed v. Brett*, 1 Pick. 401; 11 Am. Dec. 209.
³ *Bank of Alexandria v. Swan*, 9 Pet. 46; *Wyman v. Adams*, 12 Cush. 213.

afterwards is mailed too late to charge him.¹ Notice of protest left with an indorser on Sunday, he being told what it was, and the following Monday being in time to serve the notice, is sufficient.² The holder or other person entitled to give notice must give notice to a remote party in the same time as required in the case of an immediate party.³

ILLUSTRATIONS. — A drew a bill on B, in New York, June 11th, in favor of C, payable in three days after sight. During the month of June, C went to New York, and resided in B's house till August 24th, when he caused the bill to be protested, and gave A notice of non-payment. *Held*, that A was discharged: *Fernandez v. Lewis*, 1 McCord, 322. An indorser received a notice of non-payment on the day following the last day of grace. The notice was mailed to him at the place where the note was payable, and where he received his mail. *Held*, that the notice was good: *Phelps v. Stocking*, 21 Neb. 443.

§ 1539. **Time of Receiving.**—Where both parties live in the same place, the notice must be received at a reasonable hour,⁴ on the day after the sender became entitled to give notice.⁵ Where notice is not given through the post-office, the notice must, in the absence of special circumstances, be received at a reasonable hour on the same day it would have been received by due course of mail.⁶ Notice given by the holder directly to the first of several indorsers is in time if it reaches him as soon as it would have done if given circuitously through the subsequent indorsers, allowing each an entire day to notify his predecessor, though the parties live in the same town.⁷

¹ *Sanderson v. Sanderson*, 20 Fla. 292.

² *Carlisle Deposit Bank v. Rheem*, 10 Phila. 462.

³ *Rowe v. Tipper*, 22 L. J. Com. P. 135; *Simpson v. Turney*, 5 Humph. 419; 42 Am. Dec. 443.

⁴ *John v. Bank*, 57 Ala. 96; *Cabot Bank v. Warner*, 10 Allen, 524; *Adams v. Wright*, 14 Wis. 408.

⁵ *Gladwell v. Turner*, L. R. 5 Ex. 61.

⁶ *Bancroft v. Hall*, 1 Holt, 476; *Darbishire v. Parker*, 6 East, 3; *Jarvis v. St. Clair*, 23 Me. 287; *First Nat. Bank v. Wood*, 51 Vt. 471; 31 Am. Rep. 692; *Shelburne Bank v. Townsley*, 102 Mass. 183; 3 Am. Rep. 445.

⁷ *Etting v. Bank*, 2 Pa. St. 355; 44 Am. Dec. 205.

§ 1540. **Notice by Post.**—Where the party giving the notice and the party to whom it is given reside at the time in different places or post-office deliveries, the notice is presumed to have been given if the former prove that within the time required by law a letter containing the notice was duly addressed and posted.¹ If the delay in the indorser's receiving notice is due to the fault of the post-office department, the indorser is not discharged thereby.² If the notice is dropped into a street letter-box, the legal effect is the same as though it were deposited in the main post-office building.³ And the same has been held where the parties reside in the same town or delivery district, where the carrier system is in force.⁴ But where it is not, and the parties reside in the same place, the notice must be given personally or sent to his house or place of business.⁵ Notice by mail may be given although the indorser resides in the same place at which the protest was made, if after due diligence his actual residence could not be discovered.⁶ So in such a case

¹ *Shed v. Brett*, 1 Pick. 401; 11 Am. Dec. 209; *Mechanics' Bank v. Merchants' Bank*, 6 Met. 25; *Shelburne Falls etc. Bank v. Townsley*, 102 Mass. 177; 3 Am. Rep. 445; *Lothrop v. Ins. Co.*, 2 Allen, 82; *True v. Collins*, 3 Allen, 438; *Cabot Bank v. Russell*, 4 Gray, 167; *Gist v. Lybrand*, 3 Ohio, 307; 17 Am. Dec. 595; *Ransom v. Mack*, 2 Hill, 587; 38 Am. Dec. 602; *Ellis v. Com. Bank*, 7 How. (Miss.) 294; 40 Am. Dec. 63.

² *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597.

³ *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597; *Casco Nat. Bank v. Shaw*, 79 Me. 376; 1 Am. St. Rep. 319.

⁴ *Benjamin's Chalmers's Digest*, art. 193; *Bell v. Hagarstown Bank*, 7 Gill, 216; *Shoemaker v. Bank*, 59 Pa. St. 79; 98 Am. Dec. 315; *Walters v. Brown*, 15 Md. 285; 74 Am. Dec. 566; *Pearce v. Langfit*, 101 Pa. St. 507; 47 Am. Rep. 737; *Dobree v. Eastwood*, 3 Car. & P. 250; or several post-offices in the same city: *Paton v. Lent*, 4 Duer, 231.

⁵ *Curtis v. Bank*, 6 Blackf. 312; 38

Am. Dec. 143; *Manadue v. Ketchum*, 3 Rob. 261; 38 Am. Dec. 237; *Ransom v. Mack*, 2 Hill, 587; 38 Am. Dec. 602; *Williams v. Bank*, 2 Pet. 96; *Bowling v. Harrison*, 6 How. 248; *Cabot Bank v. Warner*, 10 Allen, 522; *Bassett v. Evans*, 28 Mo. 331; *Gilchrist v. Donnell*, 53 Mo. 591; *Nevius v. Bank*, 10 Mich. 547; *Pierce v. Pendar*, 5 Met. 352; *John v. Selma Bank*, 57 Ala. 96; *John v. City Bank*, 62 Ala. 529; 34 Am. Rep. 35; *Todd v. Edwards*, 7 Bush, 93; *Walters v. Brown*, 15 Md. 285; 74 Am. Dec. 566; *Shelburne etc. Bank v. Townsley*, 102 Mass. 177; 3 Am. Rep. 445; 107 Mass. 444; *Manchester Bank v. Fellows*, 28 N. H. 302; *Davis v. Gowen*, 19 Me. 447; *Hartford Bank v. Stedman*, 3 Conn. 489; *State Bank v. Slaughter*, 7 Blackf. 133; *Vance v. Collins*, 6 Cal. 435; *Hill v. Norvell*, 3 McLean, 583; *Sheldon v. Benham*, 4 Hill, 129; 40 Am. Dec. 271; and see note to case of *Ransom v. Mack*, 38 Am. Dec. 607-616.

⁶ *Vigers v. Carlon*, 14 La. 89; 33 Am. Dec. 575.

personal notice was excused when the notary on the day of dishonor called at the indorser's place of business during business hours to give him notice, but found it locked, and no one present to receive notice, and deposited the notice, properly addressed, in the post-office on the same day.¹ An indorser is deemed to live in the same town or place with the holder when he lives in the same immediate neighborhood, whether in the town or country. Therefore a notice sent through the post-office was held insufficient when the indorser lived about a mile and a half from the city of Jackson, and the holder lived in said city, the indorser being a public official, having his office in said city, and receiving his mails through the post-office thereof, at which place the notice to him was addressed.²

The sufficiency of the direction on the letter is a question of reasonable diligence. If the drawer or indorser has a place of business, the notice should be addressed to him there; if he has not, then it should be addressed to him at his residence, and the party giving notice is bound to use reasonable diligence to discover such place of business or residence.³ Notice sent to the address given by an indorser is sufficient to charge him,⁴ and in England it is held that the drawer will be charged in any case by notice sent to the place of date of the bill.⁵ In the United States the sender is nevertheless bound to use due diligence in ascertaining the drawer's true residence at the time of dishonor.⁶ The sender may, however, presume that the drawer's or indorser's residence at the time of

¹ *John v. Bank*, 62 Ala. 529; 34 Am. Rep. 35.

² *Patrick v. Beazley*, 6 How. 609; 38 Am. Dec. 456.

³ *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639; *Bank v. Bender*, 21 Wend. 643; *Herbert v. Servin*, 41 N. J. L. 225; *Roberts v. Taft*, 120 Mass. 169; *Burlingame v. Foster*, 128 Mass. 125; *Central Bank v. Levin*, 6 Mo. App. 543;

Greenwich Bank v. De Groot, 7 Hun, 210.

⁴ *Eastern Bank v. Brown*, 17 Me. 356; *Bartlett v. Robinson*, 39 N. Y. 187.

⁵ *Burmester v. Barron*, 17 Q. B. 828; *Ex parte Baker*, L. R. 4 Ch. Div. 799.

⁶ *Lowery v. Scott*, 24 Wend. 358; 35 Am. Dec. 627; *Pierce v. Struthers*, 27 Pa. St. 249; *Mason v. Pritchard*, 9 Heisk. 793.

drawing or indorsing remains unchanged.¹ The notice is good where it is directed to the post-office where the indorser habitually receives his letters, though it is not the one nearest his residence;² or where it is directed to the post-office where he is most likely to receive it at the earliest moment, though not the post-office nearest his residence;³ or where it is directed to either of two offices equally distant from his residence.⁴ A notice of protest to a member of Congress sent by mail and addressed to him at Washington is good,⁵ even though he has an agent for the transaction of business at the place of his regular domicile.⁶ So the notice was held sufficient where it was posted on the day of maturity, addressed to A, where the indorser had formerly lived, and thence forwarded on the following day by the mail of the same hour to B, where he then lived, and where he received it;⁷ where an indorser of a note, at the time of indorsing, lived in Baltimore, and continued there some time afterwards, but at the time of dishonor of the note had removed from the city, but retained his sign at his old place of business and his name in the city directory, and the notice was sent to him there;⁸ where the holder uses due diligence to ascertain the indorser's place of residence, and from information thus obtained sends the notice to the wrong post-office.⁹ Where the notary has made inquiries concerning the residence of the maker and the post-office where he receives his letters, and sends the notice to such office, the court will presume that to be the post-office

¹ *Requa v. Collins*, 51 N. Y. 148; *Knott v. Venable*, 42 Ala. 186.

² *Mead v. Carnal*, 6 Rob. 73; 39 Am. Dec. 552; *New Orleans etc. Co. v. Briggs*, 12 Rob. 175; 43 Am. Dec. 224; *Reid v. Payne*, 16 Johns. 218; 8 Am. Dec. 311; *Weakly v. Bell*, 9 Watts, 273; 36 Am. Dec. 116.

³ *Bank of United States v. Lane*, 3 Hawks, 542; 14 Am. Dec. 595.

⁴ *New Orleans etc. Co. v. Briggs*, 12 Rob. 175; 43 Am. Dec. 224.

⁵ *Commerce Bank v. Chambers*, 14 Mo. App. 152; *Tunstall v. Walker*, 10 Miss. 638.

⁶ *Chouteau v. Webster*, 6 Met. 1; 39 Am. Dec. 705.

⁷ *North Bennington Bank v. Wood*, 51 Vt. 471; 31 Am. Rep. 692.

⁸ *Reier v. Strauss*, 54 Md. 278; 39 Am. Rep. 390.

⁹ *Nichol v. Bate*, 7 Yerg. 305; 27 Am. Dec. 505.

nearest to the indorser.¹ The notice will bind the representatives of a deceased indorser, though sent to the indorser, where the notice was addressed to the indorser's late residence, which was a different town, and the notary knew nothing of his death.²

But a notice deposited in the post-office, and addressed to the drawer at the place where the bill is dated, is not sufficient to charge him, unless that was the post-office nearest his residence, or unless the holder, upon diligent inquiry, was unable to ascertain his residence.³ So a notice directed to the drawer at the place where a bill is dated and sent thither by mail, when in fact he does not reside there, without making any inquiry as to his place of residence, is insufficient.⁴ So an indorser living outside the place of dishonor, but nearer to the post-office in such place than any other, and obtaining his mail matter there, yet having no regular or usual place of business therein, cannot be held by notice of dishonor deposited in such post-office.⁵

A notice sent through the mail with only the indorser's name and the name of the town and state, is sufficient, without giving the name of the street, the houses on the street not being numbered, and there being no carrier's delivery; and it is immaterial that neither he nor another person of the same name in the town received the notice.⁶ But the proof of posting the notice must be distinct and certain. Where a witness deposes that he caused the notice to be sent, and that "to the best of his knowledge" the letter was put into the post-office, because he is not aware of any neglect of that kind having ever occurred in his store, this is insufficient.⁷ The post-

¹ *Bank of Columbia v. Magruder*, 6 Harr. & J. 172; 14 Am. Dec. 271.

² *Planters' Bank v. White*, 2 Humph. 112; 36 Am. Dec. 305.

³ *Foard v. Johnson*, 2 Ala. 565; 36 Am. Dec. 421.

⁴ *Lowery v. Scott*, 24 Wend. 358; 35 Am. Dec. 627.

⁵ *Forbes v. Omaha National Bank*, 10 Neb. 338; 35 Am. Rep. 480; *Foreman v. Wikoff*, 16 La. 20; 35 Am. Dec. 212.

⁶ *Morse v. Chamberlin*, 144 Mass. 406.

⁷ *Weakly v. Bell*, 9 Watts, 273; 36 Am. Dec. 116.

mark upon an envelope is not conclusive evidence of the time of its deposit in the post-office; it may be shown that the deposit was made at a time different from that which the post-mark indicates.¹

Where notice is given through the post-office, the notice must, in the absence of special circumstances, be sent off on the day after the dishonor of the bill, if there be a post at a reasonable hour on that day;² and if there be no such post on that day, then by the next post thereafter.³ Where the mail leaves at sunrise on the 23d, and the post-office is closed at nine o'clock, P. M., on the 22d, it is, to all practical purposes, the mail of the 22d; and upon a note dishonored there on the 22d, it is sufficient to mail the notice for the indorser on the 23d, although there is no mail again from there until the morning of the 25th.⁴

ILLUSTRATIONS.—NOTICE HELD SUFFICIENT.—The indorser of a promissory note payable at a bank in A resides four or five miles from A, in the country, and uses the post-office at A, it being as near his residence as any other. *Held*, that notice of the non-payment of the note may be given to him by putting the notice into the post-office at A, directed to him there: *Bell v. State Bank*, 7 Blackf. 456. A note was duly protested at Topeka on August 5th, and the bankers who held the note for collection mailed notice thereof on that day to the owners at Fort Scott. The latter, on receiving the notice on the 7th, mailed notice to the indorser at Atchison, who received it on the 10th, the 9th being Sunday. *Held*, a valid notification, although there was a daily mail between Topeka and Atchison, and the parties, except the notary, knew the indorser's residence, and

¹ *Ellis v. Bank*, 7 How. (Miss.) 294; 40 Am. Dec. 63.

² *Downs v. Bank*, 1 Smedes & M. 261; 40 Am. Dec. 92; *Williams v. Smith*, 2 Barn. & Ald. 496; *Lawson v. Bank*, 1 Ohio St. 206; *Stephenson v. Dickson*, 24 Pa. St. 148; *Haskell v. Boardman*, 8 Allen, 38; *West v. Brown*, 6 Ohio St. 542; *Burgess v. Vreeland*, 24 N. J. L. 71; 59 Am. Dec. 408; *Bank v. Merle*, 2 Rob. (La.) 117; 38 Am. Dec. 201; *Beckwith v. Smith*, 22 Me. 125; 38 Am. Dec. 290; *Chick v. Pillsbury*,

24 Me. 458; 41 Am. Dec. 394; *Smith v. Mullett*, 2 Camp. 208; *Hilton v. Fairclough*, 2 Camp. 633; *Walters v. Brown*, 15 Md. 292; 74 Am. Dec. 566; *Whitwell v. Johnson*, 17 Mass. 449; 9 Am. Dec. 165; *Howland v. Adrian*, 30 N. J. L. 41.

³ *Hawkes v. Salter*, 4 Bing. 715; *Lawson v. Bank*, 1 Ohio St. 206; *Carter v. Burley*, 9 N. H. 558, 570; *Geill v. Jeremy*, Moody & M. 61.

⁴ *Farmers' Bank v. Duvall*, 7 Gill & J. 78.

although the exact hours of mailing and receiving the notices and of the closing of the mails were not shown: *Seaton v. Scofield*, 18 Kan. 433; 26 Am. Rep. 779. Defendant, an indorser on a note, had lived in the town of Baldwin, but at the time the note became due lived in the adjoining town of Denmark. The notary who presented and protested the note was told by those most likely to know that defendant still resided in Baldwin, and sent the notice of dishonor by mail addressed to him at Baldwin. There was no post-office of that name, but there were three post-offices in the town, respectively named North, East, and West Baldwin, and the acceptance of a notice of the dishonor of a previous note sent to defendant at Baldwin had been admitted by him. *Held*, sufficient: *Saco Nat. Bank v. Sanborn*, 63 Me. 340; 18 Am. Rep. 224. The notary who demanded payment of a note made diligent inquiry concerning the indorser's place of residence, and being informed that he lived at G., directed the notice to him through the post-office at that place. It appeared that he often obtained letters there, and that it was more convenient for him to do so, although he in fact resided in another town in which there were two post-offices. *Held*, that the notice was sufficient: *Reid v. Payne*, 16 Johns. 218; 8 Am. Dec. 311. A note was made to C., dated at Buffalo, payable at a bank in Cleveland, Ohio, and by C. indorsed. Payment of the note was demanded at said bank, at maturity, by a notary public, who, upon being informed that C. resided in Buffalo, seasonably put into the post-office a notice of non-payment, directed to him at that place. *Held*, that the notice was sufficient: *Wood v. Corl*, 4 Met. 203. An indorser resided in a district of country passing under a particular name, having a post-office within it, and being equidistant from that office and another out of the bounds of the district. *Held*, that a notice of protest sent to the first-mentioned office was sufficient, though in fact he was accustomed to receive his letters and papers from the other office: *Rand v. Reynolds*, 2 Gratt. 171. A draft was signed by "B. & S." as partners. The notice of dishonor, sent by mail, was addressed to each, the one name being written above the other. *Held*, sufficient: *United States Bank v. Burton*, 58 Vt. 426. A bill drawn in Virginia on London was protested April 5th. Notice was sent by the next Cunard steamer, on the 19th, which line of steamers carried the mail between the two countries, and letters were usually transmitted by it. But there were regular lines of packets, for which letter-bags were made up at the London post-office. Such packets sailed on the 7th, 10th, and 17th; but it was probable that the steamer of the 19th would arrive before either. *Held*, that the notice was sufficient: *Stainback v. Bank of Virginia*, 11 Gratt. 260. Notice of protest for two indorsers residing in the

same place were mailed under cover to one. The receiver caused one to be remailed to the other indorser at that place. *Held*, valid, although not shown to have been received: *Van Brunt v. Vaughn*, 47 Iowa, 145; 29 Am. Rep. 468. A notary, having no precise knowledge of an indorser's residence, but being informed that she resided at A., mailed notice of protest to her at that place, in care of the maker. She resided midway between A. and G., but had got her letters at G. There was no post-office at A., but it was the duty of the postal agents in such cases to deliver letters at the nearest post-office, which was G. *Held*, that the notice was regular, although it never reached the indorser, and although she had changed her residence before the mailing: *Central National Bank v. Adams*, 11 S. C. 452; 32 Am. Rep. 495. The second indorser of a negotiable note, residing at Warren, Maine, having received due notice of dishonor by mail, being over eighty years old, and wishing to consult counsel, drove on the same day to the neighboring town of Thomaston, and there mailed to defendants notice of dishonor, addressed to them at New York, their residence, by the mail leaving at 1:40, P. M., which passed through Warren at 2, P. M. There was also a mail leaving Thomaston at 10:10, A. M., and Warren at 9:30, A. M. *Held*, valid notice: *Smith v. Poillon*, 87 N. Y. 590; 41 Am. Rep. 402.

ILLUSTRATIONS (CONTINUED). — NOTICE HELD INSUFFICIENT. — Davey, holder of a note indorsed by J., sent it to a bank for collection. The bank's notary misdirected the notices of protest to "Darcy"; plaintiff did not receive them, and the indorser was consequently not notified. *Held*, that defendant was not liable: *Davey v. Jones*, 42 N. J. L. 28; 36 Am. Rep. 505. Notice was put into the post-office at New Orleans in 1863, directed to the indorsers at Petersburg, Virginia. There was then no mail communication between the two cities. *Held*, that the notice was insufficient: *Billgerry v. Branch*, 19 Gratt. 393; 100 Am. Dec. 679. The indorser of a draft payable at the Omaha National Bank resided about one mile outside the corporate limits of Omaha, and had no regular place of business in that city, and obtained his mail at the Omaha post-office, which was the nearest to his residence. On the evening of the day when the draft was presented for payment, notice of its dishonor, etc., was deposited in the Omaha post-office, directed to said indorser at said post-office. *Held*, that the indorser was not notified: *Forbes v. Omaha Bank*, 10 Neb. 338; 35 Am. Rep. 480. An indorser of a note, a steamboat captain, had a residence in New Orleans at the time of protest, and his name appeared in the city directory for the year previous. *Held*, that notice placed in the post-office, directed to him at New Orleans, and a duplicate left at

a place which the notary was told was the indorser's headquarters, were not sufficient: *Cooley v. Shannon*, 20 La. Ann. 548. A married woman indorses her husband's note in a form that would indicate that she was his wife, and there are three persons of the same name as her husband, whose names and residences appear in the city directory, and her own name is not in the directory. A notice of the protest of such a note by mail, simply addressed to her by her name at the city where her husband is engaged in business, without any inquiry being made to ascertain her residence, is not sufficient: *Riggs v. Hatch*, 16 Fed. Rep. 838. On the 10th of July, 1866, a bank received notice of the dishonor of a promissory note which it had discounted, and on the 11th, after the close of the business day, notified its immediate indorser by a drop-letter, which he did not receive until the 12th, there being no system of carriers. *Held*, insufficient to charge the indorser: *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177; 3 Am. Rep. 445. A note was protested at N., and notice of protest was addressed to the indorser at H., and deposited in the post-office when there was no postal communication between H. and N., which had ceased several months previously, and it appeared that there were other practicable means of bringing home notice to the indorser which were not used. *Held*, that the indorser was discharged: *Lapeyre v. Robertson*, 20 La. Ann. 399.

§ 1541. Time—Party Receiving Notice Transferring It to Antecedent Parties—Principal and Agent.—A party who receives due notice of the dishonor of a bill or note has, after the receipt of such notice, the same time for giving notice to antecedent parties that the original holder has after the dishonor of the bill.¹ Every party is entitled to one full day in which to give notice to the party next before him, and over-diligence of one of such parties cannot make up for the under-diligence of another.² Notices under one cover to one of the indorsers in the town where they all reside, for delivery to the others, will charge them all with notice, if he mails them again to his co-indorsers.³ Where a bill or note is in the hands of an agent, the lat-

¹ *Bray v. Hadwen*, 5 Maule & S. 68; *Lawson v. Bank*, 1 Ohio St. 206; *Manchester Bank v. Fellows*, 28 N. H. 302; *State Bank v. Ayers*, 7 N. J. L. 130; 11 Am. Dec. 535; *Carter v. Bradley*, 19 Me. 62; 36 Am. Dec. 735.

² *Brown v. Ferguson*, 4 Leigh, 37; 24 Am. Dec. 707.

³ *Van Brunt v. Vaughn*, 47 Iowa, 145; 29 Am. Rep. 468.

ter has the same time for giving notice to his principal that he would have if he were an independent holder, and his principal an indorser liable to him.¹ When a bill is presented for payment through the post-office, the drawee or acceptor is deemed to be the agent of the holder for the purpose of giving notice of dishonor,² and has the same time for giving notice that the holder would have if he himself presented it.³

ILLUSTRATIONS. — A bill payable in London is indorsed in blank by the holder, and deposited with a country banker for collection. The country banker's London agent presents it for payment and gives him due notice of its dishonor. The country banker, on the day after the receipt of such notice, gives notice to his customer, who in turn gives similar notice to his indorser. *Held*, sufficient: *Bray v. Hadwen*, 5 Maule & S. 68; *Firth v. Thrush*, 8 Barn. & C. 387. X pays a bill *supra protest* for the honor of C, an indorser, who resides at Bruges, and the same day posts the bill to C. C, by return of post, sends the bill back to X, who at once gives notice of dishonor to the drawer. Although six days have elapsed since the dishonor, the notice is in time, and X can sue the drawer: *Goodall v. Polhill*, 14 L. J. Com. P. 146. Notice was given through the mail to the first indorser, who forwarded it by mail at once to the drawer, who lived in the same town. *Held*, a sufficient notice to the drawer: *United States Bank v. Burton*, 58 Vt. 426. Notices were made out by the holder to all the prior parties, and duly transmitted to the last indorser, and received by him two hours before the mail of that day left for the place of the residence of a prior indorser. *Held*, that a neglect to deposit the notice in the post-office until after the mail had left was not due diligence: *Freeman's Bank v. Perkins*, 18 Me. 292.

§ 1542. **Notice—To Whom Given—Who Entitled to—Guarantors.**—Notice of dishonor must be given to the drawer or indorser intended to be charged, or some person authorized to receive it on his behalf.⁴ When the

¹ *Lawson v. Bank*, 1 Ohio St. 206; *Howard v. Ives*, 1 Hill, 263. See *Fish v. Jackman*, 19 Me. 467; 36 Am. Dec. 769.

² *Bailey v. Bodenham*, 33 L. J. Com. P. 225, Erle, J.; *Windham Bank v. Norton*, 22 Conn. 213; 56 Am. Dec. 397.

³ *Prideaux v. Criddle*, L. R. 4 Q. B. 461; *Heywood v. Pickering*, L. R. 9 Q. B. 428.

⁴ *Carter v. Bradley*, 19 Me. 62; 36 Am. Dec. 735; *Union Bank v. Lea*, 7 Rob. (La.) 76; 41 Am. Dec. 275; *Union Bank v. Hyde*, 7 Rob. 418; 41 Am. Dec. 290.

drawer or indorser of a bill or note becomes bankrupt, notice of dishonor may be given either to the bankrupt or to his assignee,¹ and notice given to the bankrupt in ignorance that the trustee or assignee had been appointed is sufficient.² Where in ignorance of the indorser's death

¹ Benjamin's Chalmers's Digest, art. 198; *Donnell v. Bank*, 80 Mo. 165.

² "If a person entitled to notice be bankrupt, notice should be given to him if his assignees are not yet appointed. If they are, notice should perhaps be given to them if the fact of their appointment is known to the holder, or might be known by him by the exercise of due diligence, but notice might perhaps even then be sufficient if given to the bankrupt. Under our state insolvent laws, and wherever the point has not been settled by decision or a positive usage, it would seem to be the safest course to give notice both to the insolvent and to the assignees also. If the insolvent has absconded, notice should be given to the assignees; and if they are not appointed, we should suppose that a delay until their appointment would not discharge any one; and although notice may be given to any one holding or representing the estate, we should think it better to notify the assignees when appointed": 1 Parsons on Notes and Bills, 500. "If the party entitled to notice has become bankrupt, and assignees have been chosen or appointed, notice to the assignees is proper, and will be sufficient"; but he also says: "If any of them are bankrupt, notice should be given to them and to their assignees, if any are appointed; otherwise to the bankrupts themselves": Story on Bills of Exchange, secs. 305, 389. "If the party entitled to notice be a bankrupt, notice should be given to him before the choice of assignees, and after such choice to him": Chitty on Bills, 228. "If the drawer of the bill becomes bankrupt, notice must nevertheless be given to him, at all events before the choice of assignees. If the assignees are appointed, perhaps notice should be given to them": Byles on Bills, 216. "If the party be bankrupt, it is best to give notice to him and to his assignee also. If there be yet no as-

signee appointed, notice to him is sufficient, and perhaps it might be sufficient even if one had been appointed. If given to the assignee alone, it would probably be sufficient": Daniel on Negotiable Instruments, sec. 1002. Reviewing the cautious expressions of the text-writers on this subject, the court of appeals of Kentucky, in a late case (*Callahan v. Bank of Kentucky*, 82 Ky. 231), say: "The weight of authority seems to be that notice to the assignee of a bankrupt is sufficient; and by analogy the rule should be the same as to the assignee of an insolvent. It is true that a bankrupt and an insolvent do not stand upon exactly the same footing. The former may be discharged from liability for his debts, while the latter cannot be; and the former cannot be sued, while judgment may be obtained against the latter; but yet the main object of requiring notice to be given of the dishonor of negotiable paper is that the indorser may protect his estate by enforcing payment against or obtaining security from those liable to him upon it; and the rule as to notice should be the same, whether the estate has passed into the control of an assignee by a voluntary conveyance or by operation of law. In the one case the debtor selects a person to take charge of his estate, and distribute its proceeds to his creditors; while in the other the same end is accomplished by operation of law. If notice to the assignee of the bankrupt is sufficient because he is the representative of the estate, then the same reason applies with equal force to an assignee under a voluntary conveyance; and although the deed from Callahan did not in fact transfer his entire estate, yet it must be treated as a general assignment in considering this question. We must not be understood as determining whether a notice of the dishonor of negotiable paper sent to the bankrupt or insolvent alone, and not

notice is sent sufficient to charge him were he alive, such notice will be good as against his executors or administrators.¹ If the drawer or indorsers of a bill be dead, notice of dishonor must be given to one of his personal representatives, when, with the exercise of reasonable diligence, they can be discovered.² If there be no executor or administrator, notice left at the last residence of the drawer or indorser is sufficient.³ And it may be given to the person named as executor in the will, but not yet appointed,⁴ or to the executor at any time before he has rendered his account to the heir.⁵ Where there are two or more joint drawers or indorsers (not partners), notice must be given to all.⁶ The holder's duty is fulfilled by giving to the parties he intends to look to. If they in turn give notice to other parties, he may take advantage of it.⁷

to the assignee, would or would not be sufficient, as that question is not presented in this case; but it seems to us that it is consistent with both reason and law, and necessary to the usefulness of commercial paper, that when one person by an assignment of his estate has placed it and the settlement of his debts in the control of another, that a notice to the latter of the dishonor of paper should be sufficient."

¹ *Merchants' Bank v. Birch*, 17 Johns. 25; 8 Am. Dec. 367; *Maspero v. Pedesclaux*, 22 La. Ann. 227; 2 Am. Rep. 727.

² *Massachusetts Bank v. Oliver*, 10 Cush. 557; *Cayuga Bank v. Bennett*, 5 Hill, 236; *Beals v. Peck*, 12 Barb. 245; *Lewis v. Bakewell*, 6 La. Ann. 359; 54 Am. Dec. 561; *Goodnow v. Warren*, 122 Mass. 79; 23 Am. Rep. 289. Notice sent through the post addressed "Legal representatives of T. H." (the deceased), held sufficient: *Pillow v. Hardeman*, 3 Humph. 538; 39 Am. Dec. 195. But see *Smalley v. Wright*, 40 N. J. L. 471.

³ *Merchants' Bank v. Birch*, 17 Johns. 25; 8 Am. Dec. 367; *Weaver v. Penn*, 27 La. Ann. 129; *Linderman v. Guldin*, 34 Pa. St. 54; *Boyd v. Orton*, 16 Wis. 495.

⁴ *Goodnow v. Warren*, 122 Mass. 79; 23 Am. Rep. 289.

⁵ *New Orleans etc. R. R. Co. v. Kerr*, 9 Rob. (La.) 122; 41 Am. Dec. 323.

⁶ *Willis v. Green*, 5 Hill, 232; 40 Am. Dec. 351; *Miser v. Trovinger*, 7 Ohio St. 281; *State Bank v. Slaughter*, 7 Blackf. 183; *Shepard v. Hawley*, 1 Conn. 367; 6 Am. Dec. 244; *Sayre v. Frick*, 7 Watts & S. 383; 42 Am. Dec. 249. Notice to one of the partners is sufficient: *Bouldin v. Page*, 24 Mo. 594; *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562. Notice to partners as indorsers is sufficient when left either at the place of business of the firm with some one in charge thereof, or at the residence or domicile of some one of the partners: *St. Louis Bank v. Altheimer*, 91 Mo. 190. Where a bill is drawn by one partnership on and accepted by another, and the two have a common partner, notice of the dishonor of the bill is not necessary to charge the drawers: *New York etc. Contracting Co. v. Selma Savings Bank*, 51 Ala. 305; 23 Am. Rep. 552.

⁷ *Benjamin's Chalmers's Digest*, art. 189. Failure to notify a prior does not release a subsequent indorser: *Carter v. Bradley*, 19 Me. 62; 36 Am. Dec. 735.

The acceptor of a bill is not entitled to notice of dishonor.¹ But a person who is not a party to a bill, but who is liable on the consideration for which it is given, is entitled to notice.² When a bill is indorsed after its maturity, the indorser is entitled to have it presented for payment, and to receive notice of dishonor within a reasonable time, he, in effect, having indorsed a bill payable on demand;³ *aliter* if an indorser take up a dishonored bill and reissue it on his original indorsement, for his liability is already fixed.⁴

Nor is notice necessary to charge a person who has guaranteed the payment of the bill of the acceptor. Thus the indorser of a bill gives a bond to secure its payment. Want of notice of dishonor is no defense to an action on the bond;⁵ or X gives a guaranty for the price of goods to be supplied to the acceptor of a bill. X is not entitled to notice of dishonor;⁶ but X gives a guaranty for the price of goods to be supplied to the drawer of a bill. X is entitled to notice of dishonor;⁷ or X guarantees the payment of a note, "if it be not duly honored and paid" by the maker. X is not entitled to notice of dishonor.⁸ A guarantor stands in a different

¹ *Rowe v. Tipper*, 22 L. J. Com. P. 137; *Pearse v. Pemberthy*, 3 Camp. 261; *Treacher v. Hinton*, 4 Barn. & Ald. 413.

² *Benjamin's Chalmers's Digest*, art. 205.

³ *Patterson v. Todd*, 18 Pa. St. 433; 58 Am. Dec. 622; *Light v. Kingsbury*, 50 Mo. 331; *McKewer v. Kirkland*, 33 Iowa, 348.

⁴ *St. John v. Roberts*, 31 N. Y. 441; 88 Am. Dec. 287; *Libbey v. Pierce*, 47 N. H. 309.

⁵ *Murray v. King*, 5 Barn. & Ald. 165; *F. & M. Bank v. Kercheval*, 2 Mich. 504.

⁶ *Holbrow v. Wilkins*, 1 Barn. & C. 10.

⁷ *Philips v. Astling*, 2 Taunt. 206; *Hitchcock v. Humfrey*, 5 Man. & G. 564.

⁸ *Walton v. Mascal*, 13 Mees. & W. 72. *Mr. Chalmers's Digest*, article 204,

says: "The authorities conflict. No case has yet arisen calling for a decision on the necessity of notice to charge a guarantor of the contract of a party secondarily liable as drawer or indorser, but we cannot conceive how a guarantor could be held liable when the indorser whose contract he guaranteed has been discharged by failure to give notice to him of the acceptor's default. But why the guarantor should be held entitled to notice in such case, as held in *Phillips v. Astling*, is not so clear. As to the liability of a guarantor of the contract of a party primarily liable as acceptor or maker, there are two classes of cases: 1. Notice to the guarantor is held a condition precedent to his liability, but it may be given at any time before suit. If, however, the guarantor is damaged by the delay in giving notice, he is discharged to the

position from an indorser, and to discharge him for failing to demand payment and give notice, it must be shown that he has been damaged by the holder's laches, and only to the extent that he has been damaged can he escape liability.¹ Therefore it is sufficient for the holder to show as an excuse for demand and notice that the maker was insolvent.² Some cases hold in fact that an absolute guarantor is not entitled to have demand made and notice given in any event.³ But others consider the guarantor entitled to require demand and notice.⁴ The guarantor is entitled to seasonable notice of the maker's insolvency, though he had knowledge of it independently.⁵

ILLUSTRATIONS. — X, who has authority to indorse for C, indorses a bill in C's name. Notice of dishonor given to X is not sufficient: *Valk v. Gaillard*, 4 Strob. 99; *Wilcox v. Routh*, 9 Smedes & M. 476; *Firth v. Thrush*, 8 Barn. & C. 391. The drawer of a bill is a non-trader. Verbal notice of dishonor given to his wife at his house, in his absence, is sufficient: *Housego v. Cowne*, 2 Mees. & W. 348; *Wharton v. Wright*, 1 Car. & K. 585; *Blakely v. Grant*, 6 Mass. 308. The indorser of a

extent of the damage: *Geiger v. Clark*, 13 Cal. 579; *Crooks v. Tully*, 50 Cal. 254; *Foote v. Brown*, 2 McLean, 369; *Bickford v. Gibbs*, 8 Cush. 156; *Ilisley v. Jones*, 12 Gray, 260. 2. But by the weight of authority notice is not a condition precedent to his liability, but the guarantor is discharged to the extent he is damaged by failure to give him reasonable notice of the principal's default: *Brown v. Curtis*, 2 N. Y. 225; *Second Nat. Bank v. Gaylord*, 34 Iowa, 246; *McDonald v. Scott*, 8 Kan. 25; *Voltz v. Harris*, 40 Ill. 155; *Gage v. Lewis*, 68 Ill. 605; *Newton W. Co. v. Diers*, 10 Neb. 284; *Martin v. Lamar*, 75 Iowa, 235. It is prudent to give a guarantor some notice. See *Story on Notes*, 7th ed., sec. 460, note, for a clear presentation of this subject."

¹ *Arents v. Com.*, 18 Gratt. 770; *Bashford v. Shaw*, 4 Ohio St. 263; *Rhett v. Poe*, 2 How. 457; *Oxford Bank v. Haynes*, 8 Pick. 423; 19 Am. Dec. 334.

² *Gibbs v. Cannon*, 9 Serg. & R. 198; 11 Am. Dec. 699; *Reynolds v. Doug-*

lass, 12 Pet. 497; *Bashford v. Shaw*, 4 Ohio St. 263; *Whiton v. Mears*, 11 Met. 563; 45 Am. Dec. 233.

³ *Cobb v. Little*, 2 Me. 261; 11 Am. Dec. 72; *Breed v. Hillhouse*, 7 Conn. 523; *Voltz v. Harris*, 40 Ill. 159; *Penny v. Crane*, 80 Ill. 244; *Aiery v. Pierson*, 37 Mo. 424; *Allen v. Rightmere*, 20 Johns. 365; 11 Am. Dec. 288; *Hance v. Miller*, 21 Ill. 636; *Clay v. Edgerton*, 19 Ohio St. 549; 2 Am. Rep. 422; *Brown v. Curtiss*, 2 N. Y. 225; *Wright v. Dyer*, 48 Mo. 526; *Cooper v. Page*, 24 Me. 73; 41 Am. Dec. 371; *Marberger v. Pott*, 16 Pa. St. 9; 55 Am. Dec. 479; *Donley v. Camp*, 22 Ala. 659; 58 Am. Dec. 274; *Osborne v. Lawson*, 26 Mo. App. 549.

⁴ *Douglass v. Reynolds*, 7 Pet. 126; *Talbot v. Gay*, 18 Pick. 535; *Second Nat. Bank v. Gaylord*, 34 Iowa, 248; *Daniel on Negotiable Instruments*, sec. 1787; *Riggs v. Waldo*, 2 Cal. 485; 56 Am. Dec. 357; *Fessenden v. Summers*, 62 Cal. 485.

⁵ *Corbit v. Bank*, 2 Harr. (Del.) 235; 30 Am. Dec. 635.

bill is a merchant. Notice of dishonor, verbal or written, given to or left with a clerk at his counting-house, is sufficient: *Allen v. Edmundson*, 2 Ex. 719; *Viale v. Michael*, 30 L. T., N. S., 463; *Edson v. Jacobs*, 14 La. 494. C indorses a bill "in need at Messrs. X & Co." Notice of dishonor given to X & Co. is not sufficient to charge C: *Ex parte Prange*, L. R. 1 Eq. 5. The indorser of a promissory note dying before its maturity, notice of non-payment was given to the executor named in his will, after it had been offered for probate and letters testamentary applied for. Before the letters were issued, such executor renounced, and a special administrator was appointed. *Held*, that the notice was sufficient to charge the estate; *held, also*, that notice to the executor of the non-payment of a note maturing after the renunciation and the appointment of a special administrator was not sufficient, although no formal notice of the renunciation and appointment had been given: *Goodnow v. Warren*, 122 Mass. 79; 23 Am. Rep. 289.

§ 1543. **Form and Requisites of Notice.**—The notice may be in writing or oral.¹ The notice need not be signed,² provided the party to whom it is given is informed from whom it comes.³ A notice of protest partly printed and partly written is sufficient, although the official signature of the notary be printed.⁴ When notice is given by personal communication,⁵ or when a written notice is supplemented by a personal communication,⁶ the sufficiency of such notice is a question of fact.

No precise form is required,⁷ but as a general thing the notice should, —

¹ *Glasgow v. Pratte*, 8 Mo. 336; 40 Am. Dec. 142. An insufficient written notice may be made valid by a subsequent personal one: *Houlditch v. Canty*, 4 Bing. N. C. 411.

² *Maxwell v. Brain*, 10 L. T., N. S., 301; *Paul v. Joel*, 27 L. J. Ex. 380.

³ *Klockenbaum v. Pierson*, 16 Cal. 375; *Walker v. Bank*, 8 Mo. 704. In *Shed v. Brett*, 1 Pick. 401, 11 Am. Dec. 209, it was held that the notice was sufficient though it did not state at whose request it was given, or who was the owner.

⁴ *Spalding v. Krutz*, 1 Dill. 414.

⁵ *Metcalfe v. Richardson*, 11 Com. B. 1011.

⁶ *Houlditch v. Canty*, 4 Bing. N. C. 419.

⁷ *Stephenson v. Primrose*, 8 Port. 155; 33 Am. Dec. 281; *Gilbert v. Dennis*, 3 Met. 495; 38 Am. Dec. 329; *Spann v. Baltzell*, 1 Fla. 301; 46 Am. Dec. 346. In *Stoughton v. Swan*, 1 Cal. 213, 60 Am. Dec. 605, it is said: "No precise words or particular form is required in the notice to be given to the indorser of a promissory note or bill of exchange of its dishonor. It is sufficient if it appears or can reasonably be inferred from the notice that the note or bill has been duly presented for payment and has been dishonored. A notice that a note had

1. *Identify the bill or note.*¹ But a misdescription of the bill does not vitiate the notice if the party is not thereby misled.² Thus a notice which misstates the bank at which the instrument is payable,³ or describes a bill as a note,⁴ or which transposes the names of drawer and acceptor,⁵ or which describes the acceptor or indorser by a wrong name,⁶ or which misstates the sum payable,⁷ may be sufficient. A notice to an indorser of a note who became such by signing his name under the maker's name is not insufficient because it styles him the maker, when he was not misled thereby.⁸ Where a notary made a mistake in the protest of a draft and the subsequent notice, stating that the draft was made payable to George, N., whereas it was George W., the mistake was held to be immaterial.⁹ But where the notice was dated by mistake on the day before the last day of grace, it was held bad.¹⁰ If the note is correctly and sufficiently described, it is not material that the indorser is left in doubt as to which one of several similar notes indorsed by him the notice of dishonor refers.¹¹ The omission of the names of the drawees in the description of the draft in the notice is unimportant, where the date, amount, and names of the drawer and payee are mentioned.¹²

been duly presented, etc., and protested for non-payment, and that the holder looked to the indorser for payment of the same, is sufficient to put the indorser upon inquiry, which is all the law requires, and answers fully the reason and purpose of notice. The word 'protested' has a definite legal signification, which should have been recognized by the court below."

¹ *Shelton v. Braithwaite*, 7 Mees. & W. 436; *Mills v. Bank*, 11 Wheat. 431; *Gates v. Beecher*, 60 N. Y. 527; 19 Am. Rep. 207.

² *Bank v. Carneal*, 2 Pet. 543; *Thompson v. Williams*, 14 Cal. 160.

³ *Bromage v. Vaughan*, 16 L. J. Q. B. 10.

⁴ *Stockman v. Parr*, 11 Mees. & W.

809; *Bain v. Gregory*, 14 L. T., N. S., 601.

⁵ *Mellersh v. Rippen*, 7 Ex. 578; *Dennistoun v. Stewart*, 17 How. 606.

⁶ *Harpham v. Child*, 1 Post. & F. 652; *Carter v. Bradley*, 19 Me. 62; 36 Am. Dec. 735.

⁷ *Bank v. Swarm*, 9 Pet. 33; *Snow v. Perkins*, 2 Mich. 238.

⁸ *Haines v. Dubois*, 30 N. J. L. 259.

⁹ *Reid v. Reid*, 11 Tex. 585.

¹⁰ *Etting v. Bank*, 2 Pa. St. 355; 44 Am. Dec. 205.

¹¹ *Hodges v. Shuler*, 22 N. Y. 115; *Cook v. Litchfield*, 5 Sand. 340;

Hodges v. Shuler, 24 Barb. 68.

¹² *Farmers' Bank v. Stevens*, 11 La. Ann. 189.

2. *State that the bill or note has been dishonored by non-acceptance or non-payment,¹ and protested, where protest is necessary.²* But it is generally held that this need not be expressly stated, but that it is enough that this fact can be reasonably inferred from the terms of the notice.³

3. *State that the party to whom it is given is held liable for its payment.⁴* But it is sufficient if this can be inferred from the terms of the notice.⁵ In fact, it is held in a number of cases that the fact that notice is given is a sufficient indication that the party to whom it is given is called on to pay the bill or note.⁶

ILLUSTRATIONS.—A person sent by the holder goes to the house of the drawer, who is not a trader, and, not finding the drawer, informs his wife that he has brought back the bill dishonored. The wife says she will tell her husband. *Held*, sufficient: *Housego v. Cowne*, 2 Mees. & W. 348. The holder's clerk goes to the drawer and tells him that his bill has been presented and that the acceptor cannot pay it. The drawer replies that he will see the holder about it. *Held*, sufficient: *Metcalfe v. Richardson*, 11 Com. B. 1011. A notice to the indorser of a note payable at a bank stated the note to have fallen due three days before, and the name of the promisor was mistaken therein. The indorser was liable on no other note payable at the bank. *Held*, sufficient: *Smith v. Whiting*, 12 Mass. 6; 7 Am. Dec. 25. "B's acceptance for twenty-one pounds due on Saturday is unpaid. He has promised to pay it in a week. I shall be glad to see you upon it." *Held*, insufficient: *Furze v. Sharwood*, 2 Q. B. 388. "I give notice that a bill, etc. [description], indorsed by you lies at 1 X Street, dishonored." *Held*, sufficient: *King v. Bickley*, 2 Q. B. 419. The holder's clerk wrote to an indorser

¹ *Gilbert v. Dennis*, 3 Met. 495; 38 Am. Dec. 329; *Sokarte v. Palmer*, 1 Bing. N. C. 194; *Ransom v. Mack*, 2 Hill, 587; 38 Am. Dec. 602; *Wheaton v. Wilmarth*, 13 Met. 422.

² *Id.*

³ *Paul v. Joel*, 28 L. J. Ex. 143; *Ex parte Lowenthal*, L. R. 9 Ch. 591.

⁴ *Allen v. Edmundson*, 2 Ex. 719; *Metcalfe v. Richardson*, 11 Com. B. 1014; *Everard v. Watson*, 1 El. & B. 804; *Pon v. Kelly*, 2 Hayw. 45; 2 Am. Dec. 617; *Brower v. Wooten*, N. C. Term Rep. 70; 7 Am. Dec. 692.

⁵ *King v. Bickley*, 2 Q. B. 419; *Miers*

v. Brown, 11 Mees. & W. 372; *Chard v. Fox*, 14 Q. B. 200; *Bank v. Carneal*, 2 Pet. 543; *Townsend v. Lorain Bank*, 2 Ohio St. 345; *Cromer v. Platt*, 37 Mich. 132; 26 Am. Rep. 503. "The note of A., which you indorsed, fell due this day, and remains unpaid. Please let me hear from you in regard to it." *Held*, that this notice was sufficient to charge E. as indorser: *Clark v. Eldridge*, 13 Met. 96.

⁶ *Chard v. Fox*, 14 Q. B. 200; *Bank v. Carneal*, 2 Pet. 552; *Townsend v. Bank*, 2 Ohio St. 354.

that "B's acceptance due that day was unpaid, and requested his immediate attention to it." *Held*, sufficient: *Bailey v. Porter*, 14 Mees. & W. 44; *Cromer v. Platt*, 37 Mich. 132; 26 Am. Rep. 503. *Contra*, *Page v. Gilbert*, 60 Me. 488.¹ "Your draft which became due yesterday is unpaid. Unless the same is paid immediately I shall take proceedings. Noting 5s." *Held*, sufficient: *Armstrong v. Christiani*, 5 Com. B. 687; *Everard v. Watson*, 1 El. & B. 801. The following notice was left at the drawer's counting-house by the holder's clerk: "B's acceptance to A, five hundred pounds, due January 2d, is unpaid. Payment to D. is requested before four, p. m." *Held*, sufficient: *Paul v. Joel*, 27 L. J. Ex. 380; 28 L. J. Ex. 143. "D. bank. I beg to intimate that B's acceptance to you due the 30th of July is still unpaid, and I have to request your immediate attention to the same." No signature. *Held*, sufficient: *Maxwell v. Brain*, 10 L. T., N. S., 301. Notice to drawer of bill accepted by B: "Yours and B's note of hand is now due, and your attention to the same will oblige." *Held*, sufficient: *Bain v. Gregory*, 14 L. T., N. S., 601.

§ 1544. Cases in Which Notice of Dishonor is Excused.

—Notice of dishonor is excused or dispensed with in a number of cases. These are:—

1. When the drawer or indorser sought to be charged is, as between the parties to the bill, the principal debtor, and has no reason to expect that it will be honored on presentment.²

2. As to the drawer, when the drawer and drawee are the same person, or identical in interest.³

3. When the drawer or indorser sought to be charged is the person to whom the bill is presented for payment.⁴

4. Where the drawee is a fictitious person, or one not

¹ Unless bill is payable at bank: *Clark v. Eldridge*, 13 Met. 96.

² Benjamin's Chalmers's Digest, art. 200.

³ *Porthouse v. Parker*, 1 Camp. 82; *Rhett v. Poe*, 2 How. 457; *New York etc. Co. v. Bank*, 51 Ala. 305; 23 Am. Rep. 552; *Fuller v. Hooper*, 3 Gray, 334; *West Branch Bank v. Fulmer*, 3 Pa. St. 399; 45 Am. Dec. 651. Notice of the dishonor of a promissory note

need not be given to an indorser when the members of the firm making the indorsement are also members of the firm who made the note: *West Branch Bank v. Fulmer*, 3 Pa. St. 399; 45 Am. Dec. 651.

⁴ *Caunt v. Thompson*, 18 L. J. Com. P. 125. In this case the drawer of the bill became the executor of the acceptor, and it was held that he was not entitled to notice.

capable of contracting, and the drawer or indorser ought to have known it at the time.¹

5. Where the drawer or indorser has received an assignment of all the property of the acceptor as security.² So the holder, by giving a new credit or extending the time of payment, releases the indorser,³ unless the note was for the accommodation of the indorser.⁴ The mere receipt of a part of the acceptor's property as collateral security, whether the security is sufficient to meet the bill or not, does not dispense with demand and notice,⁵ though some courts hold the contrary where the security is sufficient and the indorser fully indemnified.⁶ But where the security is insufficient, the demand and notice are not dispensed with.⁷ And taking security after dishonor is no waiver of the laches of the holder.⁸

¹ *Leach v. Hewitt*, 4 Taunt. 731; *Smith v. Bellamy*, 2 Stark. 223.

² *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Barton v. Baker*, 1 Serg. & R. 334; 7 Am. Dec. 620; *Boud v. Farnham*, 5 Mass. 170; 4 Am. Dec. 47; *Spencer v. Harvey*, 17 Wend. 490; *Seacord v. Miller*, 13 N. Y. 58; *Prentiss v. Danielson*, 5 Conn. 175; 13 Am. Dec. 52; *Kramer v. Sandford*, 4 Watts & S. 328; 39 Am. Dec. 92; *Duvall v. Bank*, 9 Gill & J. 47; *Lewis v. Kramer*, 3 Md. 265; *Watkins v. Crouch*, 5 Leigh, 522; *Stephenson v. Primrose*, 8 Port. 155; 33 Am. Dec. 281; *Perry v. Green*, 19 N. J. L. 61; 38 Am. Dec. 537; *Walters v. Munroe*, 17 Md. 154; 77 Am. Dec. 328; *Brandt v. Mickle*, 28 Md. 436; *Bank v. Myers*, 1 Bail. 412; *Swan v. Hodges*, 3 Head, 251. See note to *Kramer v. Sandford*, 39 Am. Dec. 95-99.

³ *Scarborough v. Harris*, 1 Bay, 177; 1 Am. Dec. 609; *Sharpe v. Bingley*, 1 Mill, 373; 12 Am. Dec. 643; *Okie v. Spencer*, 2 Whart. 253; 30 Am. Dec. 251; *Mayhew v. Boyd*, 5 Md. 102; 59 Am. Dec. 101.

⁴ *Clopper v. Bank*, 7 Har. & J. 92; 16 Am. Dec. 294.

⁵ *Kramer v. Sandford*, 4 Watts & S. 328; 39 Am. Dec. 92; *Creamer v. Perry*, 17 Pick. 332; 28 Am. Dec. 297; *Taylor v. French*, 4 E. D. Smith, 458; *Wilson v. Senior*, 14 Wis. 380; *Wat-*

kins v. Crouch, 5 Leigh, 522; *Haskell v. Boardman*, 8 Allen, 41; *Holland v. Turner*, 10 Conn. 308; *Hayes v. Werner*, 45 Conn. 246; *Ray v. Smith*, 17 Wall. 411; *Denny v. Palmer*, 5 Ired. 610; *Maine Bank v. Smith*, 18 Me. 99; *Seacord v. Miller*, 13 N. Y. 55; *Spencer v. Harvey*, 17 Wend. 489; *Moses v. Ela*, 43 N. H. 557; 82 Am. Dec. 175; *Whittier v. Collins*, 15 R. I. 100.

⁶ *Develing v. Ferris*, 18 Ohio, 170; *Marshall v. Mitchell*, 35 Me. 223; 58 Am. Dec. 697; *Perry v. Green*, 19 N. J. L. 61; 38 Am. Dec. 536; *Mead v. Small*, 2 Me. 207; 11 Am. Dec. 62; *Durham v. Price*, 5 Yerg. 300; 26 Am. Dec. 267; *Holman v. Whiting*, 19 Ala. 703; *Watt v. Mitchell*, 6 How. (Miss.) 131; *Lewis v. Kramer*, 3 Md. 265; *Beard v. Westerman*, 32 Ohio St. 29; *Kyle v. Green*, 14 Ohio, 495; *Smith v. Lowndsdales*, 6 Or. 78; *Barrett v. Charleston*, 2 McMull. 191; *Walker v. Walker*, 7 Ark. 542; *Duvall v. Bank*, 9 Gill & J. 31; *Wright v. Andrews*, 70 Mo. 86; 35 Am. Rep. 308.

⁷ *Lewis v. Kramer*, 3 Md. 265; *Denny v. Palmer*, 5 Ired. 610; *Carlisle v. Hill*, 16 Ala. 398; *Brunson v. Napier*, 1 Yerg. 199; *Marshall v. Mitchell*, 34 Me. 227.

⁸ *Tower v. Durell*, 9 Mass. 332; *Lowry v. Bank*, 7 Ala. 120; *Swan v. Hodges*, 3 Head, 251; *Otsego Bank v.*

6. Such conduct on the part of an indorser toward the holder as is calculated to put a person of reasonable prudence off his guard, or to induce him to omit demand or protest, or to give notice of dishonor, will dispense with the necessity.¹ And protest is not essential to fix the liability of an indorser, if he has information on the day of maturity that the drawer has failed to pay the obligation.²

7. Where after reasonable diligence notice of dishonor cannot be given to or does not reach the party,³ reasonable diligence being a mixed question of law and fact.⁴ A holder making diligent inquiry for an indorser, and acting upon the best information he is able to procure in giving notice of non-payment, has used reasonable diligence, though the notice was in fact misdirected and never received.⁵

8. Sickness may also excuse. But if sickness be relied upon, it must be shown to have been not only sudden, but likewise so severe as to have prevented the owner or agent from employing another to make the presentment, and then it must be shown that the proper steps were taken as soon as the disability was removed.⁶ The prevalence of the yellow fever in a city has been held to be an excuse for delaying to give notice, while all business in the city was stopped.⁷

Warren, 18 Barb. 290; Beard v. Westerman, 32 Ohio St. 29; Burrows v. Hannegan, 1 McLean, 309. See 2 Daniel on Negotiable Instruments, 1140.

¹ Boyd v. Bank of Toledo, 32 Ohio St. 526; 30 Am. Rep. 624.

² Mutual Nat. Bank v. Rotgé, 28 La. Ann. 933; 26 Am. Rep. 126.

³ Allen v. Edmundson, 2 Ex. 723; Walker v. Stetson, 14 Ohio St. 89; 84 Am. Dec. 362; McLanahan v. Brandon, 1 Martin, N. S., 321; 14 Am. Dec. 188; New York Belting Co. v. Ela, 61 N. H. 452; McKee v. Boswell, 33 Mo. 567; Helme v. Middleton, 14 La. Ann. 484; Moore v. Coffield, 1 Dev. 247. Where the dwelling-house or place of business of the drawee of the

bill is shut up, there must be inquiry in the neighborhood, in order to excuse presentment: Ellis v. Bank, 8 Miss. 294; 40 Am. Dec. 63.

⁴ Bank of Utica v. Bender, 21 Wend. 643; 34 Am. Dec. 281; Linville v. Welch, 29 Mo. 203; Walker v. Stetson, 14 Ohio St. 89; 84 Am. Dec. 362; Bateman v. Joseph, 2 Camp. 462; Herbert v. Servin, 41 N. J. L. 225; Gilchrist v. Downell, 53 Mo. 591; Whitridge v. Rider, 22 Md. 548; Smith v. Fisher, 24 Pa. St. 222.

⁵ Bank of Utica v. Bender, 21 Wend. 643; 34 Am. Dec. 281.

⁶ Wilson v. Senior, 14 Wis. 280.

⁷ Tunno v. Lague, 2 Johns. Cas. 1; 1 Am. Dec. 141.

9. Where there were no funds in the hands of the drawee, or the drawer was not entitled to draw.¹ So where the instrument was made for the accommodation of the indorser, want of notice as to him is excused.² So where money has been left with the indorser to take up the note.³ So where the note or bill is void because illegal.⁴ If an indorser of a note takes it up and reissues it after maturity, his *status* is that of the drawer of a new bill, and demand and notice are unnecessary.⁵

ILLUSTRATIONS. — A, having a balance of ten dollars at his banker's, and having no authority to overdraw, draws a check for fifty dollars. A is not entitled to notice: *Carew v. Duckworth*, L. R. 4 Ex. 313; *Hopkirk v. Page*, 2 Brock. 20; *Blakenship v. Rogers*, 10 Ind. 333. A draws, B accepts, and C indorses a bill in order to accommodate D, the second indorser. If the bill is dishonored, A and C are entitled to notice: *Cory v. Scott*, 3 Barn. & Ald. 619; *Turner v. Samson*, L. R. 2 Q. B. D. 23; *French v. Bank*, 4 Cranch, 141. A draws and B accepts a bill to accommodate X, who is not a party to it, but who is to provide for it. A is entitled to notice: *Lafitte v. Slatter*, 6 Bing. 623. A draws a bill on B, who is under no obligation to accept or pay it, and has not held out that he will do so. It is presented and dishonored. A is not entitled to notice: *Bickerdike v. Bollman*, 1 Term Rep. 405; *Smith's Lead. Cas.* 50; *Claridge v. Dalton*, 4 Maule & S. 226; *Dickins v. Beal*, 10 Pet. 572; *Wirth v. Austin*, L. R. 10 Com. P. 689; *Welch*

¹ *Hoffman v. Smith*, 1 Caines, 160; *Foard v. Womack*, 2 Ala. 368; *Kinsley v. Robinson*, 21 Pick. 327; *Valk v. Simmons*, 4 Mason, 113; *Allen v. King*, 4 McLean, 128; *Mobley v. Clark*, 26 Barb. 390; *Baxter v. Graves*, 2 A. K. Marsh. 152; 12 Am. Dec. 374; *Humphries v. Bicknell*, 2 Litt. 296; 13 Am. Dec. 268; *Eichelberger v. Finley*, 7 Har. & J. 381; 16 Am. Dec. 312; *Fletcher v. Pierson*, 69 Ind. 281; 35 Am. Rep. 214. But it held in other cases that where the instrument is an accepted bill or a promissory note notice is essential: *Pon v. Kelly*, 2 Hayw. 45; 2 Am. Dec. 617; *Richie v. McCoy*, 13 Smedes & M. 541. The drawer of a bill who has at the time effects in the hands of the drawee is entitled to notice of non-acceptance, although such effects be attached be-

fore presentment: *Stanton v. Blossom*, 14 Mass. 116; 7 Am. Dec. 198. If the drawer has funds in the drawee's hands at the date of the bill, but draws them out before it becomes due, unless it appears to have been done for the purpose of defeating the bill, or unless he knew that the funds were exhausted, demand and notice are not dispensed with: *Edwards v. Moses*, 2 Nott & McC. 433; 10 Am. Dec. 615.

² *McVeigh v. Bank*, 26 Gratt. 785; *Keyes v. Winter*, 54 Me. 399. So as to drawer: *New Orleans Bank v. Harper*, 12 Rob. (La.) 230; 43 Am. Dec. 226; *Gillespie v. Cammack*, 3 La. Ann. 248.

³ *Ray v. Smith*, 17 Wall. 411.

⁴ *Copp v. McDougall*, 9 Mass. 1; *Tunball v. Bowyer*, 40 N. Y. 456.

⁵ *Coleman v. Dunlap*, 18 S. C. 51.

v. *B. C. Mfg. Co.*, 82 Ill. 579. A draws a bill on B payable at his own house. B accepts it. *Prima facie*, this is an accommodation bill for A's benefit, and he is not entitled to notice: *Sharp v. Bailey*, 9 Barn. & C. 44; *Carter v. Flower*, 16 Mees. & W. 743; *Reid v. Morrison*, 2 Watts & S. 401; *Torrey v. Foss*, 40 Me. 74. A signs a bill as drawer in order to accommodate the acceptor. *Held*, A is entitled to notice: *Sleigh v. Sleigh*, 5 Ex. 514; *French v. Bank*, 4 Cranch, 160. A, having a small balance in B's hands, draws on him for a larger sum. B accepts, but does not pay. A is entitled to notice: *Thackray v. Blackett*, 3 Camp. 164; *Bagnall v. Andrews*, 7 Bing. 223. The holder of a dishonored bill goes to the drawer's place of business during business hours to give him notice of dishonor. He finds the place shut and no one there of whom to make inquiries. *Held*, to excuse notice: *Allen v. Edmundson*, 2 Ex. 723; *Williams v. Bank*, 2 Pet. 96. The holder of a dishonored bill does not know the indorser's address. He makes some inquiry, but does not take the steps he reasonably might have done. *Held*, that the indorser is discharged: *Beveridge v. Burgis*, 3 Camp. 262; *Spencer v. Bank*, 3 Hill, 520.

§ 1545. **Cases where Notice of Dishonor is not Excused.**—The insolvency, bankruptcy, or death of the maker, drawer, or indorser does not excuse the giving of notice;¹ nor the fact that the drawer or indorser has

¹ *Rhode v. Proctor*, 4 Barn. & C. 517; *Smalley v. Wright*, 40 N. J. L. 471; *Crossen v. Hutchinson*, 9 Mass. 207; 6 Am. Dec. 55; *Sandford v. Dilaway*, 10 Mass. 52; 6 Am. Dec. 99; *Farnham v. Fowle*, 12 Mass. 89; 7 Am. Dec. 35; *Barton v. Baker*, 1 Serg. & R. 334; 7 Am. Dec. 620; *Juniata Bank v. Hale*, 16 Serg. & R. 157; 16 Am. Dec. 558; *Nash v. Harrington*, 2 Aiken, 9; 16 Am. Dec. 672; *Page v. Loud*, Harp. 269; 18 Am. Dec. 650; *Brown v. Ferguson*, 4 Leigh, 37; 24 Am. Dec. 707; *Colt v. Barnard*, 18 Pick. 260; 29 Am. Dec. 585; *Orear v. McDonald*, 9 Gill, 350; 54 Am. Dec. 703; *Hawley v. Jette*, 10 Or. 31; 45 Am. Rep. 129; *Second Nat. Bank v. McGuire*, 33 Ohio St. 295; 31 Am. Rep. 539. *Contra*, *Fleming v. McClure*, 1 Brev. 428; 2 Am. Dec. 671; and see *Sullivan v. Mitchell*, 1 Car. L. Rep. 482; 6 Am. Dec. 546; *Kiddell v. Ford*, 3 Brev. 178; 6 Am. Dec. 569. In a recent case in Missouri it is held that notice is not necessary where the

indorser indorsed the note after maturity and knowing that the maker was dead at that time (*Picklar v. Harlan*, 75 Mo. 678), the court saying: "We think this case falls within that class of cases where demand and notice are excused 'from the entire absence of necessity or utility because the party who should receive the notice must know the facts as well as the party who should give the notice. If, for example, A draws on himself, payable to himself, and then accepts, and then indorses, a holder need not first demand of him as drawer and then notify him again as indorser. This principle is not applied when a person can be proved to have had knowledge of the fact, for it is certain that this is no excuse for want of notice, but when the person must of necessity have knowledge, by presumption of law, as when a firm draws upon itself, or a member of the firm draws upon the firm': *Parsons on Notes and Bills*,

reason to believe that the bill or note will be dishonored on presentment;¹ nor that the drawer or indorser knows that the instrument has been dishonored;² nor that the indorser indorsed for the accommodation of the drawer, or that the drawer had no effects in the drawee's hands;³ nor that the bill has been taken up and paid for honor;⁴ nor that the bill or note was indorsed when it was overdue, i. e., after maturity.⁵

521. The indorser in the case before us knew at the time of the indorsement that the maker was dead, and is presumed to have known that the administrator of his estate could not be required to pay before the end of one year after grant of letters and notice, such being the law of this state, as enunciated by this court in the case of *Dullard v. Hardy*, 47 Mo. 403. We have not been able to find any case where it has been held that when the indorsement was made after the maturity of the note and the death of the maker, which fact was known to the indorser at the time, and where the administrator was not required by law to pay demands of that character before the end of one year, that demand and notice has been required as prerequisites to the liability of the indorser. An indorsement of a negotiable note after maturity is equivalent to drawing a new bill at sight, but this rule can have no application when the maker of the note at the time of such indorsement was dead, which was known to the indorser, for the reason that in every bill there must be a drawer and drawee, as in every deed there must be a grantor and grantee. Such cases as the one in hand are anomalous, and while the obligation of an indorser is that he will pay after due demand, protest, and notice thereof, in such a case as the above, where the indorser is presumed to know as a matter of law that the administrator is not required to pay till the expiration of one year after grant of letters, and that a demand would, therefore, be fruitless, we can perceive no reason, as was said in the case of *Davis v. Francisco*, 11 Mo. 572, 49 Am. Dec. 98, for notify-

ing him of a fact he is presumed to know."

¹ *Carew v. Duckworth*, L. R. 4 Ex. 319; *Esdaile v. Sowerby*, 11 East, 114; *Juniata Bank v. Hale*, 16 Serg. & R. 157; 16 Am. Dec. 558; *Cedar Falls Co. v. Wallace*, 83 N. C. 225; *Barton v. Baker*, 1 Serg. & R. 334; 7 Am. Dec. 620. See *Orear v. McDonald*, 9 Gill, 350; 54 Am. Dec. 703.

² *Juniata Bank v. Hale*, 16 Serg. & R. 157; 16 Am. Dec. 558; *Lane v. Bank*, 9 Heisk. 419; *Miers v. Brown*, 11 Mees. & W. 372.

³ *Warder v. Tucker*, 7 Mass. 449; 5 Am. Dec. 62; *Buck v. Cotton*, 2 Conn. 126; 7 Am. Dec. 251; *Holland v. Turner*, 10 Conn. 308; *Smith v. McLean*, N. C. Term Rep. 72; 7 Am. Dec. 693; *Austin v. Rodman*, 1 Hawks, 194; 9 Am. Dec. 630.

⁴ *Lenox v. Leverett*, 10 Mass. 1; 6 Am. Dec. 97.

⁵ *Daniel on Negotiable Instruments*, 611; *Berry v. Robinson*, 9 Johns. 121; 6 Am. Dec. 267; *Poole v. Tolleson*, 1 McCord, 199; 10 Am. Dec. 663; *Eckfert v. Des Coudres*, 1 Mill, 69; 12 Am. Dec. 609; *Jones v. Robinson*, 11 Ark. 504; 54 Am. Dec. 212; *Davis v. Francisco*, 11 Mo. 572; 49 Am. Dec. 98; *Light v. Kingsbury*, 50 Mo. 331; *Dwight v. Emerson*, 2 N. H. 159; *Colt v. Barnard*, 18 Pick. 260; *McKewer v. Kirtland*, 33 Iowa, 348; *Guild v. Goldsmith*, 9 Fla. 212; *Bemis v. McKenzie*, 13 Fla. 553; *Bishop v. Dexter*, 2 Conn. 419; *Beebe v. Brooks*, 12 Cal. 308; *Patterson v. Todd*, 18 Pa. St. 426; 57 Am. Dec. 622; *Course v. Shackelford*, 2 Nott & McC. 283; *Kenyon v. McRae*, 7 Port. 175; *Chandler v. Westfall*, 30 Tex. 475; *Corwith v. Morrison*, 1 Pinn. 489; *Bank v. Ezell*, 10 Humph. 383; *Leavitt v. Putnam*,

§ 1546. **Waiver of Notice.**—The giving of notice may be expressly or impliedly waived.¹ It may be waived in the instrument itself;² or by a separate agreement; or by the act or language of the indorser calculated to induce the holder not to give it.³ The waiver may be either before or after the maturity of the note or the time for giving notice,⁴ and may be proved by parol evidence.⁵ The word “protest” has been extended by usage to include all acts which are, by law, necessary to charge an indorser. Hence the phrase “protest waived,” when applied to a promissory note, means that both demand and notice are waived.⁶ The waiver may be made by the

3 N. Y. 494; 53 Am. Dec. 322; *Benton v. Gibson*, 1 Hill, 56; *McKinney v. Crawford*, 8 Serg. & R. 351; *Hill v. Martin*, 12 Mart. 177; 13 Am. Dec. 372; *Kirkpatrick v. McCullough*, 3 Humph. 171; 39 Am. Dec. 158; *Gray v. Bell*, 2 Rich. 67; 44 Am. Dec. 277; *Hunt v. Wadleigh*, 26 Me. 271; 45 Am. Dec. 108. But the same diligence is not required in the case of a note indorsed after due: *Chadwick v. Jeffers*, 1 Rich. 397; 44 Am. Dec. 260.

¹ *Phipson v. Kellner*, 4 Camp. 284; *Phillips v. Thompson*, 2 Johns. Ch. 418; 7 Am. Dec. 535.

² *Bryant v. Bank*, 8 Bush, 43; *Lowry v. Steele*, 27 Ind. 168. A notice posted in a bank that indorsers will be required to waive demand and notice is ineffectual if such waiver does not appear on the face of the note: *Piscataqua Bank v. Carter*, 20 N. H. 246; 51 Am. Dec. 217.

³ *Sigerson v. Mathews*, 20 How. 496; *Sheldon v. Horton*, 53 Barb. 23; *Barclay v. Weaver*, 19 Pa. St. 396; 57 Am. Dec. 661; *Leonard v. Gary*, 10 Wend. 504; *Bryant v. Wilcox*, 49 Cal. 47; *Fuller v. McDonald*, 8 Me. 213; 23 Am. Dec. 499; *Tailer v. Murphy Goods Co.*, 24 Mo. App. 420.

⁴ *Cordrey v. Colville*, 32 L. J. Com. P. 210; *Sigerson v. Mathews*, 20 How. 496; *Armstrong v. Chadwick*, 127 Mass. 156; *Rindge v. Kimball*, 124 Mass. 209. *Contra*, *Rodney v. Wilson*, 67 Mo. 123; 29 Am. Rep. 499; *Beeler v.*

Frost, 70 Mo. 185; *Piscataqua Bank v. Carter*, 20 N. H. 246; 51 Am. Dec. 217. Stronger circumstances are required to raise inference of waiver by indorser of due demand and notice, where promise to pay is made after the maturity of the note than where it is made prior to the maturity: *Lary v. Young*, 13 Ark. 401; 58 Am. Dec. 333.

⁵ *Fuller v. McDonald*, 8 Me. 213; 23 Am. Dec. 499; *Hibbard v. Russell*, 16 N. H. 410; 41 Am. Dec. 733; *Barclay v. Weaver*, 19 Pa. St. 396; 57 Am. Dec. 661; *Union Bank v. Hyde*, 6 Wheat. 572; *Hazard v. White*, 26 Ark. 155; *Central Bank v. Davis*, 19 Pick. 373; *Schmied v. Frank*, 86 Ind. 250; *Cheshire v. Taylor*, 29 Iowa, 492; *Farmers' Bank v. Waples*, 4 Harr. (Del.) 429; *Wall v. Bry*, 1 La. Ann. 312; *Lane v. Steward*, 20 Me. 98; *Power v. Mitchell*, 7 Wis. 161; *Taylor v. French*, 2 Lea, 257; 31 Am. Rep. 609; *Edwards v. Tandy*, 36 N. H. 540; *Dye v. Scott*, 35 Ohio St. 194; 35 Am. Rep. 604; *Sheldon v. Horton*, 43 N. Y. 93; 3 Am. Rep. 669.

⁶ *Carpenter v. Reynolds*, 42 Miss. 807. But a waiver of notice of protest does not waive demand on the maker: *Sprague v. Fletcher*, 8 Or. 367; 34 Am. Rep. 587. And see *Wall v. Bry*, 1 La. Ann. 312; *Bird v. Le Blanc*, 6 La. Ann. 470; *Ball v. Greaud*, 14 La. Ann. 305; 74 Am. Dec. 431.

indorser subsequently promising to pay the instrument,¹ or making a part payment of it.² These are said to raise a presumption that due demand and notice have taken place.³ So the following have been held to be waiver of the notice: A statement by the indorser to the holder that he expects to have to pay the note, coupled with a request to continue trying to collect it of the maker;⁴ an agreement between the drawer of an order and the payee that it is to be received in payment of a note due from the former to the latter, provided it is accepted by the drawee, but if not accepted, that it is to be returned to the drawer's brother;⁵ the indorser's requesting the holder not to sue on the note before seeing the maker, and stating that the maker will call and see the holder in a short time;⁶ the indorser's telling the holder to give himself no uneasiness about the note; that it will be paid at maturity; that he is collecting money for the maker, and that he will see that the note is paid;⁷ a telegram sent by the indorser of a note to the collecting bank, requesting it to pay the note and save protest, and draw on him;⁸ the payee's agreeing with the maker, before the maturity of the note, to take

¹ *Trimble v. Thorne*, 16 Johns. 152; 8 Am. Dec. 302; *Loose v. Loose*, 36 Pa. St. 538; *Ladd v. Kenney*, 2 N. H. 340; 9 Am. Dec. 77; *Debuys v. Mollere*, 3 Martin, N. S., 318; 15 Am. Dec. 159; *Durham v. Price*, 5 Yerg. 300; 26 Am. Dec. 267; *United States Bank v. Southard*, 17 N. J. L. 473; 35 Am. Dec. 521; *Mathews v. Fogg*, 1 Rich. 369; 44 Am. Dec. 257; *Whitaker v. Morrison*, 1 Fla. 25; 44 Am. Dec. 627; *Bank of Hamburg v. Wray*, 4 Strob. 87; 51 Am. Dec. 659; *Wilson v. Huston*, 13 Mo. 146; 53 Am. Dec. 138; *Bogart v. McClung*, 11 Heisk. 105; 27 Am. Rep. 737.

² *Curtiss v. Martin*, 20 Ill. 557; *Levy v. Peters*, 9 Serg. & R. 125; 11 Am. Dec. 679; *Lane v. Stewart*, 20 Me. 98; *Harvey v. Throupe*, 23 Miss. 538; *Whitaker v. Morrison*, 1 Fla. 25; 44 Am. Dec. 627.

³ *Newberry v. Trowbridge*, 13 Mich.

279; *Debuys v. Mollere*, 3 Martin, N. S., 318; 15 Am. Dec. 159; *Matthey v. Gally*, 4 Cal. 62; 60 Am. Dec. 595. But where, speaking of several bills on different places and under different circumstances, the indorser said "he would take care of the bills or see them paid," this was held not to be sufficient evidence of a subsequent promise to pay one of the bills, on which no notice of non-acceptance had been given. The promise ought to be explicit and made out by clear and unequivocal evidence: *Miller v. Hackley*, 5 Johns. 375; 4 Am. Dec. 372.

⁴ *Parsons v. Dickinson*, 23 Mich. 56. ⁵ *Geiser v. Kershner*, 4 Gill & J. 305; 23 Am. Dec. 566.

⁶ *Gove v. Vining*, 7 Met. 212; 39 Am. Dec. 770.

⁷ *Bryant v. Wilcox*, 49 Cal. 47.

⁸ *Seldner v. Mount Jackson Bank*, 66 Md. 488.

back the consideration of the note and to pay it, though the agreement be unexecuted.¹ So where an indorser admits his liability at the time of the maturity of the note, and accompanies the admission with an offer to "arrange the matter" with the holders, and thereafter by his conduct shows that he regards himself as liable, and asks for indulgence, this amounts to a waiver.²

But the indorser does not waive notice by part payment as agent of the maker, although it was credited on the note as a payment by the indorser.³ A promise of the drawer to accept a bill to be drawn on him by the drawees to enable them to take up his bill has not the effect of a waiver of notice to such drawer.⁴ Nor are demand and notice waived by an indorser who in reply to an inquiry as to what would be done about the note replied that "the note will be paid."⁵ A waiver of demand and notice will not be presumed from the fact that an indorser, at a time prior to the falling due of the note, appeared at a meeting of the creditors of the insolvent drawer and assumed the character of creditor for a sum including the amount of the note.⁶ The indorsement of a promissory note in blank, and an oral promise by the indorser to pay at maturity, is not a waiver of demand and notice.⁷ An assignment, "For value received, I assign the within note, on condition that the property of the maker and indorsers be exhausted before recourse on me,"—does not waive demand and notice on the part of a subsequent holder.⁸ The waiver must be made with full knowledge of all the facts,⁹ but a mistake as to his legal rights does

¹ *Marshall v. Mitchell*, 35 Me. 221;

58 Am. Dec. 697.

² *Moyer's Appeal*, 87 Pa. St. 129.

³ *Whitaker v. Morrison*, 1 Fla. 25; 44 Am. Dec. 627.

⁴ *Brown v. Ferguson*, 4 Leigh, 37; 24 Am. Dec. 707.

⁵ *Creamer v. Perry*, 17 Pick. 332; 28 Am. Dec. 297.

⁶ *Miranda v. Bank*, 6 La. 740; 26 Am. Dec. 494.

⁷ *Isham v. McClure*, 58 Iowa, 515.

⁸ *Duffy v. O'Conner*, 7 Baxt. 498.

⁹ *Goodall v. Dolley*, 1 Term Rep. 712; *Thornton v. Wynn*, 12 Wheat. 183; *Walker v. Rogers*, 40 Ill. 278; 89 Am. Dec. 348; *Third Nat. Bank v. Ashworth*, 105 Mass. 503; *Rindskopf v. Doman*, 28 Ohio St. 516; *Tickner v. Roberts*, 11 La. 14; 30 Am. Dec. 707; *Com. Bank v. Perry*, 10 Rob. 61; 42 Am. Dec. 168; *New Orleans Sav. Bank*

not affect the waiver.¹ The waiver in favor of the holder will inure for the benefit of parties both prior and subsequent to the holder.² Waiver of notice by an indorser does not affect prior parties.³ A payee of a negotiable note indorsing it under a waiver of demand and notice, all subsequent indorsers are deemed to assent to the same waiver, in the absence of any contrary provision.⁴ A waiver of demand and notice by the indorser to the maker uncommunicated to the holder is not a waiver by the indorser to the latter.⁵ Where, in a promissory note, there is a stipulation that all makers, drawers, and indorsers waive presentment and demand of payment, one who indorses such note becomes thereby absolutely bound for its payment. And if before the maturity of the note he dies, and his estate comes to be administered, his liability as indorser of that note is not treated as a contingent, but as a fixed, liability.⁶

The drawee of a bill cannot maintain an action against the holder, for having the bill protested after waiver of protest by the drawer and indorser.⁷

ILLUSTRATIONS.—WAIVER PRESENT.—The drawer of a bill orders the drawee not to pay it. This waives notice: *Hill v. Hean*, Dowl. & R. N. P. 57; *Havens v. Talbot*, 11 Ind. 323. The drawer of a bill informs the holder that it will not be paid on presentment. This waives notice: *Brett v. Levitt*, 13 East, 214; *Minturn v. Fisher*, 7 Cal. 573; *Taylor v. French*, 4 E. D. Smith, 458. The indorser of a bill receives no notice of dishonor. Six weeks after the dishonor he meets the holder and promises to pay the bill. This is a waiver of notice: *Cordery v. Colville*, 32 L. J. Com. P. 210; *Rindskopf v. Doman*, 28 Ohio St. 516;

v. Harper, 12 Rob. 231; 43 Am. Dec. 226; *Whittaker v. Morrison*, 1 Fla. 25; 44 Am. Dec. 627; *Hunt v. Wadleigh*, 26 Me. 271; 45 Am. Dec. 108; *Givens v. Merchants' Nat. Bank*, 85 Ill. 442.

¹ *Third Nat. Bank v. Ashworth*, 105 Mass. 503; *Richter v. Selm*, 8 Serg. & R. 425; *Hughes v. Brown*, 15 Iowa, 446.

² *Chalmers's Digest*, art. 200.

³ *Chalmers's Digest*, art. 200.

⁴ *Parshley v. Heath*, 69 Me. 90; 31 Am. Rep. 246.

⁵ *Glasgow v. Pratte*, 8 Mo. 336; 40 Am. Dec. 142.

⁶ *Dunnigan v. Stevens*, 122 Ill. 396; 3 Am. St. Rep. 496. A note payable to order contained a provision purporting to be a waiver of demand and protest on the part of all the parties to the note; held, that it bound the payee, who indorsed the note to give negotiability to it: *Woodward v. Lowry*, 74 Ga. 148.

⁷ *Bellinger v. Glenn*, 80 Ala. 190; 60 Am. Rep. 98.

Freeman v. O'Brien, 38 Iowa, 407; *Givens v. Bank*, 85 Ill. 442. The indorser of a bill, knowing that no notice of dishonor has been given him, pays part of the amount. *Held*, this is a waiver of notice: *Knapp v. Runals*, 37 Wis. 135; *Newberry v. Trowbridge*, 13 Mich. 264. A, the drawer of a bill, indorses it to C, who indorses it to D. On the day of dishonor, but before the fact of dishonor could be known, A, knowing the acceptor to be insolvent, says to C, "I suppose I shall have to take up the bill. If you will call with it in a few days I will pay you." D gives no notice of dishonor either to C or A. D cannot avail himself of the promise to C, and sue A: *Pickin v. Graham*, 1 Crompt. & M. 725. A, the drawer of a bill, indorses it to C, who indorses it to D. Some time after the dishonor, A, who has received no notice, is informed by C that D, the holder, is going to sue him. A says he will pay if D will give him time. *Held*, a waiver of notice: *Woods v. Dean*, 32 L. J. Q. B. 1; *Lecann v. Kirkman*, 6 Jur., N. S., 17; *North Staff. Co. v. Wythies*, 2 Fost. & F. 563; *Killby v. Rochussen*, 18 Com. B., N. S., 357; *Sheldon v. Horton*, 43 N. Y. 93; 3 Am. Rep. 669; *Gove v. Vining*, 7 Met. 212; 39 Am. Dec. 770; *Bryant v. Wilcox*, 49 Cal. 47. Upon being reminded shortly before the maturity of the note of the approaching maturity and the absence of the makers, the indorser replied that he owed the note; that it was all right; that he had indorsed it to pay it; and that if he was not there to pay it when it became due, his agent, who was present at the conversation, would do so, the latter having notes and accounts of the indorser's in his hands. *Held*, a waiver of demand and notice: *Lary v. Young*, 13 Ark. 401; 58 Am. Dec. 333. A note was due in June, 1848, but no formal demand on the maker and no notice to the indorser was proven, but in February, 1849, the note was presented to the indorser, and he said he would try to get it out of the maker, and if he did not, he would pay it himself. *Held*, a waiver of demand and notice: *Schmidt v. Radcliffe*, 4 Strob. 296; 53 Am. Dec. 678. Action to recover of the defendant, as indorser, the amount of two promissory notes negotiated to the plaintiff for a good consideration before they became due. Each note had on the back the words, "Alfred Caverly, accountable." It appeared that there was no demand on the signers, who failed to pay the notes, and no notice to the indorsers before suit. *Held*, that defendant had waived demand and notice: *Furber v. Caverly*, 42 N. H. 74. Suit was brought on the indorsement made on a promissory note in these words: "I assign this note to C and H, and indorse the prompt payment of it." *Held*, that demand and notice were not necessary: *Tatum v. Bonner*, 27 Miss. 760. At the maturity of a note, the holder demanded payment of the indorser, but he refused, alleging that the indorsement was forged, but to save

the expense of protest, he wrote over the indorsement the words, "Protest waived." *Held*, that, in an action against him, evidence of those facts was competent: *Robinson v. Barnett*, 18 Fla. 602; 43 Am. Rep. 327. On the day of the maturity of a note the indorsers wrote on it: "We hereby waive protest on this note, and hold ourselves responsible for the payment of the same, which is hereby extended thirty days from this date." *Held*, that this waived notice of non-payment as well as protest at the expiration of the extended time, as well as at the original maturity; and therefore a bank intrusted with the collection of the note was not in fault for not presenting and protesting the same, and giving notice thereof: *Blanc v. Mutual Nat. Bank*, 28 La. Ann. 921; 26 Am. Rep. 119. Before the maturity of a promissory note, the holder and the accommodation indorser had some conversation about extending the time of payment, but no arrangement was made. The note was not presented for payment at maturity. Afterwards the holder and the maker went to the indorser to arrange for an extension. The maker then asked the holder if he desired a new note, and he replied that if it was agreed to, he would let the note stand as it was. The indorser said: "Then I will waive protest," and the holder thereupon agreed to the extension. *Held*, in an action on the note against the indorser, that a nonsuit was erroneous: *Ross v. Hurd*, 71 N. Y. 14; 27 Am. Rep. 1. A note payable on demand and indorsed in blank by the payee was received from the indorser by the indorsee with the understanding, of which the indorser was perfectly aware, that the indorser was considered liable on the note without demand and notice. *Held*, that demand and notice were waived: *Fullerton v. Rundlett*, 27 Me. 31. An indorsee of a note living in New York said at the time of the transfer to his indorser, who lived elsewhere, that he neither knew nor had confidence in the other parties to the note, and should look wholly to him. His reply, that he should be in New York when the note fell due, and would pay it, if the maker or first indorser did not, *held*, a waiver of notice: *Boyd v. Cleveland*, 4 Pick. 525. An indorser, learning from the maker that he could not pay, wrote, on the last day of grace, to the holder, stating that the maker could not pay, but that the indorser held himself responsible. *Held*, a waiver, notwithstanding several days were required for transmission of the letter, and meantime, and independent of the letter, the holder had omitted to give timely notice of demand and non-payment: *Yeager v. Farwell*, 13 Wall. 6. A, who had indorsed a note, was, previous to its maturity, shown the note and told that the maker wanted it to remain another year. He was asked if he was willing, and he said he was willing to let it remain, and that it was a good note. *Held*, a waiver of demand and notice: *Sheldon v. Horton*,

43 N. Y. 93; 3 Am. Rep. 669. At the maturity of a note the holder demanded payment of the apparent indorser, and he refused, but to save the expense of protest he wrote over the indorsement the words, "Protest waived." In an action against him he testified that, at the same time, he notified the holder that the indorsement was forged, but the evidence on that point was conflicting. *Held*, that if the holder was misled by that act to his injury, the defendant was estopped: *Robinson v. Barnett*, 19 Fla. 670; 45 Am. Rep. 24. The indorser of an unpaid overdue note arranged with the holder to furnish a steam-boiler in part payment thereof, and also promised to pay every cent of the money. *Held*, a waiver of demand and notice: *Fell v. Dial*, 14 S. C. 247. An accommodation indorser of a note wrote the cashier of the bank where it was payable, on the day it fell due, that he would waive protest. The note was then in the hands of an indorsee for value, and the bank had no interest in it. The indorsee afterwards indorsed the note to the bank for collection. In an action by the bank on the note, it not appearing that the indorsee had known of the letter, and payment not having been demanded, and notice of non-payment not having been given, *held*, that the action could not be maintained against the indorser: *Nat. Bank of Poultney v. Lewis*, 50 Vt. 622; 28 Am. Rep. 514.

ILLUSTRATIONS (CONTINUED).—WAIVER ABSENT.—The indorser of a note, who had received no notice of its non-payment upon being asked what would be done about the note, replied that "the note will be paid." *Held*, not waiver of notice, and not to render the indorser liable as upon a renewed promise: *Creamer v. Perry*, 17 Pick. 332; 27 Am. Dec. 297. The day a note payable at a bank became due, the indorser called at the bank, and proposed to pay in part, and renew it for the balance as soon as the maker returned. By mistake the note was not protested till three days after it became due. On that day the indorser called at the bank and was told the protest would be made in the afternoon. Thereupon, he said it was too late, and refused to indorse the renewed note, as he had agreed. *Held*, that he did not waive demand and notice: *Cayuga Bank v. Dill*, 5 Hill, 404. A promissory note with two indorsers was discounted at a bank which had a by-law that all indorsers should waive notice on the back of the paper. Over the first indorser's name was written, "Waiving right to notice." *Held*, not to be a waiver by the second indorser: *Central Bank v. Davis*, 19 Pick. 373.

§ 1547. What will Excuse Delay in Giving Notice.—Delay in giving notice of dishonor is excused when such

delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his negligence. But when the cause of delay ceases to operate, notice must be given with reasonable diligence.¹ When a bill has been protested for non-acceptance, and due notice given to the indorser, it is no objection that the demand of payment and protest were a day too late, as they are not essential when the liability of the party for the non-acceptance is already fixed.²

ILLUSTRATIONS.—The indorser of a bill gives a wrong address, or by his conduct misleads the holder as to his address. In consequence a notice, posted in due time, is a long while in reaching him. *Held*, that the delay is excused and the indorser is liable: *Hewitt v. Thomson*, 1 Moody & R. 543; *Berridge v. Fitzgerald*, L. R. 4 Q. B. 639. The holder of a bill does not know the indorser's address. *Held*, that the delay occupied in making inquiries is excused: *Baldwin v. Richardson*, 1 Barn. & C. 245; *Fugitt v. Nixon*, 44 Mo. 295. A malignant fever exists in the city. *Held*, that this will excuse a delay: *Tunno v. Lague*, 2 Johns. Cas. 1; 1 Am. Dec. 141. A note payable May 15th, lay in the desk of a deceased notary till June 8th, before it was discovered. *Held*, that the delay was excusable: *Duggan v. King*, 1 Rice, 240; 33 Am. Dec. 107.

§ 1548. **To whose Benefit It Inures.**—Notice of dishonor given by or on behalf of the holder inures for the benefit of,—1. All subsequent holders; and 2. All prior indorsers liable on the bill who have a right of recourse against the party to whom notice is given.³ Notice of dishonor given by or on behalf of an indorser entitled to give notice⁴ inures for the benefit of the holder and all indorsers liable on the bill who have a right of recourse against the party to whom notice is given.⁵ A notice of protest given by a holder to an indorser too late to fix his

¹ *Firth v. Thrush*, 8 Barn. & C. 387; *Gladwell v. Turner*, L. R. 5 Ex. 61; *McVeigh v. Allen*, 29 Gratt. 588.

² *Miller v. Hackley*, 5 Johns. 375; 4 Am. Dec. 372.

³ *Bytes on Bills*, 285; *Stafford v. Yates*, 18 Johns. 327; *Williams v. Matthews*, 3 Cow. 252.

⁴ *Benjamin's Chalmers's Digest*, art. 192; *Abat v. Rion*, 9 Mart. 465; 13 Am. Dec. 313.

⁵ *Chapman v. Keane*, 3 Ad. & E. 193; *Lysaght v. Bryant*, 19 L. J. Com. P. 160; *Streever v. Fort Bank*, 34 N. Y. 413.

liability to the holder will not inure to the benefit of a subsequent indorser, although it would have been in time if given by him.¹

§ 1549. **Usages as to Demand and Notice.** — The usages of banks as to demand and notice govern,² and make valid acts otherwise invalid; as, a notice by mail where the party lives in the same town,³ and where, in the absence of such a usage, the notice would be insufficient;⁴ or a notice on a day earlier or later than the legal day;⁵ or a demand of payment on the fourth instead of the third day after due;⁶ or on the day previous to what is not a legal holiday;⁷ or an incorrect description in the notice;⁸ or a demand on the maker without presenting the note to him;⁹ or at the bank where negotiated, and not on the indorser personally;¹⁰ or a notice intended for a director, but left at the bank upon the cashier's desk.¹¹ And the

¹ *Simpson v. Turney*, 5 Humph. 419, 42 Am. Dec. 443.

² *Lawson on Usages and Customs*, 206; *Hartford Bank v. Stedman*, 3 Conn. 489; *Bowen v. Newell*, 5 Sand. 326; *Lewis v. Planters' Bank*, 3 How. (Miss.) 267; *Planters' Bank v. Markham*, 5 How. (Miss.) 397; 37 Am. Dec. 162; *Commercial etc. Bank v. Hamer*, 7 How. (Miss.) 448; 40 Am. Dec. 80; *Warren Bank v. Parker*, 8 Gray, 221; *Halls v. Howell*, Harp. 427; *Boston Bank v. Hodges*, 9 Pick. 420; *Godden v. Shipley*, 7 B. Mon. 579; *Widgery v. Munroe*, 6 Mass. 449; *Lincoln etc. Bank v. Page*, 9 Mass. 155; 6 Am. Dec. 52; *Bridgeport Bank v. Dyer*, 19 Conn. 136; *Cohea v. Hunt*, 2 Smedes & M. 227; 41 Am. Dec. 589; *Kilgore v. Bulkley*, 14 Conn. 367; *Haywood v. Pickering*, L. R. 9 Q. B. 428; *Isham v. Fox*, 7 Ohio St. 317; *Trask v. Martin*, 1 E. D. Smith, 505. But see *Bank of Alexandria v. Deneale*, 2 Cranch, 488; *Jackson v. Union Bank*, 6 Har. & J. 416.

³ *Chicopee Bank v. Eager*, 9 Met. 584; *Gindrat v. Mechanics' Bank*, 7 Ala. 325; *Grinnan v. Walker*, 9 Iowa, 426; *Bell v. Hagerstown Bank*, 7 Gill, 227.

⁴ *Forbes v. Omaha National Bank*, 42 Barb. 517,

11 Cent. L. J. 209; *Ireland v. Kip*, 10 Johns. 490; 11 Johns. 231; *Sheldon v. Benham*, 4 Hill, 129; 40 Am. Dec. 271; *Ransom v. Mack*, 2 Hill, 587; 38 Am. Dec. 602; *Shelburne Falls National Bank v. Townsley*, 102 Mass. 177; 3 Am. Rep. 445; *State Bank v. Rowell*, 6 Martin, N. S., 267.

⁵ *Blanchard v. Hilliard*, 11 Mass. 85; *Jones v. Fales*, 4 Mass. 245; *Pierce v. Butler*, 14 Mass. 303; *Wood v. Corl*, 4 Met. 205; *Taunton Bank v. Richardson*, 5 Pick. 436.

⁶ *Bank of Columbia v. Magruder*, 6 Har. & J. 172; *Bank of Columbia v. Fitzhugh*, 1 Har. & G. 239; *Patriotic Bank v. Farmers' Bank*, 2 Cranch, 560; *Bank of Washington v. Triplett*, 1 Pet. 25; *Mills v. Bank of the United States*, 11 Wheat. 431; *Raborg v. Bank of Columbia*, 1 Har. & G. 231.

⁷ *City Bank v. Cutter*, 3 Pick. 414.

⁸ *Smith v. Whiting*, 12 Mass. 6; 7 Am. Dec. 25.

⁹ *Whitwell v. Johnson*, 17 Mass. 449; 9 Am. Dec. 165.

¹⁰ *Brent v. Bank of the Metropolis*, 1 Pet. 89.

¹¹ *Weld v. Gorham*, 10 Mass. 366. And see *Hotchkiss v. Artisans' Bank*, 42 Barb. 517,

usage of depositors in certain banks to deposit checks on the same or the next day after the day on which they were received, and of the bank immediately to return any checks from the clearing-house which the bank has not funds to cover, is recognized.¹ A usage of bankers to regard drafts of a certain form payable *in futuro* as checks, and not entitled to days of grace, is not admissible to change their legal effect.²

¹ *Marrett v. Brackett*, 60 Me. 524. 64 Am. Dec. 632; *Woodruff v. Merchants' Bank*, 25 Wend. 673; *Lawson on Usages and Customs*, 208. And see *Overman v. Hoboken City Bank*, 30 N. J. L., 61.

² *Morrison v. Bailey*, 5 Ohio St. 13;

CHAPTER LXXXI.

TRANSFER AND INDORSEMENT OF NEGOTIABLE PAPER, AND
TITLE THERETO.

- § 1550. Transfer of — By assignment or sale.
- § 1551. Payable to order, without indorsement.
- § 1552. Transfer by delivery — Effect of.
- § 1553. What transferrer warrants.
- § 1554. Transfer by death — In general.
- § 1555. Transfer by negotiation — In general.
- § 1556. Who may negotiate.
- § 1557. Payee designated by wrong or misspelled name
- § 1558. Several payees or indorsers.
- § 1559. To whom may instrument be negotiated.
- § 1560. Time of negotiation.
- § 1561. Negotiation by delivery.
- § 1562. Negotiation by indorsement — In general.
- § 1563. Requisites of indorsement — As to form.
- § 1564. Indorsements in blank or general indorsements.
- § 1565. Special indorsements.
- § 1566. Striking out indorsements.
- § 1567. Partial indorsements.
- § 1568. Qualified indorsements — “Without recourse.”
- § 1569. Facultative indorsements.
- § 1570. Conditional indorsements.
- § 1571. Restrictive indorsements.
- § 1572. Indorsers — Who are — Liability in general.
- § 1573. What indorser warrants and admits.
- § 1574. Indorser of non-negotiable bill or note.
- § 1575. Liability of indorser not a party to instrument — Guarantors.
- § 1576. Liability of drawer and indorser on dishonor — Measure of damages.
- § 1577. Re-exchange and redraft.
- § 1578. Rights of de facto holder to give good title.
- § 1579. “Bona fide holder” — Negligence.
- § 1580. “For value.”
- § 1581. Note received for pre-existing debt.
- § 1582. “Before maturity.”
- § 1583. Overdue instrument subject to equities.
- § 1584. What are “equities.”
- § 1585. At what time is instrument overdue.
- § 1586. “In the usual course of business.”
- § 1587. “Without notice of any defense.”
- § 1588. Holder claiming under bona fide holder.
- § 1589. Holder presumed to be bona fide and for value.

- § 1590. Exceptions.
- § 1591. Absence of consideration.
- § 1592. Consideration in general.
- § 1593. Accommodation party — Liabilities of.
- § 1594. Rights of.
- § 1595. Partial failure of consideration.
- § 1596. Total failure of consideration.
- § 1597. Illegal consideration.
- § 1598. Forged signatures.
- § 1599. Fraud or duress.
- § 1600. Instrument or consideration void by statute.
- § 1601. Defects patent on face of instrument.
- § 1602. Fictitious payee or indorser.
- § 1603. Rights of de facto holder to bring action.
- § 1604. Defenses.

§ 1550. Transfer of Bills and Notes—By Assignment or Sale.—A bill may be transferred by assignment or sale, subject to the same conditions that would be requisite in the case of an ordinary chose in action; as, for example, by a separate assignment in writing,¹ by a voluntary deed declaring a trust,² or by a contract of sale.³ There is an implied warranty on the part of a seller of a promissory note that there is no legal defense to an action upon it, but there is no warranty that the maker is solvent.⁴ Part of a note cannot be transferred so as to give a right to sue for such part. The cause of action is entire, and cannot be severed. But where a party has not a right to a note, yet has an interest in it, a court of chancery will make such order as will protect his interest.⁵ The assignee of a note takes it subject to all available defenses existing at the time of the assignment, but discounts arising out of other transactions after notice of the assignment, or any defense at law or equity arising after such notice, and not going to affect the considera-

¹ In re Barrington, 2 Schoales & L. 112; Franklin v. Twogood, 18 Iowa, 515; French v. Turner, 15 Ind. 59.

² Richardson v. Richardson, L. R. 3 Eq. 686; Burrows v. Keays, 37 Mich. 431.

³ Sheldon v. Parker, 3 Hun, 498.

⁴ Hecht v. Batcheller, 147 Mass. 335; 9 Am. St. Rep. 708; Fake v. Smith, 7 Abb. Pr., N. S., 106.

⁵ Scott v. Searles, 7 Smedes & M. 498; 45 Am. Dec. 317.

tion, cannot be set up against the assignee.¹ An indorser by accepting an assignment of all the maker's property before the note is due waives legal diligence by the holder, and by receiving security against a particular indorsement he waives diligence as to that indorsement.² The assignee is not bound to give the maker notice of the assignment.³

Where a statute makes certain kinds of notes assignable, but not negotiable, and declares that the assignor shall not be liable until due diligence has been made by the holder to obtain the money from the maker, it is held that the holder must bring suit when that course will obtain the money.⁴ If by due diligence in prosecuting the maker the money cannot be made, the assignor is liable.⁵ The obligation of diligence in prosecuting the suit extends to every stage of it; e. g., to the time of bringing it;⁶ to the selection of the proper tribunal;⁷ to the issuing of execution and making levy.⁸ The bringing of suit is dispensed with, however, where it would be unavailing; as where the maker is insolvent,⁹ or has absconded from the state.¹⁰

§ 1551. Transfer of Bill Payable to Order without Indorsement.—The holder of a bill or note payable to order transferring it for value without indorsing it makes an

¹ *Bowman v. Halstead*, 2 A. K. Marsh. 200; 12 Am. Dec. 380.

² *Prentiss v. Danielson*, 5 Conn. 175; 13 Am. Dec. 52.

³ *Mobley v. Ryan*, 14 Ill. 51; 56 Am. Dec. 488.

⁴ *Mason v. Wash*, Breese, 39; 12 Am. Dec. 138; *Croskey v. Skinner*, 44 Ill. 321; and see *Clark v. Barr*, 2 A. K. Marsh. 255; 12 Am. Dec. 391.

⁵ *Thompson v. Armstrong*, Breese, 48; *Tarlton v. Miller*, Breese, 68.

⁶ It must be commenced, if possible, at the first term after the note falls due: *Lusk v. Cook*, Breese, 84; *Chalmers v. Moore*, 22 Ill. 359.

⁷ *Allison v. Smith*, 20 Ill. 104.

⁸ *Bestor v. Walker*, 4 Gilm. 3; *Nixon v. Weyrich*, 20 Ill. 600; *Hamlin v. Reynolds*, 22 Ill. 207.

⁹ *Humphreys v. Collier*, 1 Scam. 47; *Bledsoe v. Graves*, 4 Scam. 385; *Aldrich v. Goodell*, 75 Ill. 452; *Crouch v. Hall*, 15 Ill. 263; *Kelly v. Graves*, 74 Ill. 423; *Wickersham v. Altom*, 77 Ill. 620. But not where he is merely heavily in debt: *Roberts v. Haskell*, 20 Ill. 59.

¹⁰ *Crouch v. Hall*, 15 Ill. 263; *Hilborn v. Artus*, 3 Scam. 346; *Tarlton v. Miller*, Breese, 68; *Schuttler v. Piatt*, 12 Ill. 419.

equitable assignment of it.¹ The transferee may compel an indorsement.² So in equity a good title to a negotiable instrument may be transferred by delivery, if indorsement, though intended, is omitted by mistake.³ An executor may, without indorsement, make a valid transfer of a promissory note to a distributee of the estate.⁴ When an indorsement is subsequently obtained, the transfer takes effect as a negotiation from the time when the indorsement is given, unless it was omitted at the time of transfer, through fraud, accident, or mistake.⁵

ILLUSTRATIONS.—C, the holder of a bill payable to order, transfers it to D for value, without indorsing it. D cannot sue the acceptor in his own name, or negotiate the bill by indorsing it to E: *Cunliffe v. Whitehead*, 3 Bing. N. C. 830; *Robinson v. Wilkinson*, 38 Mich. 299; *Hull v. Conover*, 35 Ind. 372. A draws a bill on B payable to his own order. B accepts. A discounts the bill with C, but by mistake or fraud omits to indorse it. C indorses the bill in blank in A's name, and sues B. C cannot recover; he had no right to indorse the bill: *Hughes v. Nelson*, 29 N. J. Eq. 549. C, the holder of a bill payable to order, transfers it to D without indorsing it. If C becomes bankrupt, the court will compel his trustee in bankruptcy to indorse the bill: *Ex parte Mowbray*, 1 Jacob & W. 428; *Ex parte Rhodes*, 3 Mont. & A. 217. If C dies, the court will compel his executor or administrator to indorse: *Watkins v. Maule*, 2 Jacob & W. 237; *Hersey v. Elliot*, 67 Me. 526; 24 Am. Rep. 50. C, the holder of a bill for twelve thousand pounds payable to his order, deposits it with D as security for a debt for three thousand pounds. C becomes bankrupt. The court will order C's trustee to indorse the bill to D upon terms: *Ex parte Price*, 3 Mont. D. & D. 586.

§ 1552. **Transfer by Delivery—Effect of.**—The holder of a bill or note payable in the first instance, or made payable to bearer, who negotiates it by delivery without indorsement, is called a transferrer by delivery. He incurs

¹ *Carpenter v. Tucker*, 98 N. C. 316; *Whistler v. Forster*, 14 Com. B., N. S., 258; *Matteson v. Morris*, 40 Mich. 55; *Hadden v. Rodkey*, 17 Kan. 429; *Freund v. Bank*, 76 N. Y. 352.

² *Harrop v. Fisher*, 10 Com. B., N. S., 203.

³ *Hughes v. Nelson*, 29 N. J. Eq. 547; *Howe v. Ould*, 28 Gratt. 1.

⁴ *Balmer v. Sunder*, 11 Mo. App. 454.

⁵ *Benjamin's Chalmers's Digest*, art. 104; *Southard v. Porter*, 43 N. H. 380; *Hughes v. Nelson*, 29 N. J. Eq. 549.

no liability on the instrument;¹ nor if the bill or note is dishonored is he liable on the consideration in respect of which he transferred the bill.² But to this rule there are exceptions, viz., where the bill or note was given for an antecedent debt,³ and where it appears that the transfer was not intended to operate in full and complete discharge of such liability.⁴ But the transferee, in order to avail himself of the above exceptions, must use reasonable diligence in endeavoring to obtain payment, and in giving notice of dishonor or repudiating the transaction.⁵

ILLUSTRATIONS. — D., the holder of a bill for one hundred dollars, which has been indorsed in blank, discounts it with a banker for ninety dollars, without indorsing it. The bill is dishonored. D. is not liable to refund the ninety dollars: *Bank of England v. Newman*, 1 Ld. Raym. 442. D. changes a banker's note or cashes a check payable to bearer for the convenience of the holder. If the bank has stopped payment, or the check is dishonored, D. can recover the money: *Turner v. Stones*, 1 Dowl. & L. 122.

§ 1553. **Transfer by Delivery — What Transferrer Warrants.** — A transferrer by delivery warrants to his immediate transferee that the bill is what it purports to be;⁶ that he (the transferrer) is not aware of any fact that renders the instrument valueless.⁷ He warrants his title to

¹ *Ex parte Roberts*, 2 Cox, 171; *Fenn v. Harrison*, 3 Term Rep. 757; *Roberts v. Haskell*, 20 Ill. 63; *Crenshaw v. Jackson*, 6 Ga. 509; 50 Am. Dec. 361; *Baxter v. Duren*, 29 Me. 434; 50 Am. Dec. 602.

² *Read v. Hutchinson*, 3 Camp. 352; *Van Wart v. Woolley*, 3 Barn. & C. 445; *Evans v. Whyte*, 5 Bing. 485; *Noel v. Murray*, 1 Duer, 385; *Youngs v. Stahelin*, 34 N. Y. 258.

³ *Ward v. Evans*, 2 Ld. Raym. 930; *Gibson v. Toby*, 53 Barb. 191; *Camidge v. Allenby*, 6 Barn. & C. 382; *Noel v. Murray*, 13 N. Y. 167; *Downey v. Hicks*, 14 How. 249; *Devlin v. Chamblin*, 6 Minn. 468; *Bicknall v. Waterman*, 5 R. I. 48; *Guardians of Lichfield v. Greene*, 26 L. J. Ex. 142; *Bayard v. Shunk*, 1 Watts & S. 92; 37 Am. Dec. 441.

⁴ *Van Wart v. Woolley*, 3 Barn. & C. 446; *Munroe v. Hoff*, 5 Denio, 360; *Breed v. Cook*, 15 Johns. 24.

⁵ *Rogers v. Langford*, 1 Crompt. & M. 642; *Moule v. Brown*, 4 Bing. N. C. 266; *Robson v. Oliver*, 10 Q. B. 704; *Gibson v. Toby*, 53 Barb. 191. But see *Kephart v. Butcher*, 17 Iowa, 240.

⁶ *Gompertz v. Bartlett*, 23 L. J. Ex. 65; *Challis v. McCrum*, 22 Kan. 157; 31 Am. Rep. 181; *Ledwich v. McKim*, 53 N. Y. 307; *Bell v. Dagg*, 60 N. Y. 528; *Giffert v. West*, 37 Wis. 115; *Bell v. Cafferty*, 21 Ind. 411.

⁷ *Fenn v. Harrison*, 3 Term Rep. 769; *Camidge v. Allenby*, 6 Barn. & C. 382; *Lobdell v. Baker*, 3 Met. 469; *Bridge v. Batchelder*, 9 Allen, 394; *Delaware Bank v. Jarvis*, 20 N. Y. 228. *Contra*, *Littauer v. Goldman*, 72 N. Y. 506; 28 Am. Rep. 171.

the bill or note,¹ and that it is genuine, and not fictitious, forged, or altered,² and that the indorsements are genuine.³ It is held in some cases that there is no implied warranty of genuineness if the bill is *bona fide* sold, and not given in payment of a debt.⁴ And it is clear "that the contract of sale may be made in such form as to exclude the warranty of genuineness which would be implied by law in the case of a contract silent upon that subject."⁵

And so the transferrer of a note warrants the solvency of the maker at the time of the transfer.⁶ And if the instrument has been paid or is invalid in the hands of the purchaser, the implied warranty is broken.⁷ If the parties whose names appear upon the paper are in law incapable of contracting, on account of some disability,

¹ Story on Notes, sec. 118.

² Lyons v. Miller, 6 Gratt. 427; 52 Am. Dec. 129; and see note to Baxter v. Duren, 50 Am. Dec. 606; Persons v. Jones, 12 Ga. 371; 58 Am. Dec. 476; Bell v. Dagg, 60 N. Y. 530; Whitney v. National Bank, 45 N. Y. 305; Ross v. Terry, 63 N. Y. 613; Swanzy v. Parker, 50 Pa. St. 441; 88 Am. Dec. 549; Bigelow on Estoppel, 446; Story on Promissory Notes, sec. 118; Snyder v. Reno, 36 Iowa, 329; Byles on Bills (Sharswood's ed.), 278; Bell v. Cafferty, 21 Ind. 411; Cabot Bank v. Morton, 4 Gray, 158; Barton v. Trent, 3 Head, 167, the court saying: "It is certainly true that a party who transfers a note to another by mere delivery, without indorsement, is not liable in the absence of fraud or special undertaking, though the note turns out to be of no value, by reason of the insolvency of the maker. But although he does not in general warrant the solvency of the maker of the note, yet it is well settled that he does warrant that the note is not forged or fictitious." Aldrich v. Jackson, 5 R. I. 218, the court saying: "If the signatures, or either of them, be forged, what he sells is not what upon its face it purports to be, and what therefore he affirms and thus warrants it to be, and he is liable to the vendee for what he has received from him, on the ground of failure of consideration."

³ Williams v. Savings Inst., 57 Miss. 633; Giffert v. West, 37 Wis. 115.

⁴ Hussey v. Sibley, 66 Me. 192; 22 Am. Rep. 557; Fisher v. Rieman, 12 Md. 497. The defendant, without indorsing it, left a note with a broker for the purposes of discount or sale, saying "that the note was such paper as he would sell goods for," and there were two indorsements upon it, which both he and the broker supposed to be genuine, but which proved to be forgeries, and the broker sold the note. Held, that the defendant was not liable upon either an express or implied warranty that the signatures of the indorsers were genuine: Baxter v. Duren, 29 Me. 434; 50 Am. Dec. 602.

⁵ Bell v. Dagg, 60 N. Y. 530; Ross v. Terry, 63 N. Y. 615.

⁶ Ontario Bank v. Lightbody, 13 Wend. 101; 27 Am. Dec. 179; Roberts v. Fisher, 43 N. Y. 159; 3 Am. Rep. 680; Townsends v. Bank, 7 Wis. 185; Magee v. Carnack, 13 Ill. 209; Westfall v. Braley, 10 Ohio St. 188; 5 Am. Dec. 509. *Contra*, Bayard v. Shunk, 1 Watts & S. 92; 37 Am. Dec. 441; Bicknell v. Waterman, 5 R. I. 43; Lyons v. Miller, 6 Gratt. 427; 52 Am. Dec. 129; Milliken v. Chapman, 75 Me. 306; 46 Am. Rep. 386.

⁷ Hurd v. Hall, 12 Wis. 112; Fake v. Smith, 7 Abb. Fr., N. S., 106.

as infancy, coverture, lunacy, etc., the vendee may recover back the amount paid.¹ If at the time he made the assignment he knew that a valid defense against it existed, or that the parties to it were insolvent, the concealment of such knowledge is a fraud upon the transferee, and he can recover.² If with this knowledge he represents the paper to be good, the fraud is greater, and the transferee can recover.³ But the transferee, when he discovers the defect, must not be guilty of laches and must repudiate the transaction with reasonable diligence.⁴ In all cases, upon failure of the transferee to make the money by reason of some legal defense existing at the time of the assignment, the assignee is not only entitled to recover the amount paid for the note, with its interest, but all the costs and expenses incurred in the prosecution of the action to enforce its collection.⁵ On the transfer of a bill by the indorsee there is no implied warranty or representation that it is drawn against funds, or is not accommodation paper; and the indorsee's mere neglect to communicate the fact, known to him, that it is not drawn against funds, and is for accommodation, is not fraudulent.⁶

ILLUSTRATIONS. — C discounts with D a bill payable to bearer without indorsing it. It turns out that, unknown to C, the amount of the bill had been fraudulently altered by a previous holder. D can recover from C the money he paid: *Jones v. Ryde*, 5 Taunt. 488. D, the *bona fide* holder of a bill purporting to be drawn by A, accepted by B, and indorsed in blank by C, discounts it with a banker. It turns out that the signatures of A and B were forgeries, and that C, whose indorsement was genuine, is insolvent. The banker can recover the money he paid from D: *Gurney v. Womersley*, 24 L. J. Q. B. 46; *Merriam v. Wolcott*, 3 Allen, 258; 80 Am. Dec. 69. D, the

¹ *Baldwin v. Van Deusen*, 37 N. Y. 487; *Lobdell v. Baker*, 3 Met. 472; *Hussey v. Sibley*, 66 Me. 192; 22 Am. Rep. 557.

² Story on Bills, 225.

³ *Kennedy v. O'Connor*, 35 Ga. 199; *Bridge v. Batchelder*, 9 Allen, 394.

⁴ *Pooley v. Browne*, 31 L. J. Q. B. 134; *Magee v. Carmack*, 13 Ill. 289; *Frontier Bank v. Morse*, 22 Me. 88; 38 Am. Dec. 284.

⁵ *Hurst v. Chambers*, 12 Bush, 155.

⁶ *People's Bank v. Bogart*, 81 N. Y. 101; 37 Am. Rep. 481.

holder of a note payable to bearer, discounts it with E. The maker defeats the suit of E, on the ground that the note was usurious and void by statute. E cannot recover the money he paid from D, unless the latter knew of the usury when he transferred the note: *Littauer v. Goldman*, 72 N. Y. 506.

§ 1554. **By Death — In General.** — On the death of the holder of a bill or note, the title to it passes to his personal representatives, who may transfer it or sue upon it.¹ The personal representative cannot give title by mere delivery. He must indorse it *de novo*. When there are two or more executors, the indorsement of one is probably sufficient to transfer the property in the bill.² In case of the death of a joint payee, the title vests at once in the survivor.³

§ 1555. **By Negotiation.** — But the most common way in which a bill or note is transferred is by negotiation, i. e., the transfer of it in the form and manner prescribed by the law merchant, with the incidents and privileges annexed thereby, which are, that the transferee can sue all parties to the instrument in his own name; that the consideration for the transfer is *prima facie* presumed; that the transferrer can under certain conditions give a good title, although he has none himself; that the transferee can further negotiate the bill with the like privileges and incidents.⁴ The negotiability of a note is not destroyed by an injunction against its negotiation.⁵

§ 1556. **Who may Negotiate.** — A bill or note must be negotiated by the *de facto* holder of it, i. e., by the person in possession of it, and to whom it is in terms payable,

¹ *Clark v. Sigourney*, 17 Conn. 511; *Mitchell v. Dickson*, 53 Ind. 110; *Makepeace v. Moore*, 5 Gilm. 474; *Hersey v. Elliott*, 67 Me. 526; 24 Am. Rep. 50.

² *Wheeler v. Wheeler*, 9 Cow. 34; *Dwight v. Newell*, 15 Ill. 333.

³ *Russell v. Swan*, 16 Mass. 316.

⁴ *Benjamin's Chalmers's Digest*, art. 106; *Merrill v. Merrill*, 3 Me. 463; 14 Am. Dec. 247. A note, as long as it remains the property of the maker, is not vendible: *Campbell v. Nichols*, 33 N. J. L. 81.

⁵ *Winston v. Westfeldt*, 22 Ala. 760; 58 Am. Dec. 278.

whether his possession is lawful or not.¹ The *de facto* holder of a bill or note payable to bearer is the person in possession of it.² The *de facto* holder of a bill or note payable to order is the person in possession of it, and to whose order it is payable.³

§ 1557. Payee Designated by Wrong Name or Name Misspelled.—If the person to whose order a bill is meant to be payable is wrongly designated, or if his name is misspelled, he may negotiate the bill by indorsing it as described.⁴

§ 1558. Several Payees or Indorsers.—Where the instrument is payable to the order of two or more persons not partners, all must indorse it,⁵ unless one have authority to indorse for all.⁶ A note payable to the order of “myself,” signed by two, and placed by one in the hands of the other to be negotiated for his own benefit, may be transferred by indorsement by that other alone. Parol

¹ *Bolles v. Stearns*, 11 Cush. 320. Mr. Chalmers says (Digest, art. 125, note): “The term ‘holder’ is used in the cases in different senses. It is generally used to denote the ‘lawful holder.’ It then includes,—1. The person to whom a bill is in terms payable, and whose title is good against all the world; 2. The person to whom a bill is in terms payable, and who as against third parties is entitled to enforce payment, though as between himself and his transferrer he is a mere agent or bailee with a defeasible title (e. g., an indorsee for collection). But ‘holder’ is also used to denote an unlawful holder, that is, the person to whom a bill is in terms payable, whose possession is unlawful, but who nevertheless can give,—1. A valid discharge to a person who pays it in good faith; and 2. A good title to a person who takes it before maturity in good faith and for value. An unlawful holder must be distinguished from the mere wrongful possessor, e. g., a person holding under a forged indorsement, or a person who has stolen a bill

payable to order, who has no rights and can give none. When, then, a proposition is laid down which applies equally to lawful and unlawful holders, the term ‘*de facto* holder’ is used to include both.”

² For example: C, the payee of a bill, indorses it in blank and transmits it to D for some special purpose (e. g., discount or collection). As long as D retains possession, D, and not C, is the *de facto* holder, and he alone can negotiate it: *Maston v. Allen*, 8 Mees. & W. 504. C is the holder of a note payable to bearer. C loses it and D finds it. D, and not C, is the *de facto* holder, and he alone can negotiate it.

³ *Benjamin’s Chalmers’s Digest*, art. 127.

⁴ *Williamson v. Johnson*, 1 Barn. & C. 149; *Schultz v. Astley*, 2 Bing. N. C. 553; *Chenot v. Lefevre*, 3 Gilm. 637.

⁵ *Ryhiner v. Feickert*, 92 Ill. 305; *Lane v. Stacy*, 8 Allen, 42; *Smith v. Whiting*, 9 Mass. 334.

⁶ *Carvick v. Vickery*, 2 Doug. 653; *Lowell v. Reding*, 9 Me. 85; 23 Am. Dec. 545.

evidence is competent to show the circumstances, and it makes no difference that the maker not indorsing was surety, and that the transferee knew that fact.¹

§ 1559. To Whom Instrument may be Negotiated.—

A bill may be negotiated to any party thereto, i. e., drawer, drawee, acceptor, or prior indorser, and such party may reissue and further negotiate it.² When a bill is negotiated back to a party already liable thereon, he cannot sue the intermediate parties.³

ILLUSTRATIONS.—C is the holder of a bill accepted by B, payable three months after date. C can indorse the bill to B, the acceptor, and B at any time before maturity may reissue and indorse it to D: *Attenborough v. Mackenzie*, 25 L. J. Ex. 244; *Witte v. Williams*, 8 S. C. 290. A, the drawer of a bill payable to his own order, indorses it to C. C indorses it to D, who indorses it back to A. A can reissue the bill and indorse it to E: *Hubbard v. Jackson*, 4 Bing. 390; *Jones v. Broadhurst*, 9 Com. B. 173. C, the holder of a bill, indorses it to D. D indorses it to E, who indorses it back to C. C cannot sue D or E, for they in turn could sue him as a prior indorser: *Bishop v. Hayward*, 4 Term Rep. 470; *Moore v. Cross*, 19 N. Y. 228; 75 Am. Dec. 326; *Palmer v. Whitney*, 21 Ind. 58; but D and E have not been discharged; for if C reindorse to F, they are liable to him as indorsers: *West Boston Bank v. Thompson*, 124 Mass. 515. C, the holder of a bill, indorses it “without recourse” to D, who indorses it to E. E indorses it back to C. C can sue D and E; for they have no claim against him as a prior indorser: *Morris v. Walker*, 15 Q. B. 594; *Calhoun v. Albin*, 48 Mo. 306. B, for the accommodation of C, makes a note in his favor. C indorses it to D, who discounts it with B, the maker. B can sue C: *Morris v. Walker*, 15 Q. B. 594; *Calhoun v. Albin*, 48 Mo. 306.

§ 1560. Time of Negotiation—Presumption.—A bill or note may be negotiated at any time until it is discharged.⁴ That a bill or note has been dishonored and an action brought on it does not restrain its negotiabil-

¹ *First National Bank v. Fowler*, 36 Ohio St. 524; 38 Am. Rep. 610.

² *Pinney v. McGregory*, 102 Mass. 186.

³ *Wilders v. Stevens*, 15 Mees. & W. 208.

⁴ *Callow v. Lawrence*, 3 Maule & S. 97; *French v. Jarvis*, 29 Conn. 348.

ity.¹ A bill or note is presumed to have been negotiated at its inception,² or before maturity.³ But there is no presumption as to the exact time of negotiation.⁴

§ 1561. **Negotiation by Delivery.**—Negotiation may be by delivery where the instrument is payable to bearer.⁵ A bill or note is payable to bearer where it is expressly so payable, or where it is indorsed in blank.⁶ The delivery of unindorsed notes passes an equitable title.⁷ The rule that a *bona fide* holder of negotiable paper is not affected by prior equities between the maker and payee does not apply when the holder receives it from the original payee by assignment or sale without indorsement, and he gets no better title than the payee, and the maker is not estopped from maintaining any defenses that would have been good against the original payee. A mere assignment of negotiable paper without indorsement confers upon the holder the same rights only as he would derive upon an assignment of a bill or note not negotiable. If, in such case, the beneficial interest be assigned, but there is no indorsement upon the paper, suit would have to be brought in the name of the payee.⁸ Possession of an unindorsed note payable to a particular person by another than the payee is presumptive evidence of ownership, and he may recover, although a statute requires every action to be prosecuted in the name of the real party in interest.⁹

¹ Woodward v. Pell, L. R. 4 Q. B. 55; Curtis v. Bemis, 26 Conn. 1; 68 Am. Dec. 377.

² Good v. Martin, 95 U. S. 94; Noxon v. De Wolf, 10 Gray, 343; Clarke v. Johnson, 54 Ill. 296; Hayward v. Munger, 14 Iowa, 516.

³ Lewis v. Parker, 4 Ad. & E. 838; Ranger v. Cary, 1 Met. 373; McDowell v. Goldsmith, 6 Md. 320; Hutchins v. Flintge, 2 Tex. 473; 47 Am. Dec. 659; Richards v. Belzer, 53 Ill. 466.

⁴ Anderson v. Weston, 6 Bing. N. C.

296. See Hutchins v. Flintge, 2 Tex. 473; 47 Am. Dec. 659.

⁵ Tillman v. Adles, 5 Smedes & M. 373; 33 Am. Dec. 520.

⁶ Benjamin's Chalmers's Digest, art. 107.

⁷ Carpenter v. Tucker, 98 N. C. 316.

⁸ Spinning v. Sullivan, 48 Mich. 6; Andrews v. McCoy, 8 Ala. 920; 42 Am. Dec. 669; Gookin v. Richardson, 11 Ala. 889; Weber v. Orten, 91 Mo. 677.

⁹ Jackson v. Love, 82 N. C. 405; 33 Am. Rep. 685.

§ 1562. Negotiation by Indorsement — In General. —

A bill or note is also negotiable by indorsement, as where it is payable to order.¹ "Indorsement" means a writing on a bill signed by the holder ordering the amount to be paid to a person therein designated, or to his order or to bearer,² and must be completed by delivery.³ The holder who indorses a bill is called an "indorser." Any person who makes title to a bill through an indorsement is called an "indorsee."⁴ The effect of several successive indorsements is that each indorser has a right to look for indemnity to all the indorsers who precede him.⁵ The indorsement of a promissory note after it is due is equivalent to drawing a new one payable at sight.⁶ On such a note the indorser is liable only upon proof of a demand upon the maker and notice of his failure to pay.⁷ An indorsement of a bill or note after it has been protested for non-payment is to be construed according to the intention of the party making it, and if it is clear that he intended by the act to bind himself as a regular indorser whose liability is fixed, he may be sued, and a recovery had against him as such.⁸ When an instrument is in its origin negotiable, the absence in an indorsement of words implying power to transfer it does not render it subsequently non-negotiable.⁹ An indorsement void for usury is valid to pass the title of a note to the indorsee, and enable him to collect the note of the maker.¹⁰

¹ *Gibson v. Minet*, 1 H. Black. 606.

² *Benjamin's Chalmers's Digest*, art. 111.

³ *Lloyd v. Howard*, 15 Q. B. 995; *May v. Cassidy*, 7 Ark. 376; 46 Am. Dec. 292; *Bizzell v. Bank of the State*, 8 Ark. 459; *Clark v. Sigourney*, 17 Conn. 511; *Dann v. Norris*, 24 Conn. 333.

⁴ *Benjamin's Chalmers's Digest*, art. 111.

⁵ *Bank of U. S. v. Beirne*, 1 Gratt. 234; 42 Am. Dec. 551.

⁶ *Bishop v. Dexter*, 2 Conn. 419; *Bank v. Barriere*, 1 Yeates, 360; *Mudd v. Harper*, 1 Md. 110; *Devore v. Mundy*, 4 Strob. 15.

⁷ *Patterson v. Todd*, 18 Pa. St. 426; 57 Am. Dec. 623.

⁸ *Hullum v. State Bank*, 18 Ala. 805.

⁹ *Edie v. East India Co.*, 2 Burr. 1216; *Leavitt v. Putnam*, 3 N. Y. 494; 53 Am. Dec. 322.

¹⁰ *Armstrong v. Gibson*, 31 Wis. 61; 11 Am. Rep. 599.

§ 1563. Requisites of Indorsement — As to Form. —

The indorsement must be by the signature of the indorser, and while the signature alone is sufficient, any words may be added which show an intention to indorse.¹ Thus C, the holder of a bill, signs it, and writes thereon, "I hereby assign this draft and all benefit of the money secured thereby to D," this is an indorsement by C;² or C, the holder of a note, signs it, and writes thereon, "I hereby assign all my right and title to the within note to D," this is an indorsement, and C is liable as indorser;³ but C, the holder of a note, signs it, and writes thereon, "I bequeath — Pay the within to D, or his order, at my death," and gives it to D, this is not an indorsement, but an attempted testamentary gift;⁴ or C, the holder of a note, signs it, and writes thereon, "I hereby guarantee the payment of this note," and delivers it to D, this is not an indorsement, but a guaranty.⁵ An indorsement signed by the payee, "I this day sold and delivered to A the within note," renders the payee liable as an ordinary indorser.⁶ So where the payee indorsed on it an order to pay its contents to "A B, at his own risk," this was held a sufficient indorsement.⁷ An indorsement in the words, "I transfer the within note to [the plaintiff], or order, payable on demand," and signed by the defendant, renders the defendant liable as indorser.⁸ Where a negotiable note and a mortgage securing it, given to a railroad company, were attached to its negotiable bond, and the bond recited that they were transferred as security for and should be transferable only in connection with the bond, this was held to be an

¹ *Pinkney v. Hall*, 1 Ld. Raym. 175; *Partridge v. Davis*, 20 Vt. 499; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Cutting v. Conklin*, 28 Ill. 506; *Buckner v. Bank*, 5 Ark. 539; 41 Am. Dec. 105.

² *Richards v. Frankum*, 9 Car. & P. 221; *Adams v. Blethen*, 66 Me. 19; 22 Am. Rep. 547.

³ *Sears v. Lantz*, 47 Iowa, 658; *Aniba v. Yeomans*, 39 Mich. 171.

⁴ *Mitchell v. Smith*, 4 De Gex, J. & S. 422.

⁵ *Tuttle v. Bartholomew*, 13 Met. 452; *Trust Co. v. Bank*, 101 U. S. 68. *Contra*, *Childs v. Davidson*, 38 Ill. 437; *Robinson v. Lair*, 31 Iowa, 9.

⁶ *Adams v. Blethen*, 66 Me. 19; 22 Am. Rep. 547.

⁷ *Rice v. Stearns*, 3 Mass. 225; 3 Am. Dec. 129.

⁸ *Marks v. Herman*, 24 La. Ann. 335.

indorsement of the note.¹ Where a note payable to A or bearer was indorsed by A with an assignment and guaranty to B, it was held that B got title.² An indorsement of a note, "Pay contents of the within note to W. P. B.," is in legal effect an indorsement to W. P. B. or order, and W. P. B.'s indorsee may maintain an action upon it.³ But where the maker of a note payable to his own order wrote on the back of it and signed a statement of the amount of his property, and delivered the note, it was held that title did not pass.⁴ An indorsement of an overdue negotiable note omitting words "or order" nevertheless makes it payable to the indorsee's order, and his indorsee may sue him thereon.⁵

The indorsement must be placed on the instrument itself.⁶ A promise, though in writing, to indorse a bill is not an indorsement,⁷ nor is an assignment of a note by a separate writing.⁸ An indorsement in pencil is good.⁹

¹ Bange v. Flint, 25 Wis. 544.

² Johnson v. Mitchell, 50 Tex. 212; 32 Am. Rep. 602.

³ Hodges v. Adams, 19 Vt. 74; 46 Am. Dec. 181.

⁴ Pickering v. Cording, 92 Ind. 306; 47 Am. Rep. 145.

⁵ Leavitt v. Putman, 3 N. Y. 494; 53 Am. Dec. 322.

⁶ French v. Turner, 15 Ind. 59; Herring v. Woodhull, 29 Ill. 92; 81 Am. Dec. 296. Either on the face or back: Young v. Glover, 3 Jur., N. S., 637; Ex parte Yates, De Gex & J. 191.

⁷ Harrop v. Fisher, 10 Com. B., N. S., 204; Haskell v. Mitchell, 53 Me. 468; 89 Am. Dec. 711.

⁸ In re Barrington, 2 Schoales & L. 112; Willis v. Creasy, 17 Me. 9. Where there is no room on the bill for further indorsements, a slip of paper may be attached to it, and the indorsements written on it. This is called an *allonge*: Folger v. Chase, 18 Pick. 63. In Osgood v. Artt, 17 Cent. L. J. 191, Mr. Justice Harlan says: "As a general rule, the legal title to negotiable paper payable to order passes, according to the law merchant, only by the payee's indorsement on the security itself. The established exception to this rule is

where the indorsement is made on a piece of paper so attached to the original instrument as, in effect, to become part thereof or be incorporated into it. This addition is called in the adjudged cases and elementary treatises an *allonge*. That device had its origin in cases where the back of the instrument had been covered with indorsements or writing, leaving no room for further indorsements thereon. But perhaps an indorsement upon a piece of paper attached in the manner indicated would now be deemed sufficient to pass the legal title, although there may have been, in fact, room for it on the original instrument. But neither the general doctrines of commercial law, nor any established exception thereto, make words of mere assignment and transfer of such paper — contained in a separate instrument, executed for a wholly different and distinct purpose — equivalent to an indorsement within that rule which admits the payor to urge, as against the holder of an unindorsed negotiable security payable to order, any valid defense which he has against the original payee."

⁹ Closson v. Stearns, 4 Vt. 11; 23 Am. Dec. 245.

§ 1564. Indorsement in Blank, or General Indorsement.

— An indorsement in blank — called also a general indorsement — is the mere signature of the indorser, without more.¹ A bill or note indorsed in blank is payable to bearer, and may be negotiated by delivery.² An indorsement in blank intended as a guaranty gives authority to write over the name words importing a contract of guaranty.³

§ 1565. **Special Indorsement.** — A special indorsement is where the person is designated to whom or to whose order the instrument is to be paid.⁴ It is then payable to that person alone, and can only be negotiated by his indorsement.⁵ A special indorsement by the payee of a promissory note without delivery is not sufficient to divest his title.⁶ The holder of a bill indorsed in blank may convert such blank indorsement into a special indorsement by writing over the indorser's signature a direction ordering the amount of the bill to be paid to himself or some other person.⁷ The holder who converts a blank into a special indorsement does not thereby incur the liabilities of an indorser.⁸ The negotiability of a bill which is originally payable to bearer, or which has been indorsed in blank, is not restrained by a subsequent special indorsement. It is still payable to bearer.⁹ A special indorser is liable only to those who make their title through his indorsement.¹⁰ But a prior indorser may recover against a subsequent indorser on proof of

¹ Benjamin's Chalmers's Digest, art. 116.

² Peacock v. Rhodes, 2 Doug. 636; Curtis v. Sprague, 51 Cal. 239; Morris v. Preston, 93 Ill. 215; Rees v. Bank, 5 Rand. 326; 16 Am. Dec. 755; Sterling v. Bender, 7 Ark. 201; 44 Am. Dec. 539.

³ Scott v. Calkin, 139 Mass. 529.

⁴ Benjamin's Chalmers's Digest, art. 117.

⁵ Harrop v. Fisher, 30 L. J. Com. P. 283; Burnap v. Cook, 32 Ill. 168.

⁶ May v. Cassiday, 7 Ark. 376; 46 Am. Dec. 292.

⁷ Clerk v. Pigot, 12 Mod. 193; Cole v. Cushing, 8 Pick. 48; Hance v. Miller, 21 Ill. 636; Erwin v. Lynn, 16 Ohio St. 545.

⁸ Vincent v. Horlock, 1 Camp. 442.

⁹ Walker v. Macdonald, 2 Ex. 527; Rider v. Taintor, 4 Allen, 356; Johnson v. Mitchell, 50 Tex. 212; 3 Am. Rep. 602.

¹⁰ Story on Bills, sec. 207.

the proper intent of the parties.¹ A second indorser of a promissory note, who by mistake or inadvertence writes his name above the first indorser, and is called upon to pay a portion of the note, may recover the amount so paid from the first indorser.²

ILLUSTRATIONS. — B brought suit as holder of a note payable to the order of D, by whom it was indorsed, "Pay R. McCurdy. Cash." *Held*, that this being a special indorsement on its face, it carried no title to B: *Reamer v. Bell*, 79 Pa. St. 292. A bill of exchange specially indorsed, "Pay C, or order, on account of B," was indorsed generally by C, sent to his correspondent, and paid to him by the drawee. C failing, the correspondent applied the proceeds of the bill on an indebtedness from C to him. In an action by B against the correspondent, *held*, that the special indorsement was notice that C held the bill in trust for B, that this trust followed the bill, and that B could recover the money: *Blaine v. Bourne*, 11 R. I. 119; 28 Am. Rep. 429.

§ 1566. **Striking out Indorsements.**—The holder may at any time strike out any indorsement which is not necessary to his title.³ The indorser whose indorsement is intentionally struck out, and all indorsers subsequent to him, are discharged from their liabilities; *aliter* if the indorsement be struck out by mistake.⁴ The holder may, in some cases, make title through a person whose indorsement is struck out.⁵ Indorsements for collection may be struck out by the owner of the bill;⁶ and if the indorser of a bill takes it up or pays it when dishonored, he may strike out his own and all subsequent indorsements, whether blank or special, and sue the maker thereon.⁷

¹ *Hubbard v. Matthews*, 54 N. Y. 43; 13 Am. Rep. 562.

² *Slack v. Kirk*, 67 Pa. St. 380; 5 Am. Rep. 438.

³ *Mayer v. Jadis*, 1 Moody & R. 247; *Porter v. Cushman*, 19 Ill. 574; *Bank of America v. Senior*, 11 R. I. 376; *Mitchell v. Fuller*, 15 Pa. St. 268; 53 Am. Dec. 594.

⁴ *Wilkinson v. Johnson*, 3 Barn. & C. 423; *Brett v. Marston*, 45 Me. 401; *Cole v. Cushing*, 8 Pick. 48.

⁵ *Fairclough v. Pavia*, 9 Ex. 695.

⁶ *Dugan v. U. S.*, 3 Wheat. 173; *Bank of Utica v. Smith*, 18 Johns. 229; *Reading v. Beardsley*, 41 Mich. 123; *Smith v. McManus*, 7 Yerg. 477; 27 Am. Dec. 519.

⁷ *Callow v. Lawrence*, 3 Maule & S. 95; *Dollfus v. Frosch*, 1 Denio, 367; *Bond v. Storrs*, 13 Conn. 412; *Bank of U. S. v. U. S.*, 2 How. 711; *Bowie v. Duval*, 1 Gill & J. 175; *Palmer v. Gardiner*, 77 Ill. 143; *Canton etc. Ass'n v. Weber*, 34 Md. 669; *Smith v. Lawrence*, Hayw. 175; 1 Am. Dec. 557. *Contra*,

The first indorser of a note in point of time is not, of course, first responsible. If the payee of a note wrote his name over that of a person who indorsed the same in blank before delivery, but did so only on the ground of the payee's responsibility as first indorser, the payee will be liable as such in point of contract, though second in time.¹

§ 1567. Partial Indorsements.—A partial indorsement is not valid.²

ILLUSTRATIONS.—C, the holder of a bill for one hundred dollars, indorses it, "Pay fifty dollars to D, or order, and fifty dollars to E, or order." *Held*, invalid; neither D nor E can sue or further indorse: *Heilbut v. Nevill*, L. R. 4 Com. P. 358. C, the holder of a bill for one hundred dollars, indorses it, "Pay D or order, thirty dollars." *Held*, invalid, unless C also acknowledged the receipt of seventy dollars: *Hawkins v. Cardy*, 1 Ld. Raym. 360; *Frank v. Kaigler*, 36 Tex. 305.

§ 1568. Qualified Indorsement — "Without Recourse."
—A qualified indorsement is one which limits or negatives the liability of the indorser. But except as to this it does not affect the instrument or its negotiability. It is also called an indorsement "without recourse."³ Parol evidence is inadmissible to change a simple indorsement into an indorsement without recourse.⁴ The indorser without recourse impliedly warrants that the note indorsed is valid,⁵ that the prior signatures are genuine, and, so far as his dealings with the paper are concerned, that it expresses on its face the exact legal obligations of

Welch v. Lindo, 7 Cranch, 159; *Southern Bank v. Sav. Bank*, 27 Ga. 253; *Robson v. Earley*, 13 Mart. (La.) 373; *Sprigg v. Cuny*, 19 Mart. (La.) 253; *Gorgerat v. McCarty*, 2 Dall. 144; 1 Am. Dec. 270.

¹ *Chalmers v. McMurdo*, 5 Munf. 352; 7 Am. Dec. 684.

² *Heilbut v. Nevill*, L. R. 4 Com. P. 358; *Conover v. Earl*, 26 Iowa, 169; *Groves v. Ruby*, 24 Ind. 418.

³ *Castrique v. Buttigieg*, 10 Moore P. C. 110; *Stevenson v. O'Neal*, 71 Ill. 314; *Rice v. Stearns*, 3 Mass. 225; 3 Am. Dec. 129; *Stewart v. Preston*, 1 Fla. 10; 44 Am. Dec. 621.

⁴ *Doolittle v. Ferry*, 20 Kan. 230; 27 Am. Rep. 166; *Charles v. Denis*, 42 Wis. 56; 24 Am. Rep. 383; *Dale v. Gear*, 38 Conn. 15; 9 Am. Rep. 353.

⁵ *Hannum v. Richardson*, 48 Vt. 508; 21 Am. Rep. 152.

the prior parties.¹ Thus one who assigns negotiable paper "without recourse" is liable on an implied warranty, in the absence of express representation, for any deficiency between the amount apparently due upon the face of the instrument and the amount legally collectible upon it, although the deficiency arises from a successful interposition of the defense of usury, whereby the collection of interest on the note is defeated.² An assignment of a note without recourse does not put the transferee upon inquiry as to the equities between the original parties thereto.³ An instruction that, in order to exonerate the indorser, the words "without recourse" must be written in such a manner that they could be read by a man "of ordinary ability and understanding" is erroneous.⁴

ILLUSTRATIONS.—C, the holder of a bill, indorses it to D thus: "Pay D, or order, without recourse to me," or "Pay D, or order,

¹ *Challiss v. McCrum*, 22 Kan. 157; 31 Am. Rep. 181, the court saying: "In *Ticonic Bank v. Smiley*, 27 Me. 225, an overdue note was transferred, and with this indorsement, 'Indorser not holden,' yet it was decided that the indorser was liable to his vendee for any payment made on the note before the transfer, or any set-off existing against it, of which the note gave no indication and the vendor no information. In *Snyder v. Reno*, 38 Iowa, 329, it was held that there is an implied warranty that there has been no material alteration in the paper since its execution. The court says: 'We have no doubt that there is an implied warranty of the transferrer that there is no defect in the instrument, as well as that the signature of the maker is genuine': See also *Blethen v. Lovering*, 58 Me. 437; *Ogden v. Blydenburg*, 1 Hilt. 182; *Fake v. Smith*, 2 Abb. App. 76; 2 Parsons on Notes and Bills, c. 2, sec. 2, and cases in notes; *Terry v. Bissell*, 26 Conn. 23; 1 Daniel on Negotiable Instruments, sec. 670. In this the author thus states the law: 'When the indorsement is without recourse the indorser specially declines to assume any responsibility as a party to the note or bill; but by the very act of

transferring it he engages that it is what it purports to be,—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse, but who is, nevertheless, liable if he draws upon a fictitious party, or one without funds. And, therefore, the holder may recover against the indorser without recourse,—1. If any of the prior signatures were not genuine; or 2. If the note was invalid between the original parties because of the want or illegality of the consideration; or 3. If any prior party was incompetent; or 4. The indorser was without title.' These authorities fully sustain the ruling of the district court. The note was not the legal obligation of the maker to the full amount. As to the usurious portion, it was as it were no note. This was a defect in the very inception of the note. It was known to the vendor, and arose out of his own dealings in the matter. By all these authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof."

² *Drennan v. Bunn*, 124 Ill. 175; 7 Am. St. Rep. 354.

³ *Bisbing v. Graham*, 14 Pa. St. 14; 53 Am. Dec. 510.

⁴ *Hayden v. Strong*, 23 Hun, 527.

sans recours," or "Pay D, or order, at his own risk." C thereby passes his interest to D, but incurs no liability as an indorser: *Goupy v. Harden*, 7 Taunt. 163; *Rice v. Stearns*, 3 Mass. 224; 3 Am. Dec. 129. E., the holder of a bill indorsed on the back in three successive lines, as follows: "Greenwood & Nichols, . . . without recourse. . . . Asa Perley," sues G. & N. as indorsers. If defendants show that "without recourse" was written by them at the time of transfer, E. cannot recover, though ignorant of the fact when he took the bill: *Fitchburg Bank v. Greenwood*, 2 Allen, 434. A note was given for liquor sold in violation of law, and was by statute void. Defendant knew its invalidity, transferred it by an indorsement without recourse. *Held*, that he was liable to his vendee: *Hannum v. Richardson*, 48 Vt. 508; 21 Am. Rep. 152.

§ 1569. **Facultative Indorsement.**—A facultative indorsement is one which waives the duties or enlarges the rights of the holder. It does not otherwise affect the negotiability of the instrument;¹ as, for example, where the indorser adds to his indorsement, "Notice of dishonor waived."²

§ 1570. **Conditional Indorsement.**—A conditional indorsement transfers the bill to the indorsee, subject to the fulfillment of a condition therein specified. On the failure of the condition the title to the bill reverts to the indorser.³

ILLUSTRATIONS. — C, the holder of a bill, indorses it, "Pay D, or order, upon my name appearing in the Gazette as ensign in any regiment, between the 1st and 64th, if within two months from this date." The bill is subsequently accepted. D indorses it to E, who indorses it to F. At maturity F presents the bill to the acceptor, who pays it, although the condition has not been fulfilled. The payment is invalid, and C can sue the acceptor on the bill and recover: *Robertson v. Kensington*, 4 Taunt. 30. By the indorsement of a promissory note, the indorser was to be liable, "should the maker fail." *Held*, that the effect of this indorsement was different from a general one, and must be specially declared on, the word "fail" being equivalent to the insolvency of the principal: *Davis v. Campbell*, 3 Stew. (Ala.) 319.

¹ *Phipson v. Kelner*, 4 Camp. 285; *Emery v. Hobson*, 62 Me. 578; 16 Am. Rep. 513.

² *Id.*

³ Story on Bills, sec. 217.

§ 1571. **Restrictive Indorsement.**—A restrictive indorsement is one which expresses that it is a mere authority to deal with the instrument as directed, and not a transfer of the ownership in it. By such an indorsement the relation of the indorser and indorsee becomes that of principal and agent.¹ Such an indorsement restrains the negotiability of the note.² An indorsement on a bill of exchange directing the drawee to pay to another, "on account of" the indorser, or "for collection," is a restrictive indorsement, the effect of which is to restrict the further negotiability of the bill, and to give notice that the indorser does not thereby give title to the bill, or to its proceeds when collected. Although there may be no privity between the owner of the bill and the last indorsee, yet if the latter collects the bill, he is bound to pay the proceeds to the owner, and the latter may recover in *assumpsit*, on the ground that the defendant has property in his possession which belongs to the plaintiff, and refuses to pay the same over.³ The following are examples of restrictive indorsements, viz.: "Pay D, or order, for the use of X";⁴ "Pray pay the money to my use";⁵ "Pay the contents to my servant for my use";⁶ "The within must be credited to D, value in account";⁷ "Pay the contents to my use," or "Pay the contents to the use of X," or "Carry this bill to the credit of X";⁸ "Pay D, or order, for our use, value received in account";⁹ "Pay D, or order, for the account of X."¹⁰ But the statement in an indorsement that the value has been paid by some

¹ Potts v. Read, 6 Esp. 59; Rice v. Stearns, 3 Mass. 225; 3 Am. Dec. 129; Blaine v. Bourne, 11 R. I. 119; 23 Am. Rep. 429.

² Smith v. Lawrence, 1 Hayw. (N. C.) 175; 1 Am. Dec. 556.

³ First National Bank v. Reno County Bank, 11 Cent. L. J. 145; Lee v. Bank, 1 Bond, 387.

⁴ Evans v. Crambington, 1 Show. 4; 2 Show. 509; Hook v. Pratt, 78 N. Y. 371; 34 Am. Rep. 539.

⁵ Snee v. Prescott, 1 Atk. 249.

⁶ Edie v. East India Co., 2 Burr. 1227.

⁷ Ancher v. Bank, 2 Doug. 637.

⁸ Rice v. Stearns, 3 Mass. 226; 3 Am. Dec. 129; Lee v. Bank, 1 Bond, 387.

⁹ Wilson v. Holmes, 5 Mass. 543; 4 Am. Dec. 75.

¹⁰ Treuttel v. Barandon, 8 Taunt. 100; Blaine v. Bourne, 11 R. I. 119; 23 Am. Rep. 429.

one other than the indorsee does not make it restrictive;¹ nor the omission to add words of negotiability.² A restrictive indorsement gives the indorsee the right to collect the bill and to sue any party thereto that his indorser could have sued.³ But the indorsee under a restrictive indorsement may transfer his rights as indorsee if he be authorized by the terms of the indorsement so to do. In such case, the second and every subsequent indorsee takes the bill with the same rights and subject to the same liabilities as the original restricted indorsee.⁴ An indorsement "for collection," made by the payee, is canceled by his subsequent indorsement to another indorsee for value.⁵

ILLUSTRATIONS.—Two bills of exchange belonging to the plaintiff at Chicago were indorsed for collection to a bank at Atchison, Kansas, and by said Atchison bank to a bank at Kansas City, Missouri, and by the latter to defendant, a bank at Hutchinson, Kansas. *Held*, that they remained the property to plaintiff, all the indorsements being restrictive: *First National Bank v. Reno Co. Bank*, 11 Cent. L. J. 145. The payee of a note indorsed it in blank. The transferee filled up the blank, making the note payable to a bank (without the words "or order") for collection on his account. The bank, failing to collect, returned it to him, indorsed by its cashier, "without recourse." He then reindorsed and retransferred it to the plaintiff. *Held*, a valid transfer: *Fawsett v. National Life Ins. Co.*, 97 Ill. 11; 37 Am. Rep. 95. A note was indorsed by a subsequent holder as follows: "I, the undersigned, do agree that I will not sell or dispose of a note given by R. R. P." (the maker of the note). *Held*, that such indorsement did not destroy the negotiability of the note, nor render it in the hands of a holder subsequently acquiring it subject to defenses existing against it of which he had no notice: *Leland v. Parriott*, 35 Iowa, 454.

¹ *Potts v. Read*, 6 Esp. 57; *Murrow v. Stuart*, 8 Moore P. C. C. 267; *Buckley v. Jackson*, L. R. 3 Ex. 135.

² *Benjamin's Chalmers's Digest*, art. 124.

³ *Evans v. Cramlington*, 2 Show. 509; *Wilson v. Holmes*, 5 Mass. 543; 4 Am. Dec. 75; *McWilliams v. Bridges*, 7 Neb. 419; *Roberts v. Parrish*, 17 Or. 583. *Contra*, by statutes

requiring actions to be prosecuted in name of real party in interest: *Rock Co. Bank v. Hollister*, 21 Minn. 385.

⁴ *Treuttel v. Barandon*, 8 Taunt. 100; *Lloyd v. Sigourney*, 5 Bing. 531; *Sweeney v. Easter*, 1 Wall. 166; *Hook v. Pratt*, 78 N. Y. 375; 34 Am. Rep. 539; *Roberts v. Parrish*, 17 Or. 583.

⁵ *Atkins v. Cobb*, 56 Ga. 86.

§ 1572. Indorser — Who is — Liability in General. — Any person who signs a negotiable bill or note otherwise than as a drawer, maker, or acceptor incurs the liability of and is an indorser.¹ He engages that it will be accepted or paid according to its tenor, and if not, that he will indemnify the holder, provided he has due notice of its dishonor.² An indorser, though in the nature of a surety, is answerable upon an independent contract, and is not discharged by the failure of the holder to prosecute the maker when requested, though the maker afterwards becomes insolvent.³

§ 1573. What Indorser Warrants and Admits. — The indorser of a bill or note conclusively admits and warrants to a *bona fide* holder that the signature of the drawer or maker and all previous indorsers are genuine;⁴ that the bill or note is a valid and subsisting one, and that he has a good title thereto;⁵ that the maker shall be able to pay it at maturity; and that it shall then be collectible by due diligence.⁶ The indorser of a copartnership note impliedly contracts that it was made by the copartnership firm in whose name it was executed.⁷ If a person sells a promissory note the maker of which is at the time insolvent, but has not stopped payment nor been adjudged bankrupt or insolvent, and the seller does not know of the maker's actual insolvency, he does not warrant the maker's solvency.⁸ Where a minor made his note, and

¹ Benjamin's Chalmers's Digest, art. 217.

² *Suse v. Pompe*, 30 L. J. Com. P. 78; *First Nat. Bank v. Marine Bank*, 20 Minn. 63.

³ *Trimble v. Thorne*, 16 Johns. 152; 8 Am. Dec. 302.

⁴ *Ex parte Clarke*, 3 Brown Ch. 238; *Thicknesse v. Bromilow*, 2 Crompt. & J. 425; *Macgregor v. Rhodes*, 6 El. & B. 266; *Condon v. Pearce*, 43 Md. 83; *Williams v. Inst.*, 57 Miss. 633; though indorsed *sans recours*: *Dumont v. Williamson*, 18 Ohio St. 515; 98 Am. Dec. 186; *Watson v. Chesire*, 18

Iowa, 202; 87 Am. Dec. 382; *State Bank v. Fearing*, 16 Pick. 533; 28 Am. Dec. 265; *Weakly v. Bell*, 9 Watts, 273; 36 Am. Dec. 116.

⁵ *Burchfield v. Moore*, 23 L. J. Q. B. 261; *Burrill v. Smith*, 7 Pick. 291; *Prescott Bank v. Caverly*, 7 Gray, 217; 66 Am. Dec. 473; *Dalrymple v. Hillenbrand*, 62 N. Y. 5; 20 Am. Rep. 438; *Overton v. Bolton*, 9 Heisk. 762; 24 Am. Rep. 367.

⁶ *Rhodes v. Seymour*, 36 Conn. 1.

⁷ *Dalrymple v. Hillenbrand*, 62 N. Y. 5; 20 Am. Rep. 438.

⁸ *Day v. Kinney*, 131 Mass. 37.

his father indorsed it and got it discounted without disclosing the maker's infancy or making any representation as to his age, it was held not fraudulent.¹

§ 1574. **Indorser of Non-negotiable Bill or Note.**—The indorser of a non-negotiable bill or note is in some courts held absolutely liable as a maker or guarantor, and not entitled to notice of dishonor.² In others he is held liable as an indorser.³

§ 1575. **Liability of Indorser Who is not a Party to the Bill or Note.**—A person who indorses a bill or note payable to order at a time when he is not the payee or holder is not strictly an indorser. He is generally called a *quasi* indorser, and his act an irregular or an anomalous indorsement. In a few of the states, as well as in England, he *prima facie* incurs the liability of an indorser, but parol evidence is admissible of the intention of the parties, which, when ascertained, determines his liability.⁴ But by the weight of authority, he is liable as a joint promisor or co-maker if he indorsed the note before it was issued, and it is so presumed; but if shown to have indorsed it after its issue, he is liable as a guarantor; but in both cases evidence is admissible of the real intention of the parties, which, when ascertained, determines his liability.

¹ People's Bank's Appeal, 93 Pa. St. 107; 39 Am. Rep. 728.

² Cromwell v. Hewitt, 40 N. Y. 491; 100 Am. Dec. 527; Paine v. Noelke, 53 How. Pr. 273; Billingham v. Bryan, 10 Iowa, 317; Sweetser v. French, 2 Cush. 309; 48 Am. Dec. 666; Houghton v. Ely, 26 Wis. 181; 7 Am. Rep. 52.

³ Parker v. Riddle, 11 Ohio St. 102; Raymond v. Middleton, 29 Pa. St. 532.

⁴ Coulter v. Richmond, 59 N. Y. 478; Jaffray v. Brown, 74 N. Y. 393; Brown- ing v. Merritt, 61 Ind. 425; Cady v. Shepard, 12 Wis. 639; Fear v. Dunlap, 1 G. Greene, 331; Eilbert v. Fink-

beiner, 68 Pa. St. 243; 8 Am. Rep. 176; Phelps v. Vischer, 50 N. Y. 69; Meyer v. Hibsher, 47 N. Y. 279; Moore v. Cross, 19 N. Y. 227; 75 Am. Dec. 326; Prosser v. Lequeer, 4 Hill, 420; 40 Am. Dec. 288; Hall v. Newcomb, 7 Hill, 416; 42 Am. Dec. 82; Aiken v. Cathcart, 3 Rich. 133; 45 Am. Dec. 764; Myrick v. Hasey, 27 Me. 9; 46 Am. Dec. 583; Jones v. Goodwin, 39 Cal. 493; 2 Am. Rep. 473; Hooks v. Anderson, 58 Ala. 238; 29 Am. Rep. 745; Dubois v. Mason, 127 Mass. 37; 34 Am. Rep. 335; Keyser v. Hall, 85 Ill. 511; 28 Am. Rep. 624; Smith v. Long, 40 Mich. 555; 29 Am. Rep. 558.

ity.¹ Some courts, however, hold evidence inadmissible to vary the contract thus implied by law.² It would be inadmissible against a remote party.³ A few courts hold that the *quasi* indorser *prima facie* incurs the liability of a guarantor,⁴ while others hold that the law implies no contract whatever from such an indorsement.⁵ In a suit by indorsee against accommodation indorser, the latter cannot be permitted to show an agreement at the time of indorsement that the liability should be joint, and not suc-

¹ *Union Bank v. Willis*, 8 Met. 504; 41 Am. Dec. 541; *Good v. Martin*, 95 U. S. 90; *Carpenter v. McLaughlin*, 12 R. I. 270; 34 Am. Rep. 638; *Stein v. Passmore*, 25 Minn. 256; *Herbage v. McEntee*, 40 Mich. 337; 29 Am. Rep. 536; *Chafee v. R. R. Co.*, 64 Mo. 193; *Sylvester v. Downer*, 20 Vt. 355; 49 Am. Dec. 786; *Rivers v. Thomas*, 1 Lea, 649; *Rhodes v. Risley*, 1 D. Chip. 52; 1 Am. Dec. 696; *Harris v. Brooks*, 21 Pick. 195; 32 Am. Dec. 254; *Martin v. Boyd*, 11 N. H. 385; 35 Am. Dec. 501; *Stagg v. Limienfelser*, 59 Mo. 342; *Powell v. Thomas*, 7 Mo. 440; 38 Am. Dec. 465; *Stoney v. Beaubien*, 2 McMull. 313; 39 Am. Dec. 129; *Sampson v. Thornton*, 3 Met. 275; 37 Am. Dec. 135; *Colburn v. Averill*, 30 Me. 310; 50 Am. Dec. 630; *Lewis v. Harvey*, 18 Mo. 74; 59 Am. Dec. 286; *Cook v. Southwick*, 9 Tex. 615; 60 Am. Dec. 181; *Eilbert v. Finkbeiner*, 68 Pa. St. 243; 8 Am. Rep. 176; *Ives v. Bosley*, 35 Md. 262; 6 Am. Rep. 411; *Houghton v. Ely*, 26 Wis. 181; 7 Am. Rep. 52; *Harmon v. Hale*, 1 Wash. 422; 34 Am. Rep. 816; *Wright v. Remington*, 41 N. J. L. 48; 32 Am. Rep. 181; *Irvine v. Adams*, 48 Wis. 468; 33 Am. Rep. 817; *Kealing v. Vansickle*, 74 Ind. 529; 39 Am. Rep. 101; *Herbage v. McEntee*, 40 Mich. 337; 29 Am. Rep. 536; *Cole v. Smith*, 29 La. Ann. 551; 29 Am. Rep. 343; *Benton v. Hansford*, 10 W. Va. 470; 27 Am. Rep. 571; *Taylor v. French*, 2 Lea, 257; 31 Am. Rep. 609.

² *Allen v. Brown*, 124 Mass. 77; *Stack v. Beach*, 74 Ind. 571; 39 Am. Rep. 113.

³ *Schneider v. Schiffman*, 20 Me. 571; *Hoffman v. Moore*, 82 N. C. 313; *Hous-*

ton v. Bruner, 39 Ind. 376; *Good v. Martin*, 95 U. S. 90; *Greenough v. Smead*, 3 Ohio St. 415; *Nash v. Skinner*, 12 Vt. 219; 36 Am. Dec. 339.

⁴ *Castle v. Rickly*, 44 Ohio St. 490; 58 Am. Rep. 839; *Tenney v. Prince*, 4 Pick. 385; 16 Am. Dec. 347; *Ellis v. Clark*, 110 Mass. 392; 14 Am. Rep. 609; *Camden v. McKoy*, 3 Scam. 437; 38 Am. Dec. 91; *Whiton v. Mears*, 11 Met. 563; 45 Am. Dec. 233; *Riggs v. Waldo*, 2 Cal. 485; 56 Am. Dec. 357; *Carroll v. Weld*, 13 Ill. 682; 56 Am. Dec. 481; *White v. Howland*, 9 Mass. 314; 6 Am. Dec. 71; *Moies v. Bird*, 11 Mass. 436; 6 Am. Dec. 179; *Stone v. White*, 8 Gray, 593; *Boynton v. Pierce*, 79 Ill. 145; *Stowell v. Raymond*, 83 Ill. 120; *Seymour v. Mickey*, 15 Ohio St. 519; *Gillespie v. Wheeler*, 46 Conn. 410; *Ford v. Henderson*, 34 Cal. 673; *Watson v. Hurt*, 6 Gratt. 633; *Greathead v. Walton*, 40 Conn. 226; *Forsyth v. Day*, 46 Me. 176; *Rivers v. Thomas*, 1 Lea, 649; 27 Am. Rep. 784.

⁵ *Chaddock v. Vanness*, 35 N. J. L. 517; 10 Am. Rep. 256; *Crozer v. Chambers*, 20 N. J. L. 256; *Thomes v. Jennings*, 5 Smedes & M. 627; 13 Smedes & M. 617; *Fear v. Dunlap*, 1 G. Greene, 331. In Connecticut it is held that the legal import of such a signing is, that the note is due and payable, that the maker shall be able to pay it, and that it is collectible by due diligence: *Perkins v. Catlin*, 11 Conn. 213; 29 Am. Dec. 282; *Laffin v. Pomeroy*, 11 Conn. 440; *Castle v. Candee*, 16 Conn. 223; *Ranson v. Sherwood*, 23 Conn. 437; *Gillespie v. Wheeler*, 46 Conn. 410; *Holbrook v. Grove Camp*, 38 Conn. 23.

cessive.¹ One who puts his name on the back of a note payable to the order of another on the condition that he is only to be liable as second indorser cannot be held by the payee as joint maker if the payee subsequently indorses it above his name.² An accommodation indorsement of a note after delivery, but before the payee, imposes only the liability of second indorser, and does not authorize the holder to write over it a contract of guaranty.³ It is no defense that the defendant, through a mistake as to the law, signed his name in a place other than where he would have signed it had he known the obligation incurred.⁴ And an accommodation indorser of a promissory note may by agreement between himself and a subsequent indorser render himself liable to the latter as an actual indorser for value.⁵

To make a guaranty negotiable as part of note to which it relates, it must be on the note itself, or annexed to it in the nature of an *allonge*. A general guaranty of a negotiable note by a separate and distinct instrument containing no words of negotiability is not negotiable, and cannot be sued on by an assignee of the note and guaranty in his own name.⁶ An oral guaranty of the genuineness of a note,⁷ or that the note will be paid,⁸ or that the maker is solvent, is valid.⁹

ILLUSTRATIONS. — A note made by K., payable to the order of G., was indorsed by R., and transferred to G. for value. *Held*, that R. was, as to G., an original promisor, and not an indorser: *Rothschild v. Grix*, 31 Mich. 150; 18 Am. Rep. 171. P. lent to D. and another \$250 each, and took their joint note for \$500. D.

¹ *Johnson v. Ramsey*, 43 N. J. L. 279; 39 Am. Rep. 580.

² *Greusel v. Hubbard*, 51 Mich. 95; 47 Am. Rep. 549.

³ *Hayden v. Weldon*, 43 N. J. L. 128; 39 Am. Rep. 551.

⁴ *Cook v. Brown*, 62 Mich. 473; 4 Am. St. Rep. 870.

⁵ *Leeke v. Hancock*, 76 Cal. 127.

⁶ *McLaren v. Watson*, 26 Wend. 425; 37 Am. Dec. 260.

⁷ *King v. Summitt*, 73 Ind. 312; 38 Am. Rep. 145.

⁸ *Milks v. Rich*, 80 N. Y. 269; 36 Am. Rep. 615.

⁹ *Hassinger v. Newman*, 83 Ind. 124; 43 Am. Rep. 64. But a promise to pay what the holder should fail to collect is within the statute of frauds: *Hassinger v. Newman*, 83 Ind. 124; 43 Am. Rep. 64.

paid half the note and took a receipt "in full of his share of the note." *Held*, that he was still liable as surety for the other half: *Sterling v. Stewart*, 74 Pa. St. 445; 15 Am. Rep. 559. A note was indorsed by the payee in the usual position. The defendant had previously written his name across the back of the note near the other end, in an inverted position. *Held*, that the defendant was liable as second indorser: *Arnott's Administrator v. Symonds*, 85 Pa. St. 99; 27 Am. Rep. 630. L., a member of the firms of S. & Sons and P. & Co., made his own notes, payable to the order of P. & Co., and without authority indorsed them in the name of S. & Co. D., another member of the firm of P. & Co., then indorsed the name of that firm as first indorsers. They were presented to plaintiff for discount before maturity, one by a broker and the other by D., who was known to it to be a member of the firm of P. & Co., and discounted by the plaintiff. S. & Sons had no benefit from the notes. *Held*, in an action against S. & Sons, that the facts showed no conclusive notice of the invalidity of the indorsements: *Freeman's National Bank v. Savery*, 127 Mass. 75; 34 Am. Rep. 345. Defendants made a note in this form: "We, A and B as principal, and C and D as surety, promise to pay to the order of ourselves," etc., signed on the face by A and B, and indorsed by all the parties. *Held*, that D's liability was that of surety and joint promisor in a note payable to the order of the principals and by them indorsed: *National Pemberton Bank v. Lougee*, 108 Mass. 371; 11 Am. Rep. 367. A. executed and delivered to plaintiff his promissory note, in which no time of payment was specified, at the same time agreeing to procure M. to sign the note as surety, if at any time the plaintiff should desire it. The plaintiff accepted the note upon this agreement. A few months after, the plaintiff desired the additional security, and A. procured M. to sign the note, and returned it to plaintiff. No new consideration then passed between any of the parties. *Held*, that M. was liable as surety on the note: *McNaught v. McClaughry*, 42 N. Y. 22; 1 Am. Rep. 487. G. made a note payable to the order of J., and while it was unindorsed by J. procured M. to indorse it, agreeing to procure the indorsement of J. as payee before negotiating it. Without procuring the indorsement of J., he transferred it to plaintiff, and it came to maturity and was protested without such indorsement. *Held*, that M. was not liable to plaintiff as indorser: *Gibson v. Miller*, 29 Mich. 355; 18 Am. Rep. 98. A note signed by P., treasurer, and payable to the order of P., was indorsed by the payee for the accommodation of the maker. On the back of the note was the following, signed by defendants, "We hereby guarantee the payment of the within note." *Held*,

that defendants' contract was not with the payee, but with the first holder for value: *Jones v. Dow*, 142 Mass. 130. A note negotiable in form, "We, A & Co., principals, and B and C, securities, promise to pay," was signed by C after the others had signed, and without the knowledge of B; A & Co. agreeing with C, also without the knowledge of B, that "there should be no trouble about the note; that A & Co. and B would take care of it." *Held*, that it was a joint promise, and that C was bound as co-surety with B: *Stovall v. Bank*, 78 Va. 188. The maker of a note applied for a renewal to the sureties, who, claiming to have a defense to the note, refused to renew except as sureties for A. The maker then secured A's signature as surety to a note, telling him that it was in renewal of a note on which B and C were sureties. This note B and C signed, stipulating, without A's knowledge or inquiry into the circumstances of his signature, that they were sureties for him. *Held*, that A, B, and C were co-sureties: *Crouse v. Wagner*, 41 Ohio St. 470. A made his sealed note payable twelve months after date to the order of B. Nine months thereafter, C, the mother of A, indorsed the note in blank. B sued C as upon a guaranty, and at the trial wrote above the indorsement a guaranty expressing as the consideration of the guaranty the loan to A, and the original promise of A that C should guarantee the note, and forbear to bring suit on the note for two years or more. The plaintiff also offered parol evidence to prove the facts recited in the guaranty thus overwritten. *Held*, that the defendant could not be held either as original maker or indorser, nor as guarantor: *Culbertson v. Smith*, 52 Md. 628; 36 Am. Rep. 384. One signed a note as surety. He could have escaped liability by reason of the addition, without his consent, of the name of another maker. He paid the note. *Held*, that he could compel contribution from sureties who signed after the addition of the name of the other maker: *Houck v. Graham*, 106 Ind. 195; 55 Am. Rep. 727.

§ 1576. Liability of Drawer and Indorser on Dishonor—Measure of Damages.—In the case of an inland bill of exchange or a note, the drawer, maker, or indorser of a dishonored bill or note is liable for the amount of the bill or note, with interest.¹ On a foreign bill of exchange, they are liable for the amount of the bill, with interest from the time of dishonor, and notarial expenses; or if

¹ *Windle v. Andrews*, 2 Barn. & Ald. 144; *Ackermann v. Ehrensperger*, 16 696; *Keene v. Keene*, 3 Com. B., N. S., Mees. & W. 103.

it be payable abroad, the re-exchange, interest, and expenses.¹

¹ *Mellish v. Simeon*, 2 H. Black. 378; *Suse v. Pompe*, 8 Com. B., N. S., 538; *Adams v. Cordis*, 8 Pick. 265; *Bank of U. S. v. U. S.*, 2 How. 711; *Willans v. Ayers*, L. R. 3 App. C. 133; *Trammell v. Henderson*, 56 Ala. 235. As to the right of the holder of a dishonored note to recover protest fees, see article in 2 Cent. L. J. 470. By the common law, neither notes nor inland bills were protestable, and the certificate of a notary was not evidence of either a presentment or notice of non-payment, and this was because such protest was not required by law, and was hence not an official act: *Chitty on Bills*, 170, 334-335; *Borough v. Perkins*, 1 Salk. 131; *Brough v. Parkins*, 3 Salk. 69; *Chesmer v. Noyes*, 4 Camp. 129; *Marin v. Palmer*, 6 Car. & P. 466; *Chitty on Bills*, 454, 455, 465, 466. Nevertheless, inland bills were sometimes protested in England under the common law, before any statutes were passed authorizing such protests. If, however, it was not evidence of the dishonor, it is not easy to see what object could be accomplished thereby, nor what motive could actuate the holder, since it was well settled that the notarial fees could not be charged against prior parties: *Chitty on Bills*, 466, 683; *Kendrick v. Lomax*, 2 Crompt. & J. 407. The rule in England, it is fair to presume, was founded upon the general principle that a protest in such cases was not necessary; that the object and efficacy of a protest was, as in the case of foreign bills, to accompany the bill into foreign countries, there to attest the dishonor of the bill, as the mode of proof prescribed by the common consent of all commercial countries, to avoid the delay and expense of the ordinary course of proving facts abroad; and that no such exigency or object could apply in the case of an inland bill, where presentment and notice of non-payment by the holder or his agent would answer every purpose of a protest. The courts would never permit one party to incur unnecessary expense for another party to pay. In most of the states statutes

are in force changing the law merchant to the extent of providing that notes may be protested, and that the protest and notice by the notary shall be *prima facie* evidence to fix the liability of the indorser. Nevertheless, the courts have almost unanimously held the very ground upon which, in England, a charge of protest fees was denied, — that the protest of notes was neither obligatory nor necessary, no more where these statutes prevail than where the common law remains unchanged; but, as said by Judge Story (see his work on promissory notes, page 297), the practice “is simply an arrangement made for the convenience of the holders”: See *Burke v. McKay*, 2 How. 66; *Pinkham v. Macy*, 9 Met. 174; *Coddington v. Davis*, 1 N. Y. 185; *Young v. Bryan*, 6 Wheat. 146. If it be said that the right to charge protest fees follows the right to go to protest as provided in these statutes, it may be answered that the position is directly opposed to all the authorities, which hold that the protest of inland bills being unnecessary, no fees are chargeable. The only direct authorities upon the question are the cases of *City Bank v. Cutter*, 3 Pick. 414; *Merritt v. Benton*, 10 Wend. 116, and *Doughty v. Hildt*, 1 McLean, 334. In the first case the charge was denied by the supreme court of Massachusetts, on the true ground that a protest was unnecessary. In the second, it was allowed by the supreme court of New York, without reason or comment other than that “it might fairly be considered as a charge incident upon the indorser’s failure to perform his contract.” This, moreover, was a suit against an accommodation indorser, and upon well-known principles a distinction might have been taken between such a case and one against a maker or indorser for value upon a regular transfer. In the last case cited, Judge McLean allowed the charge upon a judgment by default, and seemed to take a distinction between such case and a judgment after full defense. The case cited from 7

§ 1577. **Re-exchange and Redraft.**— Re-exchange means the loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed.¹ The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the then rate of exchange on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonor the amount of the dishonored bill and the expenses consequent on its dishonor.² The holder may recoup himself by drawing a sight bill for such sum on either the drawer or one of the indorsers. Such bill is called a "redraft." The indorser who pays a redraft may in like manner draw upon an antecedent party.³

§ 1578. **Rights of De Facto Holder—To Give Good Title.**— A holder has the right to further negotiate the instrument.⁴ The indorsee of a negotiable note who takes it discharged of the equities to which it was subject in the hands of the payee acquires the same right in a mortgage given to secure it which the payee would have had if no equities had existed against the note.⁵ The *de facto* holder of a genuine bill regular on the face of it,

Cranch, 273, in support of his position, wholly fails to sustain him. The question has, therefore, in the main, been left to be decided and controlled by those general principles which we have referred to governing inland bills by the law merchant, and by which no protest fees were chargeable except when the protest was obligatory, as in cases of foreign bills, or when made so and the fees allowed by express statute. In this view all the authorities in England and America settling this principle, as well as those deciding that the maker of a note and the acceptor of a bill (except in case of foreign bills) can in no case be liable for more than the principal of the note or the amount of the acceptance with interest, are directly applicable to the question: See Chitty on Bills, 683,

684; Simpson v. Griffin, 9 Johns. 131; Napier v. Schneider, 12 East, 420; Hanrick v. Farmers' Bank, 8 Port. 539. Protest not being essential to hold a guarantor, protest fees are not recoverable against maker and guarantor: Woolley v. Van Volkenburgh, 16 Kan. 20.

¹ Willans v. Ayers, L. R. 3 App. C. 146.

² De Tastet v. Baring, 11 East, 269; Suse v. Pompe, 8 Com. B., N. S., 566; Bank of U. S. v. United States, 2 How. 737.

³ Mellish v. Simeon, 2 H. Black. 378; Suse v. Pompe, 8 Com. B., N. S., 566.

⁴ Crouch v. Credit Foncier, L. R. 8 Q. B. 380.

⁵ Logan v. Smith, 62 Mo. 455; Duncan v. Louisville, 13 Bush, 378; 26 Am. Rep. 201.

who has stolen it, or who holds it wrongfully, or who by parting with it is guilty of a fraud, or an act in breach of the original contract, can negotiate it with a good and complete title to a person who takes it in due course of business before maturity as a *bona fide* holder for value without notice.¹ So while, as between the parties to a note given for a patent right in which are not inserted the words "given for a patent right," as required by the statute, the note is inoperative, it is good in the hands of a *bona fide* indorsee for value before maturity without notice.² But notes without words of negotiability, though held by a *bona fide* buyer, are subject to the equities and defenses existing between the assignor and debtor at the time of the assignment.³ Where one has paid value for a promissory note payable to order, and takes a transfer of it by delivery only, without indorsement, he acquires title, but not the rights of a *bona fide* purchaser.⁴

ILLUSTRATIONS. — L. wrote a note, "We promise to pay to the order of L.," etc., indorsed it in blank, and intrusted it to his clerk, with authority to deliver it to N. upon N.'s signing it with the name of N.'s firm. N. obtained the note from the clerk, and signed it with his own name only. N. then obtained, but afterwards erased, the signature of S. as an additional maker, and subsequently sold the note to W., who bought it in good faith. Held, that W. could maintain an action on the note against L.: *Whitmore v. Nickerson*, 125 Mass. 496; 28 Am. Rep. 257. A principal employed an agent to purchase an outstanding draft against the principal. Without the principal's knowl-

¹ *East Birmingham L. Co. v. Dennis*, 85 Ala. 565; 7 Am. St. Rep. 73; *Marston v. Allen*, 8 Mees. & W. 504; *Ridgway v. Bank*, 12 Serg. & R. 256; 14 Am. Dec. 681; *Sims v. Lyles*, 1 Hill (S. C.), 39; 26 Am. Dec. 155; *Wheeler v. Guild*, 20 Pick. 545; 32 Am. Dec. 231; *Chicopee Bank v. Chapin*, 8 Met. 43; *Nat. Bank v. Kirby*, 108 Mass. 50; *Sweetser v. French*, 2 Cush. 309; 48 Am. Dec. 666; *Hughes v. McAlister*, 15 Mo. 296; 55 Am. Dec. 143; *Park Bank v. Watson*, 42 N. Y. 490; 1 Am. Rep. 573; *Crampton v. Perkins*, 65 Md. 22; *Flower v. Noble*, 38 La. Ann. 938; *Jee v. Saunders*, 66 Tex.

333. Where the owner of state bonds issued to blank payee intrusted them to another for safe-keeping, and the latter pledged them upon a loan made to him at the same time to a third, who acted in good faith, the latter may hold them as against the owner: *Tucker v. New Hampshire Savings Bank*, 58 N. H. 83; 42 Am. Rep. 580.

² *New v. Walker*, 108 Ind. 365; 58 Am. Rep. 40.

³ *Hamilton v. Ins. Co.*, 65 Ga. 750. See *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180.

⁴ *Moore v. Miller*, 6 Or. 254; 25 Am. Rep. 518.

edge, the agent purchased the draft at a discount, and the principal gave his negotiable note to the agent for the full amount of the draft. *Held*, that a transfer of the note before maturity as collateral for indorsements previously made precluded the principal from setting up, as against the transferee without notice, that the discount should inure to the principal's benefit: *Noyes v. Landon*, 59 Vt. 569. The plaintiff drew a draft on London payable to the order of C., a banker, and delivered the draft to C. for collection for his account. C. delivered the draft to defendant bank for his own account, he being in debt to the defendant. After payment, but before defendant received the proceeds, the defendant was notified that the draft had been delivered to C. for collection only, and that the plaintiff claimed the proceeds. *Held*, that the defendant was not liable in *assumpsit* therefor: *Wyman v. Colorado National Bank*, 5 Col. 30; 40 Am. Rep. 133. An agent having authority to take notes payable only to his principal in fact took some payable to himself, and before maturity pledged them as security with a bank for advances made him, the bank having no notice of the agent's want of title. *Held*, that the bank could hold the notes for the amount of its advances: *Winship v. Bank*, 42 Ark. 22. A note was made payable to A and B jointly. A alone indorsed it. *Held*, that the indorsement was not sufficient to put the indorsee in the position of a *bona fide* indorsee not chargeable with equities which might have been availed of in a suit by A and B: *Haydon v. Nicoletti*, 18 Nev. 290.

§ 1579. **Bona Fide Holder—Negligence.**—As to who is a "*bona fide* holder": In *Gill v. Cubitt*,¹ Chief Justice Abbott ruled that although a holder of a bill had given full value for it, yet if he took it under circumstances which ought to have excited the suspicion of a prudent and careful man he was not entitled to protection as a *bona fide* holder. This ruling created great dissatisfaction in mercantile and commercial circles, but it was adhered to for a period of twelve years, or as long as Chief Justice Abbott presided on the bench, but it died with his retirement. In *Crook v. Jadis*,² the doctrine received a very decided modification. The action was brought by the indorser of the bill against the drawer. It was held that it was no defense that the plaintiff took the bill under

¹ 3 Barn. & C. (1824).

² 5 Barn. & Adol. 909.

circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained. The defendant must show that the plaintiff was guilty of gross negligence. This last case was affirmed in *Backhouse v. Harrison*,¹ and one of the judges (Patteson) earnestly assailed the case of *Gill v. Cubitt*. Finally, a step further was taken in *Goodman v. Harvey*,² and the rule in *Gill v. Cubitt* was utterly rejected and repudiated. Lord Denman, speaking for the whole court of king's bench, used the following language: "I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."³ In the United States a majority of the states and the federal courts, following the ruling in *Goodman v. Harvey*, hold that a party taking a note before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.⁴ And while

¹ 5 Barn. & Adol. 1098.

² 4 Ad. & E. 870.

³ And see *Uther v. Rich*, 10 Ad. & E. 784; *Arbounin v. Anderson*, 1 Q. B. 498.

⁴ *Swift v. Tyson*, 16 Pet. 1; *Goodman v. Simonds*, 20 How. 343; *Bank of Pittsburgh v. Neal*, 22 How. 96; *Murray v. Lardner*, 2 Wall. 110; *Maggee v. Badger*, 34 N. Y. 247; 90 Am. Dec. 691; *Belmont Bank v. Hoge*, 35 N. Y. 65; *Phelan v. Moss*, 67 Pa. St.

59; 5 Am. Rep. 59; *Lake v. Reed*, 29 Iowa, 258; 4 Am. Rep. 209; *Brush v. Scribner*, 11 Conn. 388; *Woolfolk v. Bank*, 10 Bush, 504; *Worcester etc. Bank v. Bank*, 10 Cush. 488; *Russell v. Hadduck*, 3 Gilm. 233; 44 Am. Dec. 693; *Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401; *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306; *Farrell v. Lovett*, 68 Me. 326; 28 Am. Rep. 59; *Kelley v. Whitney*, 45 Wis. 110; 30 Am. Rep. 697; *Conkling v. Christie*,

one engaged in dealing in commercial paper may be more familiar with the habits of business men in the making and discounting of such paper, and therefore more chargeable with notice of anything unusual in the form of the paper or the conduct of the holder, yet beyond that he is under no greater obligation than any other purchaser of such paper to inquire into and ascertain the true nature of the transaction between the maker and the payee.¹ But payment before maturity of a lost or stolen negotiable instrument has no different effect than a payment after maturity.² One having an equitable title only to negotiable paper is not a *bona fide* holder of it.³ So one who receives a note from a president of a bank who has no authority to transfer it is not a *bona fide* holder, though he supposes the president to have such power, such supposition being a mistake of law.⁴

ILLUSTRATIONS. — Two drafts were drawn, in blank as to the amount, upon the defendants, and accepted by them, payable to the order of W., the drawer, with the understanding that the sums to be inserted should not in the aggregate exceed one thousand dollars, and W. exceeded this limitation of his author-

20 Neb. 507; *Hamilton v. Marks*, 63 Mo. 167, the court saying: "The rule that a purchaser is not an innocent holder if there are circumstances connected with the transfer sufficient to put an ordinarily prudent man on inquiry is uncertain and void of uniformity. Suspicions assert themselves in different ways in different minds. In like manner, what is to be deemed prudence will be found to vary with different persons. One innocent holder may be more or less suspicious under similar circumstances at one time than at another. So, too, one prudent man may also suspect when another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. In any view, therefore, both upon principle and authority, and from the experience of jurists and commercial men, and the interests of the affairs of business life, it is safe

to say that the liberal doctrine which promotes the free circulation of negotiable instruments is the best, and that the good faith of the transaction should be the decisive test of the holder's rights." But the rule in *Gill v. Cubitt* has been followed in this country: See *Varin v. Hobson*, 8 La. 50; 28 Am. Dec. 125; *Gould v. Stevens*, 43 Vt. 125; 5 Am. Rep. 265; *Mitchell v. Catchings*, 23 Fed. Rep. 710. The question of negligence in the purchase of negotiable paper for value before maturity is material only as bearing on the question of bad faith in making the purchase: *Cloud v. International Book and News Co.*, 23 Mo. App. 319.

¹ *Bedell v. Nat. Bank*, 16 Kan. 130.

² *Bainbridge v. Louisville*, 83 Ky. 285; 4 Am. St. Rep. 153.

³ *Muller v. Pondir*, 55 N. Y. 325; 14 Am. Rep. 259.

⁴ *Smith v. Lawson*, 18 W. Va. 212; 41 Am. Rep. 688.

ity, and negotiated the drafts to the plaintiffs, before maturity, who paid him the money upon them without notice of such excess of authority. *Held*, that the plaintiffs were *bona fide* holders for value, and entitled to recover: *Griggs v. Howe*, 31 Barb. 100. F., the treasurer of a corporation, being obliged to meet a cash assessment on his stock therein, K. agreed to take from F. one hundred shares, and gave therefor his note payable to the company. By an arrangement between D., who was a director, and F., D. advanced the necessary cash, taking therefor F.'s own note and K.'s note as collateral, and part of his stock was issued to K., who knew nothing of the transaction between D. and F. F. made misrepresentations to K. in selling him the stock, of which D. knew nothing. *Held*, that D. was a *bona fide* purchaser for value of K.'s note, and could maintain an action thereon against K.: *Doane v. King*, 30 Fed. Rep. 106. Plaintiff induced a third person to lend his indorsement to defendants, and obtain a discount of the paper at bank; but after the failure of the defendants, plaintiff paid and took up the note at maturity without its dishonor. *Held*, that he acquired the rights of the bank as a *bona fide* holder, and that, in his action against the defendants, evidence of his knowledge of an original want of consideration was not admissible: *Benedict v. De Groot*, 1 Abb. App. 125. A person employed an attorney to write a letter for him to a person whom he claimed as his brother, and ask of such person that he would remit money to the attorney for the use of the person sending. The money was sent to the attorney in the form of drafts payable to the order of the person who was falsely representing himself to be the brother of the person sending them. The person who thus fraudulently represented himself negotiated the drafts, and they came, in the course of business, into the hands of certain bankers. All the parties concerned, except the fraudulent personator, acted in good faith. *Held*, that the bankers, under the circumstances, in purchasing the drafts, were guilty of no negligence, and were not liable to the persons sending the drafts: *Maloney v. Clark*, 6 Kan. 82. Pending the negotiation of a note which bore illegal interest, the maker informed the intending purchaser that it was "all right," and would be paid, and agreed, if the time of payment should be extended, that he would pay interest at the rate of fifteen per cent. *Held*, that the transferee was not a purchaser in good faith, and that the claim of usury was a defense to an action upon the note: *Watson v. Hoag*, 40 Iowa, 142.

§ 1580. **Value.**—"Value," in the law of bills and notes, means any consideration which is sufficient to

support a contract,¹ or any antecedent or pre-existing debt.² One may be a *bona fide* holder of a note without having paid for it in cash, if he acquired it in a genuine business transaction in which he believed that he was paying for it with a valid and valuable asset.³ But in order to constitute such valuable consideration as will protect a *bona fide* purchaser, it must appear that credit was given on the faith of the negotiable paper transferred to him.⁴ While the mere discounting of paper by a bank, and placing the amount thereof to the credit of the depositor having already a balance to his credit, will not constitute the bank a purchaser for value so as to cut off equities, yet, as by the discount and credit it becomes a debtor to the depositor, if before receiving notice of any infirmity in the paper it pays out on the checks of the depositor the full amount due him, including the discount, it thereby becomes a purchaser for value so as to be entitled to full protection. This rule obtains, although the depositor by subsequent deposits and discounts preserves a constant balance to his credit, for in the absence of special facts demanding a different rule, payments are applied to the oldest debts.⁵ The fact that the paper has been purchased at a great discount is immaterial,⁶ even though notes for ten thousand dollars have been purchased for no more than five hundred dollars.⁷ But where only five dollars was paid by the holder for a note

¹ Delivering up papers on which one claims a lien, upon receiving a check to discharge his demand, constitutes him a holder of the check for value: *Aitken v. Meyer*, 67 Barb. 131. See Title Contracts, chapter on Consideration.

² *Swift v. Tyson*, 16 Pet. 1; *Poiner v. Morris*, 2 El. & B. 89. Taking a note of B., indorsed by C. L. & V., in lieu of other notes of B., indorsed by V. alone, and thereupon discontinuing a suit commenced upon them, is a sufficient parting with value to entitle one to the rights of a *bona fide*

holder: *Mohawk Bank v. Corey*, 1 Hill, 513. See *post*, § 1581.

³ *In re Great Western Tel. Co.*, 5 Biss. 363.

⁴ *Odell v. Gray*, 15 Mo. 337; 55 Am. Dec. 147.

⁵ *Fox v. Bank*, 30 Kan. 441.

⁶ *Vinton v. Peck*, 14 Mich. 287; *Michigan Nat. Bank v. Green*, 33 Iowa, 140; *Durant v. Banta*, 27 N. J. L. 624; *Brown v. Penfield*, 36 N. Y. 473; *Citizens' Bank v. Ryman*, 12 Neb. 541.

⁷ *Dresser v. Mo. & Iowa R'y Const. Co.*, 93 U. S. 92; *Barnard v. Campbell*, 58 N. Y. 73; 17 Am. Rep. 208.

of three hundred dollars, the court was compelled to hold that a presumption of fraud was thereby raised.¹ In one case it was held that a "fair" value must have been paid;² in another, that it must have been "full and fair";³ and in another, that it must have been "fair and reasonable";⁴ but the rule is unquestionably the other way. In Nebraska it has been held that one who buys five promissory notes of the face value of one hundred dollars each, secured by mortgage on real estate, for thirty dollars, a few days before one of them is due, may properly be found not a *bona fide* purchaser.⁵

If value has at any time been given, the holder is a holder for value, as regards the acceptor and all parties prior to such time.⁶ It is immaterial that the value is given by or to a person who never signed the instrument or whose signature has been struck out.⁷ The holder of a bill who receives it from a holder for value, but does not himself give value for it, has all the rights of a holder for value against all parties to the bill, except the person from whom he received it.⁸ A holder who has a lien on a bill arising either from agreement or by implication of law is deemed to be a holder for value to the extent of the sum for which he has a lien.⁹

The holder's right of recovery is not restricted to the sum actually paid by him, but he is entitled to recover the full amount of the note.¹⁰

ILLUSTRATIONS. — Plaintiff, having a claim for money collected by its agents, took their check for the amount due, which, however, was not paid on presentment. The agents, being pressed for payment, finally gave the note in suit to the plaintiff, and

¹ De Witt v. Perkins, 22 Wis. 473. v. Lifford, 1 Camp. 246; Watson v. And see Williams v. Huntington, 68 Md. 590; 6 Am. St. Rep. 477. Flanagan, 14 Tex. 354.

² Gould v. Segee, 5 Duer, 260.

⁷ Fairclough v. Pavia, 9 Ex. 690.

³ Hall v. Wilson, 16 Barb. 548.

⁸ Benjamin's Chalmers's Digest, art. 00.

⁴ Baily v. Smith, 14 Ohio St. 396.

⁹ Benjamin's Chalmers's Digest, art. 84.

⁵ Smith v. Jansen, 12 Neb. 125; 41 Am. Rep. 761.

¹⁰ Williams v. Huntington, 68 Md. 590; 6 Am. St. Rep. 477.

⁶ Hunter v. Wilson, 4 Ex. 489; Scott

the unpaid check was surrendered to them. The note so given proving to be a diverted note, though taken in good faith, *held*, that the plaintiff had given value, and might recover on the note against the maker: *Phenix Ins. Co. v. Church*, 56 How. Pr. 493. Defendant made and indorsed in blank a note to his own order, which, within a week, was cashed by the bank of which the plaintiff was president, under his direction, without further indorsement, and the plaintiff heard afterwards that the maker alleged fraud in the origin of the paper, and deeming himself negligent in not requiring a second indorser, took the note long after its maturity, paying his bank the amount. *Held*, that he was a *bona fide* holder for value: *Roberts v. Lane*, 64 Me. 108; 18 Am. Rep. 242. An agent at Nicaragua having collected a claim for his principal, the plaintiff, at Panama, sent him a draft for the net proceeds, drawn by him on the defendant at New York, which was received by the plaintiff in place of the money collected, and was accepted by the defendant, but was not paid. *Held*, that the plaintiff was a *bona fide* holder for value: *Heuertematte v. Morris*, 101 N. Y. 63; 54 Am. Rep. 657. A bank which held several drafts which it had previously discounted, some of which had been drawn by B. on a firm of which he was a member, and had been accepted, and others had been drawn by a third party on said firm to the order of B., and had also been accepted, received, as collateral security for said drafts, a draft from L., who was the payee of the same, and in consideration therefor expressly agreed not to sue either L. or his firm on said drafts before the maturity of the draft thus received. *Held*, that he was a holder for value to the full amount of the draft so received: *Traders' Bank v. Bradner*, 43 Barb. 379. Indorsements of notes were obtained by false representations and fraudulently diverted from the purpose for which they were made, and transferred to plaintiff, and the latter gave therefor his checks payable at future periods; it being agreed that such checks should not be presented at the bank, but that when the money was wanted they should be returned to plaintiff and new checks given. This arrangement was subsequently carried out. But before the checks had been presented or exchanged, and before anything had been paid, plaintiff was informed of the fraud which had been practiced, and requested not to pay or advance any more money on the notes to the maker. *Held*, that the plaintiff was not a *bona fide* holder of the notes, as against the indorser: *Crandall v. Vickery*, 45 Barb. 156. J. drew a check to the order of his wife, May 5, 1862, on a bank, which was on that day certified by the bank (J.'s account there being then good for the amount), but not charged up against J. He gave the check to his wife, who indorsed it and returned it to him. It was put away and for-

gotten, and was not used until January 18, 1869, when it was transferred by J. to plaintiff in consideration of an executory agreement by plaintiff to pay a certain sum out of contingent profits from a patented article. At the time the check was drawn and certified, and afterward, J. was the attorney in fact and agent of his wife, and did business in her name. Before the check was transferred to plaintiff, the deposit of J. in the bank had been reduced to a nominal sum. *Held*, that plaintiff did not part with value when the check was transferred to him, and only acquired the rights of J.'s wife: *Stevens v. Bank*, 5 Thomp. & C. 283; 3 Hun, 147.

§ 1581. Note Received for Pre-existing Debt.—

Whether a person who receives before maturity negotiable paper in payment of or as collateral security for a pre-existing debt is a holder for value, is a question on which the courts have differed. A majority of the cases hold that he is;¹ while in New York and other states the contrary is held.² Other cases are to the effect that, stand-

¹ *Swift v. Tyson*, 16 Pet. 1; *Railroad Co. v. Nat. Bank*, 102 U. S. 14; *Peacock v. Pursell*, 14 Com. B., N. S., 728; *Fisher v. Fisher*, 98 Mass. 303; *Manning v. McClure*, 36 Ill. 490; *First Nat Bank v. Beaird*, 3 Brad. App. 239; *Robinson v. Smith*, 14 Cal. 94; *Outhwaite v. Porter*, 13 Mich. 533; *Cobb v. Doyle*, 7 R. I. 550; *Bank v. Hall*, 6 Ala. 639; 41 Am. Dec. 72; *Bank v. Welch*, 29 Conn. 475; *Williams v. Little*, 11 N. H. 66; *Blanchard v. Stevens*, 3 Cush. 162; 50 Am. Dec. 723; *Woodruff v. Hill*, 116 Mass. 310; *Himmelmann v. Hoteling*, 40 Cal. 111; 6 Am. Rep. 600; *Atkinson v. Brooks*, 26 Vt. 574; 62 Am. Dec. 592; *Russell v. Splater*, 47 Vt. 273; *Stevenson v. Heyland*, 11 Minn. 198; *Sav. Inst. v. Holland*, 38 Mo. 49; *Bank v. Chambers*, 11 Rich. 657; *Bank v. Gilman*, 18 La. Ann. 222; *Maitland v. Bank*, 40 Md. 540; 17 Am. Rep. 620; *Bostwick v. Dodge*, 1 Doug. (Mich.) 413; 41 Am. Dec. 584; *Reddick v. Jones*, 6 Ired. 107; 44 Am. Dec. 68; *Russell v. Hadduck*, 3 Gilm. 233; 44 Am. Dec. 693; *Allaire v. Hartshorne*, 21 N. J. L. 665; 47 Am. Dec. 175; *Schaub v. Clark*, 1 Strob. 209; 47 Am. Dec. 554; *Pitts v. Foglesong*, 37 Ohio St. 676; 41 Am. Rep. 540; *Mix v. Nat. Bank*, 91 Ill. 20; 33 Am.

Rep. 44; *Deere v. Marsden*, 88 Mo. 512; *Merchants' Bank v. McClelland*, 9 Col. 608; *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454; 3 Am. St. Rep. 241; *Harrold v. Kays*, 64 Mich. 439; 8 Am. St. Rep. 835; *Fitzgerald v. Barker*, 96 Mo. 661; 9 Am. St. Rep. 375.

² *Bay v. Coddington*, 5 Johns. Ch. 54; 9 Am. Dec. 263; *Stalker v. McDonald*, 6 Hill, 93; 40 Am. Dec. 389; *Commonstock v. Hier*, 73 N. Y. 269; 29 Am. Rep. 142; *Roxborough v. Messick*, 6 Ohio St. 448; 67 Am. Dec. 346; *Jenkins v. Schaub*, 14 Wis. 1; *Trustees v. Hill*, 12 Iowa, 462; *Royer v. Bank*, 83 Pa. St. 248; *Davis v. Carson*, 69 Mo. 609; *Lawrence v. Clark*, 36 N. Y. 128; *Weaver v. Barden*, 49 N. Y. 286; *Atlantic Bank v. Franklin*, 55 N. Y. 236; *Barnard v. Campbell*, 58 N. Y. 77; 17 Am. Rep. 208; *Moore v. Ryder*, 65 N. Y. 438; *Ins. Co. v. Church*, 81 N. Y. 221; *Bramhall v. Beckett*, 31 Me. 205; *Bailey v. Smith*, 14 Ohio St. 396; 84 Am. Dec. 385; *Garrard v. R. R. Co.*, 29 Pa. St. 154; *Bowman v. Van Kuren*, 29 Wis. 209; 19 Am. Dec. 554; *Depeau v. Waddington*, 6 Whart. 220; 36 Am. Dec. 216; *Taylor's Appeal*, 45 Pa. St. 83; *Lenhem v. Wilmarding*, 55 Pa. St. 76; *Coddington v. Bay*, 20 Johns. 637; 11 Am. Dec. 342; *Petrie*

ing alone, the position of the holder is not that of a holder for value, unless the note is taken, not as security, but in satisfaction and discharge of the original debt,¹ or unless there is an express agreement to extend the time of payment thereof,² or an agreement to that effect implied from the acceptance of the security merely,³ or from other circumstances, e. g., the course of business between the parties, and commercial usage of the place,⁴ or equality in amount of the security and the debt,⁵ or the surrender of securities,⁶ or some other consideration.⁷ But the holder in such cases, the instrument being without consideration or void between the parties, cannot recover its face, but only the amount due him.⁸

v. Clark, 11 Serg. & R. 377; 14 Am. Dec. 636; *Boykin v. Bank*, 72 Ala. 262; 47 Am. Rep. 408; *Craighead v. Wells*, 8 Baxt. 38; 35 Am. Rep. 685; *Richardson v. Rice*, 9 Baxt. 290; 40 Am. Rep. 92. Where a negotiable note is indorsed in blank and delivered to a person who has no interest in it to have it discounted, and he indorses it before maturity to a third person without notice in satisfaction of his own private debt, such person is a *bona fide* holder: *Brush v. Scribner*, 11 Conn. 388; 29 Am. Dec. 303. A firm, being indebted to the plaintiff, delivered to it a note made by A for the accommodation of B, and by D indorsed to the firm; and the plaintiff at the same time surrendered a dishonored check of the firm which they had previously given for the same debt. Held, that this did not constitute the plaintiff a *bona fide* holder so as to exclude proof of a wrong diversion of the note by the payee: *Phoenix Ins. Co. v. Church*, 81 N. Y. 218; 37 Am. Rep. 494. A creditor holding his debtor's note and the note of another as collateral transferred them to different persons after maturity. Held, that if the collateral was first transferred, it operated *pro tanto* as a payment or extinguishment of the original debt, and the subsequent transferee of the original note took it subject to such credit or extinguishment; but if the original note was

first transferred the collateral would follow it, subject to any defense the maker might have made against the first holder: *Ware v. Russell*, 57 Ala. 43; 39 Am. Rep. 710. A pledgee of negotiable paper has a right to collect the whole amount of securities pledged to him, and account to the pledgor for the surplus over his debt. But in case of accommodation paper pledged, the pledgee can recover of the maker only the amount of the debt due him from the pledgor: *Atlas Bank v. Doyle*, 9 R. I. 76; 11 Am. Rep. 219.

¹ *Bank of St. Albans v. Gilliland*, 23 Wend. 311; 35 Am. Dec. 566. A note received as security for a possible future loss is not protected: *Bank of Mobile v. Hall*, 6 Ala. 639; 41 Am. Dec. 72; *Andrews v. McCoy*, 8 Ala. 920; 42 Am. Dec. 669.

² *Goodman v. Simonds*, 20 How. 343; *Oates v. Bank*, 100 U. S. 239; *Moore v. Ryder*, 65 N. Y. 438.

³ *Blanchard v. Stevens*, 3 Cush. 162; 50 Am. Dec. 723; *Holzworth v. Koch*, 26 Ohio St. 33.

⁴ *Bank of Metropolis v. Bank*, 1 How. 234.

⁵ *Michigan Bank v. Leavenworth*, 28 Vt. 209.

⁶ *Pratt v. Coman*, 37 N. Y. 440; *Naglee v. Lyman*, 14 Cal. 450.

⁷ *Stotts v. Byers*, 17 Iowa, 303; *Roxborough v. Messick*, 6 Ohio St. 443.

⁸ *Allaire v. Hartshorne*, 21 N. J. L. 655; 47 Am. Dec. 175.

§ 1582. "Before Maturity."—The instrument must not be due; if it is taken after maturity, the holder is not protected, but takes it subject to all the equities which may have attached against it.¹ Where a note payable to a person's order is transferred by him before its maturity, but not indorsed until after, the indorsement does not relate back, but the holder is subject to its equities.² An indorsement without date is presumed to have been made before the maturity of the note.³

§ 1583. Overdue Bill is Taken Subject to "Equities."—One who takes a bill or note after it is overdue takes it subject to all equities which may have attached to it. In other words, the fact that a bill or note is overdue is equivalent to notice of all facts relating to it.⁴ Payment of

¹ *Jenness v. Bean*, 10 N. H. 266; 34 Am. Dec. 152. A promissory note had been transferred by indorsement as collateral security; and before maturity, with the knowledge of the indorsee, the payee sold it to a third party, into whose possession it did not come until after maturity. Held, that the latter acquired it free from equities and as an indorsee before maturity: *Grimm v. Warner*, 45 Iowa, 106.

² *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18; 1 Am. Rep. 71; *Clark v. Whitaker*, 50 N. H. 474; 9 Am. Rep. 286.

³ *Mobley v. Ryan*, 14 Ill. 51; 56 Am. Dec. 488.

⁴ *Brown v. Davies*, 3 Term Rep. 82; *Cripps v. Davis*, 12 Mees. & W. 165; *Lloyd v. Howard*, 15 Q. B. 998; *Kittle v. De Lamater*, 3 Neb. 325; *Picker v. Sawyer*, 24 Vt. 45; *Eggan v. Briggs*, 23 Kan. 710; *Johnson v. Bloodgood*, 1 Johns. Cas. 51; 1 Am. Dec. 93; *Ayer v. Hutchins*, 4 Mass. 370; 3 Am. Dec. 232; *Sargent v. Southgate*, 5 Pick. 312; 16 Am. Dec. 409; *Cochran v. Wheeler*, 7 N. H. 202; 26 Am. Dec. 732; *Whitwell v. Crehore*, 8 La. 540; 28 Am. Dec. 141; *Robinson v. Lyman*, 10 Conn. 30; 25 Am. Dec. 52; *Foot v. Ketchum*, 15 Vt. 258; 40 Am. Dec. 678; *Thompson v. Shepherd*, 12 Met. 311; 46 Am. Dec. 676; *Snyder v. Riley*,

6 Pa. St. 164; 47 Am. Dec. 452; *Comstock v. Draper*, 1 Mich. 481; 53 Am. Dec. 78; *Weathered v. Smith*, 9 Tex. 622; 60 Am. Dec. 187. "The position of a holder who takes a bill when overdue is this: he is a holder with notice. He may or may not be a holder for value, and his rights will be regulated accordingly. He is a holder with notice for this reason: he takes a bill which, on the face of it, ought to have got home and to have been paid. He is therefore bound to make two inquiries: 1. Has what ought to have been done really been done,—i. e., has the bill in fact been discharged? 2. If not, why not? Is there any equity attaching thereto, i. e., was the title of the person who held it at maturity defective? If his title to the instrument was complete, it is immaterial that for some collateral reason, e. g., a set-off, he could not have enforced the bill against some one or more of the parties liable thereon": *Benjamin's Chalmers's Digest*, art. 134, note. Under the Colorado statute an assignee of a note takes it subject to any defense existing between the maker and the payee which appears on the face of the note, or of which he had notice at the time of the assignment, and in such case it is immaterial whether the note was assigned before or after it became due: *Dunn v. Ghost*, 5 Col. 134.

an overdue note to one who held it at maturity, but who had transferred it after maturity and before such payment to another, of which transfer the one making the payment had no notice, does not discharge the maker.¹ A debtor who has paid the debt for which a note was given as collateral security may recover the note from a transferee after maturity, though the latter took the note without knowledge of his transferee's wrong and for value.² Where interest coupons payable to bearer on a specified day are transferred after that day, the transferee gets no better title than the transferrer had.³

§ 1584. **What are "Equities."** — The rights of a person who is not a party to the bill, but which arise out of transactions relating to it, may constitute an "equity."⁴ So part payment is an "equity" which will attach to the instrument.⁵ So is an agreement, either express or implied, not to negotiate an accommodation bill after its maturity.⁶ A note given in satisfaction of judgment recovered upon an invalid instrument is subject to the same defenses which might have been made to the original instrument.⁷ But the existence of a set-off or counterclaim which is an independent demand against the holder is not an "equity";⁸ nor is the fact that the bill

¹ *Smith v. Lawson*, 18 W. Va. 212.

² *Wood v. McKean*, 64 Iowa, 16.

³ *McKim v. King*, 58 Md. 502; 42 Am. Rep. 34.

⁴ *Ex parte Oriental Bank*, L. R. 5 Ch. 358; *Warren v. Haight*, 65 N. Y. 171.

⁵ *Graves v. Key*, 3 Barn. & Adol. 319; *Lanato v. Boyhi*, 31 La. Ann. 229; *Fowler v. Palmer*, 62 N. Y. 533.

⁶ *Parr v. Jewell*, 16 Com. B. 684; *Carruthers v. West*, 11 Q. B. 143.

⁷ *Comstock v. Draper*, 1 Mich. 481; 53 Am. Dec. 78.

⁸ *Oulds v. Harrison*, 10 Ex. 572; *Ex parte Swan*, L. R. 6 Eq. 344; *Richard-*

son v. Daily, 34 Iowa, 427; *Davis v. Neligh*, 7 Neb. 82; *Young v. Shroner*, 80 Pa. St. 463; *Arman v. Houck*, 4 Gill, 325; 45 Am. Dec. 133. *Contra*, *Baxter v. Little*, 6 Met. 7; 39 Am. Dec. 707; *Armstrong v. Chadwick*, 127 Mass. 156; *Driggs v. Rockwell*, 11 Wend. 504; *Sargent v. Southgate*, 5 Pick. 312; 16 Am. Dec. 409. The assignee of non-negotiable paper takes it subject only to those equities to which it was subject in the hands of the assignor, as between the original parties, not to those arising between other parties in the course of its transfer: *Goldthwaite v. Montgomery Bank*, 67 Ala. 549.

or note was an accommodation bill or note given without consideration;¹ nor a set-off acquired after the transfer.² One who has bought a bill or note for value and without notice is not bound by a secret equity in favor of a third person not connected with the legal title, as the interest of a beneficiary in a note which a trustee has sold in violation of his trust.³ The maker of a note transferred after due cannot set off against it a note against the payee purchased before the transfer, where he was indebted to the payee at the time of such transfer on other demands exceeding the amount of the note so purchased.⁴ And any infirmity, equity, or defense must exist and attach to the note before its transfer.⁵

ILLUSTRATIONS. — B, to accommodate A, accepts a bill drawn on him by the latter, payable six months after date. A, after the bill is overdue, indorses it to C for value. C can sue B: *Stein v. Yglesias*, 1 Crompt. M. & R. 565. C, the holder of a bill accepted by B, is indebted to B for arrears of rent. If C sues B, B can set off the arrears of rent; but if C indorses the bill, when overdue, to D for value, B cannot set off C's debt against D: *Trafford v. Hall*, 7 R. I. 104; 82 Am. Dec. 589. B, being willing to accommodate A with a three months' credit, accepts a bill drawn on him by A payable three months after date, upon the terms that it is not to be left outstanding after that time. A discounts the bill with C when overdue. C cannot recover against B: *Parr v. Jewell*, 16 Com. B. 684; *Chester v. Dorr*, 41 N. Y. 279. After the maturity of a note, the payee drew an order upon the maker. This was done without any express understanding that the same, when accepted, should be regarded as a payment upon the note; and the note was, before payment of the acceptance, sold and transferred to a third party. *Held*, that the maker was entitled to be credited with the amount of the outstanding acceptance: *Schuster v. Marden*, 34 Iowa, 181.

¹ *Sturtevant v. Ford*, 4 Man. & G. 101; *Ex parte Swan*, L. R. 6 Eq. 344; *Davis v. Miller*, 14 Gratt. 1. *Contra*, *Chester v. Dorr*, 41 N. Y. 279; *Kellogg v. Barton*, 12 Allen, 527; *Coghlin v. May*, 17 Cal. 515; *Hoffman v. Foster*, 43 Pa. St. 137.

² *Baxter v. Little*, 6 Met. 7; 39 Am. Dec. 707.

³ *Hibernian Bank v. Everman*, 52 Miss. 500.

⁴ *Collins v. Allen*, 12 Wend. 356; 27 Am. Dec. 130.

⁵ *Robinson v. Lyman*, 10 Conn. 30; 25 Am. Dec. 52.

§ 1585. **At What Time is Bill or Note Overdue.** — Bills or notes not payable on demand are deemed overdue after the expiration of the last day of grace.¹ One payable on demand, and negotiated eighteen months after its date, was considered overdue so as to let in equities in one case,² while in another it was not.³ In another it was held that in such a case there was no precise time when such a note was to be deemed dishonored; "the demand must be made in reasonable time, and that will depend upon the circumstances of the case and the situation of the parties."⁴ But the rule that a promissory note payable on demand, with interest, is a continuing security, does not apply between holder and maker. Therefore, a note payable on demand, with interest, transferred nearly three months after date, is past due when transferred, and subject to all the defenses that would have been available if the suit had been by the original payee.⁵ A bill or note payable in installments is overdue *in toto* when any installment becomes overdue.⁶ But a bill or note is not overdue because interest on it is overdue.⁷ Want of protest will not warrant the inference in favor of the maker of a negotiable promissory note that the transfer of the note from the payee was after it fell due.⁸ It has been held in Massachusetts that a transfer of a bill on the last day of grace is a transfer of an overdue bill.⁹

¹ *Leftley v. Mills*, 4 Term Rep. 170; *Chambless v. Matthews*, 57 Miss. 306. A note which is payable "on or before three years from date" is not due until the three years has expired; and a purchaser for value within that time is entitled to the same protection as if the note were made payable three years from date: *Helmer v. Krolick*, 36 Mich. 371.

² *Farnham v. Haskin*, 2 Caines, 369.

³ *Hendricks v. Judah*, 1 Johns. 319.

⁴ *Losee v. Dunkin*, 7 Johns. 70; 5 Am. Dec. 245.

⁵ *Herrick v. Woolverton*, 41 N. Y. 581; 1 Am. Rep. 461.

⁶ *Vinton v. King*, 4 Allen, 562; *Field v. Tibbetts*, 57 Me. 358; 99 Am. Dec. 779.

⁷ *Kelley v. Whitney*, 45 Wis. 110; *Cromwell v. County of Sac*, 96 U. S. 51; *Boss v. Hewitt*, 15 Wis. 260; *Nat. Bank v. Kirby*, 108 Mass. 497. *Contra*, *Hart v. Stickney*, 41 Wis. 630; 22 Am. Rep. 728; *First Nat. Bank v. Scott Co.*, 14 Minn. 77; *Newell v. Gregg*, 51 Barb. 263.

⁸ *Pearce v. Austin*, 4 Whart. 489; 34 Am. Dec. 523.

⁹ *Pine v. Smith*, 11 Gray, 38.

The authorities are in conflict as to when suit may be begun against the maker or acceptor. It is held that suit may be commenced,—1. Not until the day after the last day of grace, since the maker has the whole of that day in which to pay the note, and is not in default until its expiration;¹ 2. On the last day of grace, after due demand and refusal;² 3. On the last day of grace, after reasonable hours for payment have elapsed.³ The Massachusetts cases cited *supra*, and others, hold that suit may be begun immediately upon posting the notice of non-payment, though before the indorser had time to receive it.⁴ Other cases, however, hold that the holder cannot bring suit until the indorser has had time to receive notice by due course of mail.⁵

ILLUSTRATIONS. — The defendant drew a check in favor of M., or bearer, and handed it to G. C., under circumstances which might have been a defense in an action by G. C. on the check. G. C. handed the check, eight days after date, to his bankers, who, without any knowledge of the circumstances under which it was given to G. C., gave value for it. The check being dishonored, in an action by the banker against the drawer, *held*, that the rule of law applicable to overdue bills and notes does not apply to checks, and that therefore the mere fact that the holder receives a check eight days after date does not render his title subject to any equities or matter attaching to the check which might amount to a defense as between the drawer

¹ *Wilcombe v. Dodge*, 3 Cal. 260; 58 Am. Dec. 411; *Osborne v. Moncure*, 3 Wend. 170; *Bevan v. Eldridge*, 2 Miles, 353; *McFarland v. Pico*, 8 Cal. 626; *Davis v. Eppinger*, 18 Cal. 379; 79 Am. Dec. 184; *Douthit v. Ballard*, 41 Barb. 33; *Ethridge v. Ladd*, 44 Barb. 69; *Smith v. Aylesworth*, 40 Barb. 104; *Taylor v. Jacoby*, 2 Pa. St. 495; 45 Am. Dec. 615; *Benson v. Adams*, 67 Ind. 353; 35 Am. Rep. 220.

² *Estes v. Tower*, 102 Mass. 65; 3 Am. Rep. 439; *Ammidown v. Woodman*, 31 Me. 580; *Daly v. Proetz*, 20 Minn. 411; *Shed v. Brett*, 1 Pick. 401; 11 Am. Dec. 209; *City Bank v. Cutter*, 3 Pick. 414; *Staples v. Bank*, 1 Met. 43; 35 Am. Dec. 345; *Gilbert v. Dennis*, 3 Met. 495; 38 Am. Dec. 329;

Whitwell v. Brigham, 19 Pick. 117; *Greeley v. Thurston*, 4 Me. 479; 16 Am. Dec. 285; *Coleman v. Ewing*, 4 Humph. 241; *Dennie v. Walker*, 7 N. H. 201.

³ *McKenzie v. Durant*, 9 Rich. 61; *Veazie Bank v. Winn*, 40 Me. 62; *Coleman v. Carpenter*, 9 Pa. St. 552; 49 Am. Dec. 553.

⁴ *Shed v. Brett*, 1 Pick. 401; 11 Am. Dec. 209; *Greeley v. Thurston*, 4 Me. 479; 16 Am. Dec. 285; *Dickens v. Beal*, 10 Pet. 572; *Dennie v. Walker*, 7 N. H. 201; *Manchester Bank v. Fellows*, 28 N. H. 302.

⁵ *Smith v. Bank*, 5 Serg. & R. 318; *Love v. Nelson*, 1 Mart. & Y. 237; *Wiggle v. Thomasson*, 11 Smedes & M. 452.

and payee. It is a question for the jury whether the check was taken by the plaintiffs under circumstances which ought to have excited their suspicion, and the fact that it was eight days overdue is evidence in deciding the question: *London etc. Bank v. Groome*, 14 Cent. L. J. 329. A procured from a bank a discount on the demand note of a third person, secured by negotiable bonds as collateral. *Held*, that the note was not overdue and dishonored so as to impair the bank's title to the collateral: *Jersey City Savings Bank v. Jersey City Bank*, 48 N. J. L. 513. Action upon a promissory note for twenty thousand dollars, payable in five years, with interest annually. The note was transferred to the plaintiff after interest had fallen due and remained unpaid, the plaintiff giving his note for it, which remained overdue and unpaid in the hands of the payee. *Held*, that the plaintiff was not a *bona fide* holder: *Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428.

§ 1586. "In the Usual Course of Business."—The phrase "in the usual course of business" is not confined to persons engaged habitually in banking or purchasing notes; but one who in good faith purchases a negotiable note before maturity for value, or, as shown in a former section,¹ who takes it in payment of an antecedent debt, is in the usual course of business;² in short, this phrase, though a part of most of the definitions, seems to be no more than, or to require nothing beyond, the former requisite, *bona fides*. Speaking of it, the supreme court of Connecticut say:³ "Would a business man of ordinary intelligence and capacity receive commercial paper when offered for the purpose for which this was transferred, as money, and upon its credit part with his property? Or would he at once suspect the integrity of the paper itself, and the credit and standing of the party offering it? A correct answer to these questions must settle conclusively the mercantile character of this transaction."⁴ A note is

¹ See *ante*, § 1581.

² *Tescher v. Merea*, 118 Ind. 586.

³ *Roberts v. Hall*, 37 Conn. 205; 9 Am. Rep. 308.

⁴ And see *Coddington v. Bay*, 20 Johns. 637; 11 Am. Dec. 342. The mere fact that a note, before its maturity, comes in the usual course of

business into the hands of the payee after having been once negotiated by him does not destroy its negotiability, nor defeat the right of a *bona fide* holder to recover against all who are parties to the note at the time it is negotiated by him: *West Boston Savings Bank v. Thompson*, 124 Mass. 506.

received in due course of trade, where the holder has given for it money, goods, or credit, or has sustained on its account some loss or incurred some liability.¹

ILLUSTRATIONS. — A obtained defendant's promissory note by fraud. On discovering the fraud defendant demanded a return of the note. A refused to return it, but, before its maturity, indorsed it to plaintiff, who had no knowledge of the fraud, in trust for A's creditors, and the balance for A's wife. *Held*, that plaintiff did not take the note "in the regular course of business," and that it was open to the defense of fraud: *Roberts v. Hall*, 37 Conn. 205; 9 Am. Rep. 308. A, being indebted to plaintiffs in a sum for which they held his two notes, gave plaintiffs a note of a third party, and the note in suit of which he was the maker. A had obtained the note in suit surreptitiously, and in fraud of the defendant, who had indorsed it in blank and deposited it with a third party for another and a special purpose. It did not appear whether the latter notes were given by A to plaintiffs in payment or as collateral, or whether his former two notes were surrendered. In a suit against defendant as indorser, *held*, that plaintiffs were not holders in the usual course of business so as to protect themselves against the fraud of A, the maker: *Lenheim v. Wilmar-ding*, 55 Pa. St. 73. A gave B an accommodation note without consideration, payable in thirty days from date. On the day of the date, B, being indebted to C on a demand then due and payable, indorsed the note to C merely as collateral security for said demand, he being ignorant of the fact that the note was without consideration. *Held*, not a commercial negotiation in the usual course of business and trade, and the indorsee could not recover in a suit against the maker: *Bram-hall v. Beckett*, 31 Me. 205. A drew a bill on B in favor of C, which was indorsed by C and D on Sunday, and handed to B, who delivered it to E as a substitute for another bill held by E against B for the same amount, on which he had paid usurious interest, and extending the time of payment, E taking it without notice that they were indorsed on Sunday. *Held*, that E was not a *bona fide* holder in the usual course of trade: *Salt-marsh v. Tuthill*, 13 Ala. 390. The plaintiffs were the agents of a manufacturer of guano, and as such, by their local agent, sold to the defendant a lot of guano, and warranted the same to be a good fertilizer, taking a note for the price payable to themselves. Afterwards, before the note became due, they became the real owners of the note by arrangement between themselves and the manufacturers. *Held*, that the plaintiffs

¹ *Kimbrow v. Lytle*, 10 Yerg. 417; 31 Am. Dec. 586.

were not *bona fide* purchasers without notice of defendant's note: *Boit v. Whitehead*, 50 Ga. 76. Action upon a promissory note for twenty thousand dollars, made by the grandfather of the payee, payable in five years, with interest annually. When the note was executed it was attached to a stub, the whole being torn from the maker's note-book of blank forms, and filled up and signed in the grandfather's handwriting. The stub contained memoranda of the date, amount, maturity, and payee's name, and the words, "to make the amount the same as Chas. W. Cornell." The latter was another grandson to whom he had given twenty thousand dollars. The stub was removed, and the note was transferred to the plaintiff after interest had fallen due and remained unpaid, the plaintiff giving his own note for it, which remained overdue and unpaid in the hands of the payee. *Held*, that the plaintiff was not a *bona fide* holder: *Cowee v. Cornell*, 75 N. Y. 91; 31 Am. Rep. 428. A vendor of land took several negotiable notes for the payment of the purchase-money, one of which was negotiated in the usual course of trade, and the others were not. *Held*, that although the holder of the note so negotiated was not subject to an equity existing against the vendor, such equity could be enforced against the holders of the other notes, and that the vendor could not be required to apportion the loss: *Andrews v. McCoy*, 8 Ala. 920; 42 Am. Dec. 669.

§ 1587. "Without Notice of Any Defense." — Notice means actual notice, i. e., either knowledge of the facts or a suspicion of something wrong, combined with a willful disregard of the means of knowledge.¹ It must be actual, and not merely constructive.² But an indorsee having knowledge of such facts as should put him on inquiry as to the validity of the indorsement is charged with a knowledge of what he would have learned by such inquiry.³ One is not chargeable with notice of equities knowledge of which came to his agent through a transaction outside his agency.⁴ A member of a copartnership is not chargeable with notice of fraudulent representations made by a copartner in selling his interest in the part-

¹ *Kittle v. De Lamater*, 3 Neb. 325; *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491; *Borden v. Clark*, 26 Mich. 410; *Kline v. Spaehr*, 56 Ind. 296; *Miller v. Finley*, 26 Mich. 249; 12 Am. Rep. 306; *Cooper v. Nock*, 27 Ill. 301.

² *Rock Island Bank v. Loyhed*, 28 Minn. 396.

³ *Bank v. Rider*, 58 N. H. 512.

⁴ *Kauffman v. Robey*, 60 Tex. 308; 48 Am. Rep. 264.

nership, and the note so obtained and taken by such first-named partner for a pre-existing debt due from his copartner is not void because of the fraud.¹ The fact that one purchases a negotiable note before maturity for about one half the face value, there being evidence tending to show that he did not regard it as good, and no evidence showing it to be worth more, is not sufficient to put the purchaser on inquiry as to the consideration.² Nor will a small discount on the sale of a note, nor the seller's indorsement "to be accountable without demand and notice," support an inference of notice to the purchaser of the invalidity of the note.³ The fact that some of the interest coupons were overdue at the time of plaintiff's purchase is not sufficient to put him upon inquiry, or charge him with notice of any defenses to the bonds.⁴ Publication in a newspaper of equities existing in favor of the maker or indorser of a promissory note will not affect a purchaser for value without notice of such equities, although he may be a regular subscriber of such paper.⁵ An indorsee who takes a negotiable note for value, before maturity, on the face of which is written, "To be held as collateral," is chargeable with notice of equities between the original parties.⁶ So the outstanding of a common bank check for two and a half years, as shown by the date of it, together with the word "Mem." on its face, is notice that it was not given in the usual course of trade.⁷ Knowledge at the time of taking a note that the maker intends to set up in defense a failure of title to the land for the price of which it was given will subject an indorser to that defense, although he did not know the particular facts invalidating the title.⁸ The maker's tele-

¹ Liddell v. Crain, 53 Tex. 549.

² Cannon v. Canfield, 11 Neb. 506.

³ Pierce v. Ricker, 16 N. H. 322; 41 Am. Dec. 728.

⁴ Preble v. Supervisors, 8 Biss. 358; R. R. Co. v. Sprague, 103 U. S. 756.

⁵ Beltzhoover v. Blackstock, 3 Watts, 20; 27 Am. Dec. 330.

⁶ Gibson v. Hawkins, 69 Ga. 354; 47 Am. Rep. 757.

⁷ Skillman v. Titus, 32 N. J. L. 96.

⁸ Knapp v. Lee, 3 Pick. 452; Bank of Tennessee v. Johnson, 1 Swan, 217.

gram to the indorsee, before taking the note, that it would be good "if the consideration for which it was given has not been misrepresented; this has not been tested yet," charges him with notice, so that he cannot enforce the note if procured by fraudulent misrepresentation.¹ A note which shows on its face that it was given by a married woman is sufficient notice to any one to put him on inquiry as to whether it inured to her separate use before he discounted it, or whether the authority of her husband could be dispensed with.² Where a negotiable note payable to bearer has been lost or stolen without the fault or negligence of the owner, and is presented for payment when overdue, the party liable to pay it is bound by previous notice of the loss to inquire into the title of the *de facto* holder before payment.³

¹ Studebaker Mfg. Co. v. Dickson, 70 Mo. 272.

² Gaalon v. Matherne, 5 La. Ann. 496; McComas v. Greene, 5 La. Ann. 121; Pilcher v. Kerr, 5 La. Ann. 144.

³ Hinckley v. R. R. Co., 129 Mass. 52, 37 Am. Rep. 297, the court saying: "It is conceded that the text-books declare generally that liability ensues from the payment of a lost negotiable instrument after notice of loss, and that no such payment will operate as a discharge against the loser, unless the party presenting the instrument for payment is required before payment to establish a clear title thereto: Chitty on Bills, 11th ed., 188, 278, 279; Bayley on Bills, 2d Am. ed., 112, 113; Byles on Bills, 13th ed., 223, 224, 379; 2 Daniel on Negotiable Instruments, 2d ed., 507, 538; 2 Parsons on Notes and Bills, 2d ed., 81, 212, 213. It is alleged for the defense, as a circumstance calculated greatly to weaken the force of this consensus of text-writers that no case has been found in which recovery has actually been had, or even sought, upon such liability. But it must be remembered that upon a principle of law so important as this the absence of decisions may be because of the long and unquestioning acquiescence in the rule; and certainly it is more reasonable

thus to construe it than to attribute it to any doubtfulness or uncertainty as to the rule itself. Such doubt or uncertainty would almost necessarily lead to a judicial decision. It has unquestionably been the practice of the Bank of England for more than a century to regard notices of the loss of their notes, and to delay payment for the purpose of making inquiry into the title of the *de facto* holder. It becomes, then, of great importance to determine what notice is sufficient to charge the party liable to pay with a duty of inquiry into the title of the *de facto* holder. It is clear that such notice need not be accompanied by an offer of indemnity, since the filing of a bond of indemnity merely takes the place of the filing in court of the note or other security; and such filing, as was very clearly stated by Chief Justice Shaw in *Fales v. Russell*, 16 Pick. 315, is not a condition precedent of the right to recover, but simply an acquittance to be made in obtaining judgment. As to the time of the notice, there can be no question that if at the very moment of payment the payor were reminded that the note which he was about to pay had been lost or stolen, it would be his duty to delay payment till the *de facto* holder had established a title to the instrument.

ILLUSTRATIONS.—NOTICE PRESENT.—A. gave E., his confidential clerk, a note signed in blank. E. left A.'s service, and four years afterwards, without A.'s knowledge, transferred the note to H., who knew these facts. *Held*, that H. could not recover of A.: *Snyder v. Armstrong*, 9 Phila. 146. The payee of a promissory note for eighty-seven dollars in writing agreed to sell the same to H. for a specified price, which H. agreed to pay. Afterwards, and before maturity, such payee transferred the note for value to plaintiff, who knew of the agreement with H. *Held*, that the sale to H. was valid, and plaintiff was not a *bona fide* holder: *Sheldon v. Parker*, 5 Thomp. & C. 616; 3 Hun, 498. A note was indorsed by the defendant for the accommodation of the makers, who delivered it to the owner of a ship in payment of the price of their passage therein, and such owner transferred the note, without indorsement, to the plaintiffs on account of a precedent debt due to them from the transferrer, with notice that the note would be contested mainly on the ground of the ship's bad character. *Held*, that the plaintiffs had sufficient notice to put them upon inquiry: *Holbrook v. Mix*, 1 E. D. Smith, 154. A sheriff, under an order of court, sold certain lands and took notes to himself as sheriff from the purchaser, secured by deeds of trust, and afterwards indorsed one of the notes to a third party, accompanied by a delivery of the deed of trust, which showed clearly the consideration for which the note was given. *Held*, that the indorsee

The question before us is whether notice previously given of the loss of a negotiable instrument distinguishable by number or other ear-mark is sufficient to fix upon the party liable to pay a duty of inquiry, and of refusal to pay to a holder who cannot substantiate his title. We think that such previous notice is sufficient. Whether it is sufficient to fix such duty of inquiry upon a mere transferee it is not necessary for us to inquire, because the party liable to pay a negotiable instrument bears a relation and owes duties to the holder and loser different from those of the transferee; though it has certainly never been decided in this commonwealth that such previous notice is insufficient to fix a duty of inquiry even upon a mere transferee, and the doctrine laid down in *Fales v. Russell* tends strongly the other way. For a party engaged in mercantile business pursuits to keep a list of notes signed by himself which he has been notified have been lost or stolen is neither impracticable nor

burdensome, and is no more a hardship than any other precaution which the law merchant imposes upon those who make use of the benefits of negotiable paper for the discouragement of fraud and the protection of the public. And the fact that an individual or a corporation does business on a very large scale is far from being a reason why such individual or corporation should be allowed to disregard any of the obligations laid upon those who issue only small amounts of negotiable paper. Ordinarily, opportunities for fraud upon the public will increase with the increase of the business of a great corporation, and it is the duty of such a corporation to provide proportionally greater means of guarding against such fraud. If it be necessary to engage special clerks, or to devote extra time to applying the precautions imposed by the law merchant, it is no hardship, but only the natural and reasonable increase of a duty proportionate to the magnitude of the obligations of such a corporation.

had notice of the fiduciary character of the sheriff: *Renshaw v. Wills*, 38 Mo. 201. A person indorsed a note for the accommodation of the maker, the amount in the body of the note at the time being in blank, and it being intended that it should be filled up for the amount as written in figures in the corner and margin of the note, but it was filled out to a larger amount in the presence of the holder. *Held*, that the holder was in possession of such knowledge as was sufficient to put him on his guard: *Henderson v. Bondurant*, 39 Mo. 369; 93 Am. Dec. 281. A note was given by a debtor to an execution creditor to obtain a release from a levy, and was indorsed in the name of a firm by one of the partners. There was no showing that the firm received any consideration, or that one of the partners consented to the indorsement. *Held*, that it was purely an accommodation indorsement, and that the creditor, who was not a *bona fide* holder, was privy to all the facts: *Heffron v. Hanaford*, 40 Mich. 305.

ILLUSTRATIONS (CONTINUED).—NOTICE ABSENT.—A member of the firm of B. & Co. made a note in the firm name payable to the order of W. & Co., and gave it to W., a member of both firms, who indorsed the firm name of W. & Co. upon it in fraud of that firm, and negotiated it. *Held*, in suit thereon against the members of the firm of W. & Co., that there was nothing upon the face of the note which, as matter of law, was conclusive notice to plaintiff that the indorsement of W. & Co. was invalid, or that their indorsement was for the accommodation of B. & Co., although plaintiff knew that W. was a member of both firms: *Stimson v. Whitney*, 130 Mass. 591. Action upon a promissory note, brought by the indorsee for value before maturity. The defense was that the note was given for spirituous liquors to be sold in the state in violation of law. *Held*, that evidence that the payee was called Whisky Smith, or Whisky Bill Smith, was not admissible to establish such defense, or to show that the indorsee purchased the note with knowledge of its legal consideration: *Wright v. Wheeler*, 72 Me. 278. A, the owner and payee of a negotiable promissory note, indorsed the same in blank, and deposited it for safe-keeping in the hands of B, his agent, who, without authority and fraudulently, put his own name on the back of the note, appending to his name the word "curator," and transferred the note, so that it came into the hands of C, who took it in good faith as collateral security for the debt of a fourth party. *Held*, that C was not to be charged with notice of B's fraud in disposing of the note: *Paulette v. Brown*, 40 Mo. 52. C. contracted for ice with G. & Co., a firm of which two of the three members did a paving business under the same firm

name. The ice firm drew upon C., who accepted the bills, which were indorsed to F., a clerk of the paying firm, who knew the ice firm was using the paying firm's name. *Held*, that there was nothing suspicious to require F., in an action on the bills against C., to prove the consideration or the *bona fides* of the transaction: *Callen v. Fawcett*, 58 Pa. St. 113. L., to pay his individual debt, gave to his creditors, a business firm, a promissory note with his own indorsement and that of the firm of which he was a member, without the knowledge or consent of said firm. One of the firm, to whom L. transferred the note, was a director of the bank that discounted it. In a suit by the bank against the firm upon the indorsement, *held*, that this latter fact constituted no ground of defense: *Atlantic State Bank v. Savery*, 82 N. Y. 291. A promissory note contained the following clause: "This note is given for part of" the purchase price of a certain specific lot of ground. *Held*, that while such clause in the note notified the assignee or purchaser of the true consideration, it was not sufficient to advise him that there was or would necessarily be a failure of the consideration: *Henneberry v. Morse*, 56 Ill. 394.

§ 1588. Holder Claiming under Bona Fide Holder.

—One who derives his title through a *bona fide* holder for value without notice has all the rights of such *bona fide* holder against the acceptor and all prior parties, although he himself may have given no value and may be affected with notice.¹

ILLUSTRATIONS. — The promissory note of defendant was before maturity purchased for value by the E. bank, the bank having no notice of any defense thereto. After the note was due, defendant having threatened to set up the defense of fraud, plaintiff, who was president of the E. bank, purchased the note. *Held*, that plaintiff was a *bona fide* holder, and the fact that the note had been obtained from defendant by the fraud of a holder prior to the bank was no defense against plaintiff: *Roberts v. Lane*, 64 Me. 108; 18 Am. Rep. 242.

§ 1589. Holder Presumed to be for Value and Bona Fide. — The holder of a bill or note is presumed to be a

¹ *May v. Chapman*, 16 Mees. & W. 355; *Masters v. Ibberson*, 8 Com. B. 100; *Connors v. Clark*, 94 U. S. 278; *Woodworth v. Huntoon*, 40 Ill. 131; 89 Am. Dec. 340; *Mowyer v. Cooper*, 35 Iowa, 257; *Hascall v. Whitmore*, 19 Me. 102; 36 Am. Dec. 739.

bona fide holder for value without notice.¹ The holder of a promissory note payable to bearer is not bound to prove that he came by the note fairly and for a valuable consideration, unless some evidence is given to raise a suspicion, at least, that he did not come fairly by the note.² The indorsee's purchase for value before maturity being shown, the *onus* of proving his knowledge of the maker's defenses is on the maker.³ When a note is payable to order, and not indorsed, the presumption is that it was delivered to the payee named or some one authorized by him to receive it, and its possession by a third party will be deemed to be in trust. As between him and the payee, the note furnishes at least *prima facie* evidence that the former has the legal title.⁴

ILLUSTRATIONS.—A draws a bill on B and indorses it to C. C sues B. It is shown that B accepted it for A's accommodation. C is not called on to prove that he gave value; he can recover without so doing: *Millis v. Barber*, 1 Mees. & W. 425.

§ 1590. **Exceptions.**—Where it is proved that the note was obtained by fraud or was illegal in its inception, the burden is cast on the holder to show that he took it *bona fide* and for value.⁵ But a partial or total failure of con-

¹ *Collins v. Gilbert*, 94 U. S. 753; *Root v. Cook*, 81 Ill. 261; *Hall v. Allen*, 37 Ind. 541; *Harger v. Worrall*, 69 N. Y. 370; *Dingham v. Arnswick*, 77 Pa. St. 114; *Conroy v. Warren*, 3 Johns. Cas. 259; 2 Am. Dec. 156; *Harrison v. Edwards*, 12 Vt. 648; 36 Am. Dec. 364; *Knight v. Pugh*, 4 Watts & S. 445; 39 Am. Dec. 99; *Brown v. Street*, 6 Watts & S. 222; *Schaub v. Clark*, 1 Strob. 299; 47 Am. Dec. 554; *Jennison v. Stafford*, 1 Cush. 168; 48 Am. Dec. 594; *Atlas Bank v. Doyle*, 9 R. I. 76; 11 Am. Rep. 219; 206; *Auburn Bank v. Veneman*, 43 Hun, 241.

² *Jones v. Westcott*, 2 Brev. 166; 3 Am. Dec. 704.

³ *Wildsmith v. Tracy*, 80 Ala. 258.

⁴ *Price v. Brown*, 98 N. Y. 388.

⁵ *Woodward v. Rogers*, 31 Iowa,

342; *Lane v. Krekle*, 22 Iowa, 400; *Munroe v. Cooper*, 5 Pick. 412; *Perrin v. Noyes*, 39 Me. 384; 63 Am. Dec. 633; *Gray v. Bank*, 29 Pa. St. 365; *Smith v. Lac. Co.*, 11 Wall. 139; *Tucker v. Morrill*, 1 Allen, 528; *Sistermans v. Field*, 9 Gray, 331; *Sanford v. Norton*, 14 Vt. 228; *Atkinson v. Brooks*, 26 Vt. 574; 62 Am. Dec. 592; *Paton v. Coit*, 5 Mich. 505; 72 Am. Dec. 58; *Edmunds v. Groves*, 2 Mees. & W. 642; *Harvey v. Townes*, 6 Ex. 656; 4 Eng. L. & Eq. 531; *Hall v. Featherstone*, 3 Hurl. & N. 284; *Hogg v. Skeen*, 114 Eng. Com. Law Rep. 426; *Ellicott v. Martin*, 6 Md. 509; 61 Am. Dec. 327; *Vather v. Zane*, 6 Gratt. 246; *Holme v. Karsper*, 5 Binn. 469; *Woodhull v. Holmes*, 10 Johns. 231; *Cummings v. Thompson*, 18 Minn. 246; *Porter v. Knapp*, 6 Lans. 125; *Bank*

sideration, payment, or matters going to discharge the instrument arising after its delivery to the payee will not shift the burden of proof.¹

ILLUSTRATIONS. — B makes a note payable to C. C indorses it to D, who sues B. If it appears that B made the note for an illegal consideration, D must prove that he gave value: *Bailey v. Bidwell*, 13 Mees. & W. 73; *Bottomley v. Goldsmith*, 36 Mich. 27; *Emerson v. Burns*, 114 Mass. 348. The holder of a bill indorses it to D to get it discounted. D fraudulently negotiates it to E, who negotiates it to F. F sues the acceptor. Evidence is given of D's fraud. F must prove that he is the holder for value: *Smith v. Braine*, 16 Q. B. 244; *Berry v. Alderman*, 14 Com. B. 95. B makes a note payable to C, the consideration for which is a wager, i. e., a consideration void by statute, but not prohibited under a penalty. C indorses it to D, who sues B. Evidence is given of these facts. D is not called on to prove that he gave value: *Fitch v. Jones*, 5 El. & B. 238. Action against the maker of a note payable to bearer. It is shown to have been stolen from the true owner. It lies on the holder to prove that he gave value: *Raphael v. Bank*, 17 Com. B. 161; *Robinson v. Hodgson*, 73 Pa. St. 202. An acceptance is given in renewal of a bill which turns out to be a forgery. The genuine bill is negotiated, and the holder sues the acceptor. Evidence is given of these facts. It lies on the holder to prove that he is the holder for value: *Mather v. Maidstone*, 1 Com. B., N. S., 273. A partner accepts a bill in the firm's name for a private debt and in fraud of his copartners. The bill is negotiated. The holder sues the firm as acceptors. As soon as it appears that the bill was given for a private debt, the holder is called upon to prove that he is a holder for value: *Hogg v. Skeen*, 18 Com. B., N. S., 426; *Bank v. Gilliland*, 23 Wend. 311; 36 Am. Dec. 566.

v. Ryan, 21 La. Ann. 551; *McKesson v. Stanberry*, 3 Ohio St. 156; *Bank v. Gibson*, 5 Duer, 574; *Bertrand v. Barkman*, 13 Ark. 150; *Rogers v. Morton*, 12 Wend. 484; *Clark v. Thayer*, 105 Mass. 216; 7 Am. Rep. 511; *Wyer v. Bank*, 11 Cush. 51; *Sperry v. Spaulding*, 45 Cal. 544; *Kinney v. Krouse*, 28 Wis. 188; *Sloan v. Union Bank*, 67 Pa. St. 470; *Beltzhoover v. Blackstock*, 3 Watts, 20; 27 Am. Dec. 330; *Knight v. Pugh*, 4 Watts & S. 445; 39 Am. Dec. 99; *Schaub v. Clark*, 1 Strob. 299; 47 Am.

Dec. 554; *Small v. Clewley*, 62 Me. 155; 16 Am. Rep. 410; *Kellogg v. Curtis*, 69 Me. 212; 31 Am. Rep. 273; 1 Smith's Lead. Cas. *610; *Redfield and Bigelow's Leading Cases on Bills and Notes*, 198, 199; 1 Parsons on Notes and Bills, 188; *Edwards on Bills*, 318, 319.

¹ *Sloan v. Union Banking Co.*, 67 Pa. St. 470; *Smith v. Braine*, 3 Eng. L. & Eq. 379; *Phelan v. Moss*, 67 Pa. St. 59; 5 Am. Rep. 402; *Atlas Bank v. Doyle*, 9 R. I. 76; 11 Am. Rep. 219.

§ 1591. **Absence of Consideration.**— Mere absence of consideration, total or partial, is matter of defense against an immediate party or a remote party who is not a holder for value, but it is not a defense against a remote party who is a holder for value.¹

§ 1592. **The Consideration—In General.**— A negotiable instrument imports a consideration, and this, even though the words "value received" are not contained in it.² But the consideration expressed on the face of the instrument must not be executory.³ In a bill payable to a third party, "value received" means, *prima facie*, value received by the drawer;⁴ but in an accepted bill payable to drawer's order, it means value received by the acceptor.⁵ In an action on a promissory note between the original parties thereto, where a want of consideration is relied upon as a defense, and evidence is given on the one side in the affirmative, and on the other in the negative, of the fact of consideration, the burden of proof is on the plaintiff to satisfy the jury, upon the whole evidence, of that fact.⁶

§ 1593. **Accommodation Party—Liabilities of.**— An accommodation bill or note is one where the acceptor or maker (i. e., the principal debtor on the instrument) is substantially a mere surety for some other person, who may or may not be a party thereto.⁷ An "accommodation party" is a person who has signed a bill as drawer,

¹ Benjamin's Chalmers's Digest, art. 91; Hascall v. Whitmore, 19 Me. 102; 36 Am. Dec. 738; Drew v. Towle, 27 N. H. 412; 59 Am. Dec. 380; Woodsum v. Cole, 69 Cal. 142.

² Hatch v. Traves, 11 Ad. & E. 702; Mehlberg v. Fisher, 24 Wis. 607; Townsend v. Derby, 3 Met. 363; Arnold v. Sprague, 34 Vt. 402; Lobadie v. Chouteau, 37 Mo. 413; Barnes v. Ward, 51 Me. 91; Bristol v. Warner, 19 Conn. 7; Conroy v. Warren, 3 Johns. Cas. 259; 2 Am. Dec. 156; Franklin v. March, 6 N. H. 364; 25 Am. Dec. 462;

Hubble v. Fogartie, 3 Rich. 413; 45 Am. Dec. 775.

³ As this would render it conditional: Drury v. Macaulay, 16 Mees. & W. 146; Hays v. Gwin, 19 Ind. 19.

⁴ Grant v. Da Costa, 3 Maule & S. 351; Benjamin v. Tillman, 2 McLean, 213.

⁵ Highmore v. Primrose, 5 Maule & S. 65; Thurman v. Van Brunt, 19 Barb. 409.

⁶ Small v. Clewley, 62 Me. 155; 16 Am. Rep. 410.

⁷ Benjamin's Chalmers's Digest, art. 90. An accommodation indorser is

indorser, or acceptor without receiving value, and for the purpose of lending his name to some other person as a means of credit, or the maker or indorser of a note under such circumstances.¹ One who is induced to take from a third party a note for the amount of property taken from him by his creditor in full discharge of the debt, and who then is induced to indorse it to the creditor whom he has paid, is an accommodation indorser.² The law imputes to an accommodation indorser the consideration paid to the person accommodated.³ The acceptor cannot require proof of consideration between the drawer and payee.⁴ So an action between remote parties to a bill will not fail for want of consideration because the acceptor received no consideration for his liability, unless in case of absence or failure of consideration being given by the holder.⁵ When a person makes, draws, indorses, or accepts a note or bill for the accommodation of another, the person accommodated impliedly engages,—1. That he will provide funds for the payment of the bill or note at maturity; 2. That if, owing to his omission so to do, the accommodation party is compelled to pay the bill or note, he will indemnify such party.⁶ It is no defense to a suit against the acceptor of a draft which has been discounted, and upon which money has been advanced by the plaintiff, that the draft was accepted for the accommodation of the drawer.⁷ It is no defense, as against a *bona fide* holder, that the instrument has been fraudulently diverted from the purpose

regarded as a surety for the maker of a note not negotiated in the ordinary course of business: *Noll v. Oberhellmann*, 20 Mo. App. 336. Accommodation paper, in the strict sense of the term, is a loan of the maker's credit, without instruction as to the manner of its use: *Lenheim v. Wilmarding*, 55 Pa. St. 73.

¹ Benjamin's Chalmers's Digest, art. 90.

² *Platt v. Snipes*, 43 Ark. 21.

³ *Bank of United States v. Weisiger*, 2 Pet. 331.

⁴ *Wells v. Brigham*, 6 Cush. 6; 52 Am. Dec. 750.

⁵ *Schaub v. Clark*, 1 Strob. 299; 47 Am. Dec. 555.

⁶ *Reynolds v. Doyle*, 1 Man. & G. 753; *Sleigh v. Sleigh*, 5 Ex. 516; *Osprey v. Levy*, 16 Mees. & W. 851.

⁷ *Davis v. Randall*, 115 Mass. 547; 15 Am. Rep. 146.

for which it was given.¹ Thus it is no defense in favor of an accommodation party that he signed the note and delivered it to the maker on the condition that he shall procure the signature of a certain other person as surety before delivery to the payee;² or that he signed the bill to enable the party to raise money, and he used it to pay a debt;³ or that, given with the understanding that the payee was to deposit it temporarily as collateral security for a loan to be made to him, he deposited it in a bank as security for a debt already owed to the bank by him.⁴ An accommodation party is liable to a holder for value who takes the instrument knowing him to be such,⁵ or to one who takes it for a pre-existing debt.⁶ In respect to third persons, the accommodation maker of a note is liable to pay it according to its tenor, and cannot allege that he was merely a surety.⁷ The maker of an accommodation note lent without restriction is liable to a third person who acquires it for value after maturity.⁸ The maker of a renewal accommodation note is liable thereon to a third person who has advanced money on the original, which was given without restriction of use, and surrenders it for the second.⁹ One liable on a note after paying

¹ First National Bank v. Hall, 44 N. Y. 395; 4 Am. Rep. 698; Park Bank v. Watson, 42 N. Y. 490; 1 Am. Rep. 573; Quinn v. Ward, 43 Vt. 375; 5 Am. Rep. 284; Fetters v. Bank, 34 Ind. 251; 7 Am. Rep. 225; Merchants' Bank v. Comstock, 55 N. Y. 24; 14 Am. Rep. 168; Maitland v. Bank, 40 Md. 540; 17 Am. Rep. 620; Parker v. McDowell, 95 N. C. 219; 59 Am. Rep. 235. A bona fide purchaser for value and before maturity of a promissory note, with knowledge of the previous decease of the maker, but without notice that it was an accommodation note, may recover upon it against the representatives of the deceased maker, although the indorser, for whose accommodation it was made, fraudulently put it into circulation as against the maker: Clark v. Thayer, 105 Mass. 216; 7 Am. Rep. 511.

² Jordan v. Jordan, 10 Lea, 124; 43 Am. Rep. 294.

³ Fetters v. Muncie Nat. Bank, 34 Ind. 251; 7 Am. Rep. 225; Comstock v. Hier, 73 N. Y. 269; 29 Am. Rep. 142.

⁴ Jackson v. Jersey City Bank, 42 N. J. L. 177.

⁵ Thompson v. Shepherd, 12 Met. 311; 46 Am. Dec. 676; Winter v. Ins. Co., 30 Iowa, 172.

⁶ Fetters v. Muncie National Bank, 34 Ind. 251; 7 Am. Rep. 225; Grocers' Bank v. Penfield, 69 N. Y. 502; 25 Am. Rep. 231; Comstock v. Hier, 73 N. Y. 269; 29 Am. Rep. 142; Marks v. Bank, 79 Ala. 550; 58 Am. Rep. 620.

⁷ Stephens v. McNongahela Nat. Bank, 88 Pa. St. 157; 32 Am. Rep. 438.

⁸ First Nat. Bank v. Grant, 71 Me. 374; 36 Am. Rep. 334.

⁹ Dunn v. Weston, 71 Me. 270; 36 Am. Rep. 310.

it cannot recover from one who indorsed it for his accommodation.¹

§ 1594. **Rights of.**—An accommodation party who is compelled to pay the bill or note has all the rights of an ordinary surety in such case, e. g., he is entitled to the benefit of all securities held by the creditor.² But one who has discounted negotiable paper for the maker cannot be compelled by the accommodation indorser to resort to collaterals belonging to the maker in his hands before resorting to him, although the indorser relied on the collaterals in making such indorsement; although the holder knew of his reliance, and that the indorsement was for accommodation; although the proceeds were applied by the holder to payment of other paper of the maker; and although other parties are in the same situation with the indorser. The remedy of the indorser is to pay the paper and demand and enforce the security.³ An accommodation indorser is not a surety in the sense that he may discharge himself from liability on the note by requesting the holder to enforce payment from the maker, and by showing the neglect of the holder to do so, the solvency of the maker at the time, and his insolvency afterwards.⁴ An accommodation party known to be such may avail himself of any defenses which the person accommodated might set up.⁵ The second indorser who has paid the note may recover from the first, although both are accommodation indorsers.⁶ An acceptor paying a bill for the drawer's accommodation may recover the amount

¹ *Grabbe v. Bosse*, 10 Mo. App. 492.

² *Bechervaise v. Lewis*, L. R. 7 Com. P. 377; *Gray v. Seckham*, L. R. 7 Ch. 680.

³ *First National Bank v. Wood*, 71 N. Y. 405; 27 Am. Rep. 66.

⁴ *Converse v. Cook*, 25 Hun, 44.

⁵ *Bechervaise v. Wight*, L. R. 7 Com. P. 372. The maker of an accommoda-

tion note may show usury in its inception, in a suit against them by indorsee from the payee, taken with knowledge of usury, or by one who received the note from him after it was dishonored: *Tufts v. Shepherd*, 49 Me. 312; *Keim v. Bank of Penn Township*, 1 Pa. St. 36.

⁶ *Kelly v. Burroughs*, 102 N. Y. 93; *McGurk v. Huggett*, 56 Mich. 189.

from the drawer on an implied contract to indemnify him, but not on the bill, because its vitality is destroyed by payment.¹ It is held in North Carolina that accommodation indorsers are *prima facie* co-sureties, and entitled to contribution as against each other.² But this is opposed to the great weight of authority, which has established elsewhere the rule that to render indorsers—whether accommodation or for value—co-sureties and entitled to contribution, there must be a special agreement between them to that effect, or their engagement must have been joint, and not successive.³

ILLUSTRATIONS.—In an action by the payee against the maker of a promissory note, it appeared that the note was made for the accommodation of the payee, to enable him to obtain money at a particular bank, but it did not appear that the note had been discounted. *Held*, that the plaintiff was not entitled to recover: *Allen v. Mathews*, 1 Stew. 273. A bill was indorsed for accommodation, and delivered to the maker on the express condition that if the bill was not that day discounted by a particular bank, it was to be returned to the indorser or destroyed. Discount by the bank being refused, the bill was passed, with notice to the United States marshal to pay executions for the satisfaction of which the money was to be raised from the bank. *Held*, that there was no authority so to apply the bill: *Hickerson v. Raiguel*, 2 Heisk. 329. Defendant made a note for the accommodation of a firm who procured its discount at a bank. A partner in the firm borrowed money from plaintiff to take up the note, and after it was due took it up and sent it to plaintiff. *Held*, that plaintiff took title to the note from the partner, and not from the bank, and could not recover against defendant thereon: *Lancey v. Clark*, 64 N. Y. 209; 21 Am. Rep. 604.

¹ *Griffith v. Reed*, 21 Wend. 502; 34 Am. Dec. 267.

² *Daniel v. McRae*, 2 Hawks, 590; 11 Am. Dec. 787; *Hatcher v. McMorine*, 3 Dev. 228; *Richards v. Simms*, 1 Dev. & B. 48; *Dawson v. Pettaway*, 4 Dev. & B. 397. And perhaps Ohio: See *Douglas v. Waddle*, 1 Ohio, 413; 13 Am. Dec. 630; *Greenough v. Smead*, 3 Ohio St. 422; *Kelley v. Few*, 18 Ohio St. 422; *Williams v. Blosson*, 11 Ohio, 67; *Barnet v. Young*, 29 Ohio St. 11; and Vermont: *Pitkin*

v. Flanagan, 23 Vt. 160; 56 Am. Dec. 61.

³ *McDonald v. McGruder*, 3 Pet. 470; *McCarty v. Roots*, 21 How. 432; *McCune v. Belt*, 45 Mo. 174; *Goveris Bank*, 85 Ill. 443; *Esterly v. Barber*, 66 N. Y. 433; *Moody v. Findley*, 43 Ala. 167; *Kirchner v. Conklin*, 40 Conn. 77; *Clapp v. Rice*, 13 Gray, 403; 74 Am. Dec. 639; *Shaw v. Knox*, 98 Mass. 214; *Core v. Wilson*, 40 Ind. 204; *Hillegas v. Stephenson*, 75 Mo. 118; 42 Am. Rep. 393; *Phillips v. Plato*, 42 Hun, 189. —

§ 1595. **Partial Failure of Consideration.**—Partial failure of consideration is a defense *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise.¹ But it is not a defense against a remote party who is a holder for value.²

ILLUSTRATIONS.—B accepts a bill for one hundred dollars, drawn by A. This is the agreed price of goods to be supplied by A to B. When the goods arrive they are found to be inferior to sample, and worth only eighty dollars. B retains the goods. If A sue B on the bill, this is not a defense *pro tanto*: *Glennie v. Imri*, 3 Younge & C. 436. B accepts a bill for six thousand pounds. This is the agreed price of goods to be supplied by A to B. A only delivers part of the goods. A indorses the bill to C, his agent, to collect. C can only recover twelve hundred pounds, price of goods received: *Agra Bank v. Leighton*, L. R. 2 Ex. 64. B accepts a bill drawn by A for one hundred dollars. This is the agreed price of two bales of cotton to be supplied by A to B. When the cotton arrives, one bale is found to be inferior to sample, and is returned as useless. A indorses the bill to C without value. If C sues B, he can only recover fifty dollars, the price of the one bale which is kept: *Agra Bank v. Leighton*, L. R. 2 Ex. 64.

§ 1596. **Total Failure of Consideration.**—Total failure of consideration is a defense against an immediate party, but it is not a defense against a remote party who is a *bona fide* holder for value without notice.³

ILLUSTRATIONS.—B makes a note payable to C. The only consideration is that C is to act as B's executor. C dies first. His personal representatives cannot enforce payment against B: *Solly v. Hinde*, 2 Crompt. & M. 516. B authorizes A to draw on him against bills of lading. A draws a bill on B and indorses it to C with the bill of lading attached. C gives value to A. B accepts the bill on receiving from C the bill of lading. The bill of lading turns out to be a forgery, but C did not know it

¹ Benjamin's Chalmers's Digest, art. 93; *Day v. Nix*, 9 Moore, 159; *Warwick v. Nairn*, 10 Ex. 762; *Davis v. Bean*, 114 Mass. 358; *Holzworth v. Koch*, 26 Ohio St. 33. See *Stacy v. Kemp*, 97 Mass. 166; *Spalding v. Vandercook*, 2 Wend. 431; *Reese v. Gordon*, 19 Cal. 147; *Peterson v. Johnson*, 22 Wis. 21; 94 Am. Dec. 581.

² *Archer v. Namford*, 3 Stark. 175; *Stevens v. Campbell*, 13 Wis. 419; *Richards v. Betzer*, 53 Ill. 466. See *Petty v. Hannum*, 2 Humph. 102; 36 Am. Dec. 303.

³ *Robinson v. Reynolds*, 2 Q. B. 211; *Aldrich v. Stockwell*, 9 Allen, 45; *Gee v. Saunders*, 66 Tex. 333.

when he obtained the acceptances. C can sue B: *Robinson v. Reynolds*, 2 Q. B. 196, Ex. Ch.; *Craig v. Sibbett*, 15 Pa. St. 238; *Leather v. Simpson*, L. R. 11 Eq. 398. A draws a bill at three months on B, his agent, in favor of C, who agrees to pay therefor in seven days. B accepts on A's account. C does not pay A for the bill. C cannot sue B: *Astley v. Johnson*, 5 Hurl. & N. 137. A draws a bill on B payable to his own order. B accepts. The consideration between A and B fails. A subsequently indorses the bill for value to C, who knows that the consideration between A and B has failed. C cannot sue B: *Loyd v. Davies*, 3 L. J. K. B. 38; *Fairclough v. Pavia*, 9 Ex. Ch. 690; *Starr v. Torrey*, 22 N. J. L. 190. The consideration of a promissory note was the ice to be formed on certain ponds during the winter. *Held*, that it was no defense to an action on the note that no ice of any value was formed during the winter, and that whatever ice was formed was wholly worthless to defendant: *Townsend v. Board of Water Commissioners*, 63 Ill. 26; 14 Am. Rep. 109.

§ 1597. **Illegal Consideration.** — Illegality of consideration, either total or partial, is a defense *in toto* against an immediate party or a remote one not a *bona fide* holder for value without notice.¹ And under a statute providing that all notes the consideration for which is money won or lost at gaming "are absolutely void and of no effect," a note with such consideration is void even in the hands of a *bona fide* holder.²

§ 1598. **Forged Signatures.** — No person is liable as a party to a bill whose signature has been placed thereon without his authority, and no right or title can be derived through a forged or unauthorized signature.³ A forged indorsement of the payee's name passes no title to a ne-

¹ *Perkins v. Cummings*, 2 Gray, 258; *Wisner v. Bardwell*, 38 Mich. 278; *Widoe v. Webb*, 20 Ohio St. 431; 5 Am. Rep. 664; *Warren v. Chapman*, 105 Mass. 87; *Doty v. Bank*, 16 Ohio St. 133; *Hay v. Ayling*, 16 Q. B. 431; *Scollans v. Flynn*, 120 Mass. 271; *Shirley v. Howard*, 53 Ill. 455; *Atwood v. Weeden*, 12 R. I. 293.

² *Traders' Bank v. Alsop*, 64 Iowa, 97.

³ *Bank of Bengal v. Fagan*, 7 Moore P. C. C. 72; *Harrop v. Fisher*, 30 L. J. Com. P. 283; *Carpenter v. Bank*,

123 Mass. 66; *Buckley v. Bank*, 35 N. J. L. 400; 10 Am. Rep. 249; *Dinsmore v. Duncan*, 57 N. Y. 573; 15 Am. Rep. 534; *Palm v. Watt*, 14 N. Y. Sup. Ct. 317; *Caulkins v. Whisler*, 29 Iowa, 495; 4 Am. Rep. 236; *Whitney v. Bank*, 45 N. Y. 303. The receipt of a new promissory note, a signature to which is afterwards found to be forged, does not operate as a payment of the original note or an extinguishment of the right of action thereon: *Goodrich v. Tracy*, 43 Vt. 314; 5 Am. Rep. 281.

gotiable note so as to enable a subsequent indorsee to sue the maker thereon.¹ No interest passes by a forged indorsement on a bill assignable only by indorsement, nor can the acceptor of such a bill defend against the original holder by setting up his payment thereof, unless he can also show that the loss he has incurred by such payment is attributable to some fault of the latter.² The maker of a check obtained from him by fraud, and payable to an existing firm, is not liable to an innocent indorsee holding the check under a forged indorsement of the payee's name.³ But an unauthorized signature, though a forgery, may be ratified by the party whose name is used,⁴ or he may be estopped by his conduct from setting up the forgery.⁵ An acceptor is bound to know the drawer's handwriting, and cannot resist payment to a *bona fide* holder, though the bill be a forgery.⁶ Forgery of names ahead of the indorser, or any other fraudulent act of the maker to whose order a note was made payable upon the indorser, will not affect a *bona fide* holder without notice before the note became due.⁷ When the name of one maker of a joint note has been forged, another maker, although only a surety, and signing in the belief that the forged name is genuine, is nevertheless bound to an innocent payee.⁸ Where a merchant has intrusted blank indorsements to his clerk, and one by false pretenses obtained and used them, such fraudulent use is not a forgery, nor such a fraud as will discharge the indorser as against an innocent indorsee.⁹

¹ Lancaster v. Baltzell, 7 Gill & J. 468; 28 Am Dec. 233.

² Jackson v. Bank, 2 Rob. 128; 38 Am. Dec. 204.

³ Rowe v. Putnam, 131 Mass. 281.

⁴ Greenfield Bank v. Crafts, 4 Allen, 447; Gleason v. Henry, 71 Ill. 109.

⁵ Meacher v. Fort, 3 Hill, 227; 30 Am. Dec. 364.

⁶ Bank of United States v. Bank of Georgia, 10 Wheat. 333; 4 Dall. 235; Levy v. Bank of United States, 1 Binn. 27; 4 Dall. 234; Bullett v.

Hewitt, 11 La. Ann. 327; McKleroy v. Southern Bank etc., 14 La. Ann. 458; 74 Am. Dec. 438; Williams v. Drexel, 14 Md. 566; Claflin v. Griffin, 8 Bosw. 689; Bank of Commerce v. Union Bank, 3 N. Y. 230; Ellis v. Ohio etc. Ins. Co., 1 Handy, 119.

⁷ Rambo v. Metz, 5 Strob. 108; 53 Am. Dec. 695.

⁸ Helms v. Agricultural Co., 73 Md. 325; 38 Am. Rep. 147.

⁹ Putnam v. Sullivan, 4 Mass. 45; 3 Am. Dec. 206.

Payment of forged commercial paper without inspection, under circumstances giving the party paying no previous opportunity for inspection, does not of itself preclude a recovery back of the money so paid. The party paying, however, is bound to use due diligence in making the inspection as soon as he has the opportunity, and in giving notice of the forgery, and if by his failure to do so the party receiving payment is prejudiced, such negligence will defeat a recovery.¹ Payment of a bill made by the drawee and acceptor to the indorsee is good, and cannot be recovered back, notwithstanding the indorsee discounted the bill for the maker on the faith of an indorsement which was forged. Such indorsee's title to the bill is good, both because the maker is estopped to deny the indorsement, and because the bill may be treated as if drawn in favor of a fictitious person or of "bearer."

ILLUSTRATIONS.—A wrote his name upon a piece of blank paper at the request of B, who afterwards, without the knowledge or consent of A, wrote a promissory note over the signature. In an action on the note by an innocent holder, *held*, that the instrument was a forgery, and that A was not liable thereon: *Caulkins v. Whisler*, 29 Iowa, 495; 4 Am. Rep. 236. Defendants, after receiving a check purporting to have been previously indorsed by the payees, in payment of a debt due to them from the holder, indorsed their names thereon and presented it at their bank for deposit, and being there warned against taking the check, they refused to keep it, and permitted the holder to receive it back, without canceling their indorsement. The check was afterwards sold to the plaintiff, and it was then discovered that the indorsement of the payees was forged. *Held*, that the defendants were liable upon the check: *Turnbull v. Bouyer*, 2 Robt. 406. A stranger presented to the plaintiff bank a draft drawn by a New Jersey bank upon a New York bank, which had been fraudulently altered by raising the amount and changing the date and the name of the payee. The defendant's testator came with the stranger, and put his name on the draft as an indorser for accommodation to the plaintiff's knowledge. The plaintiff thereupon purchased the draft from the stranger. The draft was paid by the drawee,

¹ *Allen v. Fourth Nat. Bank*, 59 N. Y. 12.

² *Coggill v. Bank*, 1 N. Y. 113; 49 Am. Dec. 310.

but the money was refunded on discovery of the forgery. In an action on the indorsement, *held*, that he could not be presumed to have known of the forgery; and that he was not liable without demand, refusal, and notice of non-payment: *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207; 39 Am. Rep. 652. A bill of exchange, payable at a bank November 1st and 4th, was accepted by plaintiffs September 1st. Soon after another bill for the same amount, payable at the same time and place, was drawn by the same person upon plaintiffs, whose acceptance thereto was subsequently forged. The bill with the forged acceptance by circulation reached the bank for collection; plaintiffs were notified that their check was there, and they sent a check for the amount, with instructions to pay their acceptance "due 1st and 4th November." The bank paid this bill October 24th, and forwarded it immediately to plaintiffs, who did not personally inspect it until long after November 4th. On the 3d of November the genuine bill was presented, and the bank refused payment for want of funds of the acceptors. *Held*, that the bank was liable to plaintiffs for the amount paid on the forged acceptance: *First National Bank v. Tappan*, 6 Kan. 456; 7 Am. Rep. 568. A drawee paid the holder a draft which had been negotiated by a forged indorsement of the payee's names, of which forgery the drawer was ignorant. *Held*, that he could recover of the holder the amount paid: *Star Fire Ins. Co. v. Bank*, 60 N. H. 442. A., for M.'s accommodation, indorsed his note, which was discounted by B., with the knowledge that it was an accommodation note. At its maturity M. presented a second note purporting to have A.'s indorsement thereon, which was accepted in good faith by B. as a substitute or renewal of the first note. M. was insolvent. A.'s indorsement on the second note was a forgery. In an action on the first note, *held*, that A. was not discharged: *Allen v. Sharpe*, 37 Ind. 67; 10 Am. Rep. 80.

§ 1599. **Fraud or Duress.**—Where a bill or note is affected with fraud, i. e., when the issue of it or its subsequent negotiation is obtained by fraud or duress, or when it is negotiated in breach of faith or agreement, or in fraud of third parties, these facts are a defense only against an immediate party or a remote holder who is not a holder for value without notice.¹ When a person is in-

¹ *Fisher v. Leland*, 4 Cush. 456; 50 Spitta, 3 Camp. 376; *Dawes v. Har-*
Am. Dec. 805; Whistler v. Forster, 14 ness, L. R. 10 Com. P. 166; *Von Win-*
Com. B., N. S., 258; Wienholt v. disch v. Klaus, 46 Conn. 433; *Heaton*,

duced by fraud to sign a bill under the belief that he is signing a wholly different instrument, his signature is null and void.¹ Where a person signs a paper, believing

v. Knowlton, 53 Ind. 357; *Duncan v. Scott*, 1 Camp. 100; *Kearns v. Durrell*, 6 Com. B. 596; *Heysham v. Dettre*, 89 Pa. St. 506; *Loomis v. Ruck*, 56 N. Y. 462; *Barnes v. Stevens*, 62 Ind. 226; *Segrum v. Prescott*, 69 Me. 376; *Lloyd v. Howard*, 15 Q. B. 995; *Barber v. Richards*, 6 Ex. 53; *Gage v. Sharp*, 24 Iowa, 15; *Nickerson v. Ruger*, 76 N. Y. 279; *Reed v. Trentman*, 53 Ind. 438; *Fay v. Fay*, 121 Mass. 561; *Bastian v. Dreyer*, 7 Mo. App. 332; *Smith v. Moberly*, 10 B. Mon. 266; 52 Am. Dec. 543; *Douglas v. Matting*, 29 Iowa, 498; 4 Am. Rep. 238; *Bowman v. Hiller*, 130 Mass. 153; 39 Am. Rep. 442; *Ormsbee v. Howe*, 54 Vt. 182; 41 Am. Rep. 841; *Millard v. Barton*, 13 R. I. 601; 43 Am. Rep. 51; *Holcomb v. Wyckoff*, 35 N. J. L. 35; 10 Am. Rep. 219.

¹ *Foster v. McKinnon*, L. R. 4 Com. P. 704; *Briggs v. Ewart*, 51 Mo. 245; 11 Am. Rep. 445; *Ross v. Doland*, 29 Ohio St. 473; *Cline v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357; *Butler v. Carns*, 37 Wis. 61; *Homes v. Hale*, 71 Ill. 552; *Mulford v. Shepherd*, 1 Seam. 583; 33 Am. Dec. 432; *Walker v. Egbert*, 29 Wis. 194; 9 Am. Rep. 548; *Abbott v. Rose*, 62 Me. 194; 16 Am. Rep. 427; *Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401; *Frederick v. Clemens*, 60 Mo. 313; *Citizens' Nat. Bank v. Smith*, 55 N. H. 593; *Hubbard v. Rankin*, 71 Ill. 129; *Griffiths v. Kellogg*, 39 Wis. 290; 20 Am. Rep. 48; *Taylor v. Atchison*, 54 Ill. 196; 5 Am. Rep. 118. *Contra*, *First Nat. Bank v. Johns*, 22 W. Va. 520; 46 Am. Rep. 506. See *Anderson v. Warne*, 71 Ill. 20; 22 Am. Rep. 83. In *Chapman v. Rose*, 56 N. Y. 137, 15 Am. Rep. 400, the court says: "The evidence tended very strongly to show that the signature of the defendant to the note sued upon was obtained from him through a very gross and fraudulent representation perpetrated upon him by one Miller; that when he signed it he supposed he was signing a paper of a very different character, and not an engagement to pay money absolutely. He

had just before signed an order for the delivery to himself of a hay-fork and two grappling-pulleys, amounting together in price to nine dollars, for which he engaged to pay, and this paper now in suit was presented to him as a duplicate of that order, and was signed as such without examination or reading it, upon the statement of Miller, with whom he was dealing, that such was its character. There does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it. He had the power to know with certainty the exact obligation he was assuming, and chose to trust the integrity of the person with whom he was dealing instead of exercising his own power to protect himself. It turns out that he signed a promissory note, and that it is now in the hands of a holder in good faith for value. The question which arises on the branch of the charge now under consideration is, whether it is enough, as against a *bona fide* holder, to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no laches or negligence in signing the instrument. To that inquiry the attention of the judge at the trial was distinctly called, and the instruction which he gave and which was excepted to did not submit, but excluded, the consideration of it from the jury. It is quite plain that if the law is, that no such inquiry is admissible, a serious blow will have fallen upon the negotiability of paper,—it will be a premium offered to negligence. To insure irresponsibility only the utmost carelessness, coupled with a little friendly fraud, will be essential. Paper in abundance will be found afloat, the makers of which will have no idea they were signing notes, and will have trusted readily to the assurance of whoever procured it that it created no

it to be an ordinary contract for service, which afterwards proves to be or to contain a negotiable promissory note, such person, having exercised reasonable precaution and prudence to avoid fraud and imposition, is not liable on the note to an assignee before maturity.¹ So where an old man with enfeebled sight is induced to sign his name on the back of a bill, by being told that it is a railway guaranty which he had promised to sign, and the bill is negotiated to a *bona fide* holder, he is not liable as an indorser.² But the circumstances of the case must show that the signer was not negligent. Thus if he is able and has the opportunity to read the instrument, but relies on the payee's statement of its contents, he is guilty of such negligence as will estop him as against a *bona fide* holder.³ If one unable to read or write English signs a negotiable promissory note in English, without consideration, upon the fraudulent representation that it is a contract of a different character, but without having the paper read to him, he is liable thereon to an innocent holder.⁴ Where one signs a negotiable note relying on the fraudulent representations of the payee that it is something different from a note, and makes no effort to ascertain its

obligation. To avoid such evils it is necessary at least to hold firmly to the doctrine that he who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person shall answer the loss. If it be objected that there must be a duty of care in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has the means to do, upon the representation of another, he puts confidence in that person, and if injury ensues to an innocent third person by reason of that confidence, his act is the means of the injury, and he ought to answer to it."

¹ Taylor v. Atchison, 54 Ill. 196; 5 Am. Rep. 118.

² Whitney v. Snyder, 2 Lans. 477; Society Generale v. Bank, 27 L. T., N. S., 849.

³ Chapman v. Rose, 56 N. Y. 137; 15 Am. Rep. 401; Swannell v. Watson, 71 Ill. 456; Winchell v. Crider, 29 Ohio St. 480; Indiana Bank v. Weekly, 67 Ind. 345; Wright v. Flynn, 33 Iowa, 159; Shuts v. Overjohn, 60 Mo. 305. See, *contra*, Anderson v. Walter, 34 Mich. 479. Where one signs a note without reading it or calling on any one except the payee's agent to read it, this is not, as between him and the payee, negligence *per se*. Hopkins v. Hawkeye Ins. Co., 57 Iowa, 203; 42 Am. Rep. 41.

⁴ Fisher v. Von Behren, 70 Ind. 19; 36 Am. Rep. 162; Williams v. Stoll, 79 Ind. 80; 41 Am. Rep. 604.

tenor, whether he can read or not, he is liable thereon to a *bona fide* holder for value.¹ To avoid the payment of a note in a suit at law on the ground of fraud, the fraud must extend to the whole consideration.²

ILLUSTRATIONS.—D was induced to sign a promissory note by the fraudulent representation of the payee that the paper was an instrument of a different character. There was no physical obstacle to D's reading the paper before he signed it. In an action on the note by a holder in good faith, *held*, that D was guilty of negligence in not ascertaining the character of the paper, and therefore liable: *Chapman v. Rose*, 56 N. Y. 137; 15 Am. Rep. 401. A, while "partly drunk," or "pretty drunk," was induced by fraud to sign a negotiable note. *Held*, that the indorsee for value before maturity without notice could recover against A: *McSparran v. Neeley*, 91 Pa. St. 17. A bought a churn of a traveling agent for ten dollars, and offered to pay for it on the spot; but the agent suggested that he would take A's note for the price at six months, without interest, and tendered him a note for his signature, which was apparently for ten dollars. A read the note over twice, and then, in some way unknown to him, he signed what proved to be a note for three hundred dollars. *Held*, that A had used due caution to prevent being imposed upon, and could defend as against a *bona fide* holder: *Auten v. Gruner*, 90 Ill. 300. D signed an agreement constituting him an agent for the sale of a patented article, which agreement was so framed that a part of it could be cut off, leaving a perfect negotiable note. It was so cut without D's knowledge, and the resulting note was transferred for value to plaintiff. *Held*, that D was not liable in the absence of negligence, and that the question of his negligence was for the jury: *Brown v. Reed*, 79 Pa. St. 370; 21 Am. Rep. 75. A person was induced, without his negligence, to sign a negotiable note by a fraudulent representation that it was a different note, and for a less sum. *Held*, that he was not liable thereon to a *bona fide* holder for value: *Griffiths v. Kellogg*, 39 Wis. 290; 20 Am. Rep. 48. D was induced by fraud, and without negligence on his part, to sign a promissory note, thinking it was a contract making him an agent for the sale of a patent hay-fork. *Held*, that the note was void in the hands of a *bona fide* purchaser for value before maturity: *Gibbs v. Linabury*, 22 Mich. 479; 7 Am. Rep. 675. The maker of a promissory note was

¹ *Ruddell v. Dillman*, 73 Ind. 518; ² *Harlan v. Read*, 3 Ohio, 285; 17 38 Am. Rep. 152; *Ort v. Fowler*, 31 Am. Dec. 594. Kan. 478; 47 Am. Rep. 501.

induced, by the fraud and circumvention of the payee, to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to enable the payee to see how his name was spelled or written, and the maker did not, after he discovered he had so signed his name to the note, voluntarily deliver it to the payee, but it was taken possession of wrongfully and forcibly by the payee, and by him carried away against the consent of the maker, and negotiated. *Held*, that the maker was not liable on the note to an innocent purchaser for value and before maturity: *Cline v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357. Defendant was procured to sign what turned out to be a promissory note, under the assurance that he was signing an agreement respecting his agency to sell machinery, and of his pecuniary ability, he not being able to read writing readily, and the proof showed that he did not sign the same recklessly, but commenced to read the papers he signed, and was prevented by the restiveness of his team in the field where he was plowing. *Held*, that a verdict finding that the execution of the note was procured through fraud and circumvention, in a suit by an assignee before maturity, was not against the preponderance of the evidence: *Sims v. Bice*, 67 Ill. 88. A woman who could not read signed a negotiable note for sixty-five dollars, on the assurance of two men, strangers, who had put up lightning-rods for her, that the note was for nine dollars. *Held*, that she was liable to a *bona fide* holder: *Yeagley v. Webb*, 86 Ind. 424. D signed a promissory note, being told by the payee's agent that it was a receipt for a plow, and the agent reading it to him as such. He could not read English, and there was no one within half a mile who could. *Held*, that he was liable to a *bona fide* purchaser: *Mackey v. Peterson*, 29 Minn. 298; 43 Am. Rep. 211.

§ 1600. **Where Void by Statute.**—A bill or note made void by statute, or given for a consideration which by statute expressly makes it void, is, as against the party who gave it, void in the hands of both an immediate party and a *bona fide* holder for value without notice, unless his rights are saved by statute.¹

§ 1601. **Defects Patent on Face of Instrument.**—An irregularity patent on the face of a bill or note is equiv-

¹ *Edwards v. Dick*, 4 Barn. & Ald. 435; *Cowling v. Altman*, 71 N. Y. 435; 212; *Towne v. Rice*, 122 Mass. 71; 27 Am. Rep. 70; *Rock Island Bank v. Aurora v. West*, 22 Ind. 88; 85 Am. Nelson, 41 Iowa, 563; *Paton v. Coit*, Dec. 413; *Eagle v. Kohn*, 84 Ill. 292; 5 Mich. 505; 72 Am. Dec. 58.

alent to notice of any defect that may be behind it, and deprives the holder of the protection afforded to a *bona fide* holder for value without notice.¹ A note payable on its face to a guardian or agent is notice that the obligation belongs to the minors or principal, and a holder can acquire by taking it no rights adverse to the parties in whose interest the restriction is made.²

ILLUSTRATIONS. — A line was drawn over the words "order of" in the printed blank, and in the margin was written, in red ink, "This note is not negotiable." *Held*, that an indorsee was so put on inquiry as to charge him with equities between the original parties: *Prins v. Lumber Co.*, 20 Ill. App. 236. Certain corporate paper was placed in the hands of the president to sign and negotiate. A blank was left for his signature. Without signing the paper he pledged it for the debt of a third person to one who had dealt in the corporation paper, and who was familiar with mode of its execution. *Held*, that the pledgee could not claim protection as a *bona fide* purchaser, the defect in the paper being apparent on its face: *Davis Sewing Machine Co. v. Best*, 105 N. Y. 59.

§ 1602. **Fictitious Payee or Indorser.** — No title can be made to a bill through the indorsement of a fictitious or non-existing person, unless the party sued is estopped from setting up the fact.³ A person who signs a fictitious name to a promissory note, or the name of a real person, without authority, is not liable on the note, though he would be liable in tort.⁴ The payee and indorser of a negotiable promissory note is liable as maker, where he knows the maker is a fictitious person; and if he were to be regarded as an indorser, he would be liable on his indorsement without demand or notice.⁵ A *bona fide* holder of a bill payable to fictitious persons ignorant of the facts may recover against an acceptor who knew that the payee

¹ *Colson v. Arnott*, 57 N. Y. 253; 15 Am. Rep. 496; *Angle v. Ins. Co.*, 92 U. S. 342; *Freeman's Bank v. Savery*, 127 Mass. 75; 34 Am. Rep. 345; *Ingham v. Primrose*, 7 Com. B., N. S., 82.

² *McMasters v. Dunbar*, 2 La. Ann. 577.

³ *Benjamin's Chalmers's Digest*, art. 139; 139; *Kohn v. Watkins*, 26 Kan. 691; 40 Am. Rep. 336.

⁴ *Bartlett v. Tucker*, 104 Mass. 336; 6 Am. Rep. 240.

⁵ *Bundy v. Jackson*, 24 Fed. Rep. 628.

was a fictitious person; but an acceptance without knowledge by the acceptor of the fictitious character of the bill would give no remedy, and be completely void.¹ Where one is induced by the false and fraudulent representations of another to draw a bill to the order of a third person known to the drawer, and present to his mind at the time as the payee, a *bona fide* transferee cannot recover without the genuine indorsement of such payee, although the payee was ignorant of the transaction. Where one is induced by false representations to draw a bill to the order of a fictitious person, supposing him to be real, and delivers the bill with instructions to deliver it to the payee on receiving a mortgage security, and the fraudulent receiver negotiates the bill to an innocent purchaser, the drawer is liable.²

ILLUSTRATIONS. — A bill purporting to be drawn by A on B, payable to C's order, and indorsed by C in blank, is held by D. X accepts it *supra protest* for A's honor. D, who is a *bona fide* holder, sues X. It turns out that A's signature was forged, and that C is a fictitious person. *Held*, X is estopped from setting up these facts: *Phillips v. im Thurn*, 18 Com. B., N. S., 694. B, at the request of X, makes a note payable to C's order. C is a fictitious person, but B does not know this. X indorses the note in C's name, and it is negotiated to D, a *bona fide* holder for value without notice. *Held*, D can sue B: *Lane v. Krekle*, 22 Iowa, 399; *Dana v. Underwood*, 19 Pick. 99; *Mamort v. Roberts*, 4 E. D. Smith, 83. A draws a bill on B payable to C's order. C is a fictitious person. B accepts in ignorance of this fact. A then indorses the bill in blank in C's name, and discounts it with D, who has notice. *Held*, D cannot sue B: *Hunter v. Jeffery*, Peake Ad. Cas. 146; *Bennett v. Farrell*, 1 Camp. 129. A draws a bill on B payable to C's order. C is a fictitious person. B knowing this accepts. A indorses the bill in blank in C's name, and it is negotiated to D, a *bona fide* holder for value without notice. *Held*, D can sue B: *Gibson v. Minet*, 1 H. Black. 569; *Gibson v. Hunter*, 2 H. Black. 288; *Farnsworth v. Drake*, 11 Ind. 101; *Forbes v. Espy*, 21 Ohio St. 474. B is indebted to C. By arrangement between them, a bill is drawn in the name of A, a deceased person, on B, pay-

¹ *McCall v. Corning*, 3 La. Ann. 409; ² *Kohn v. Watkins*, 26 Kan. 691; 40 Am. Dec. 454. Am. Rep. 336.

able to drawer's order. B accepts, and the bill is indorsed in A's name to C. *Held*, C can sue B: *Asphitel v. Bryan*, 32 L. J. Q. B. 91.

§ 1603. Rights of De Facto Holder—To Bring Action.

—The *de facto* holder of a bill or note has a right to sue thereon, unless he holds it adversely to the true owner.¹ When a bill is payable to bearer, an action thereon may be brought in the name of any person who has either the actual or the constructive possession thereof.² One to whom a note has been indorsed as collateral security may maintain an action thereon against the maker, after the payment of his debt, either for himself or as trustee for the payee, unless the maker is thus deprived of some equitable defense as against the payee.³ A bill payable to a particular person or his order must be sued on in the name of such person.⁴ If a bill is payable to the order of a person, and another person of the same name of the payee gets hold of it and wrongfully indorses it to a party who wrongfully takes it in good faith and for value, such party acquires no title to the bill.⁵

ILLUSTRATIONS. — C, the holder of a bill, indorses it in blank to D to collect it for him. Either C or D may sue the acceptor: *Bawden v. Howell*, 3 Man. & G. 638; *Clerk v. Pigot*, 12 Mod. 193; *Stone v. Butt*, 2 Crompt. & M. 416. But that D cannot sue, see *Best v. Bank*, 76 Ill. 608. A bill accepted by B is indorsed in blank by C. D, E, and F bring an action on the bill against B. They can recover, although there is no evidence to show that they are partners, or what the nature of their joint interest is: *Ord v. Portal*, 3 Camp. 239; *Rordunz v. Leach*, 1 Stark. 446; *Low v. Copestake*, 3 Car. & P. 300. A bill is indorsed in blank to a firm. Any one of the partners may bring an action on it in his own name: *Lindley on Partnership*, 302; *Attwood v. Rattenbury*, 6 Moore, 579; *Wood v. Connop*, 5 Q. B. 292, as to

¹ *Jones v. Broadhurst*, 9 Com. B. 173; *Agra Bank v. Leighton*, L. R. 2 Ex. 63; *Wells v. Schoonover*, 9 Heisk. 805.

² *Benjamin's Chalmers's Digest*, art. 143.

³ *Logan v. Cassell*, 88 Pa. St. 288; 32 Am. Rep. 453.

⁴ *Attwood v. Rattenbury*, 6 Moore, 583; *Pease v. Hirst*, 10 Barn. & C. 122; *Nixon v. Smith*, 127 Mass. 485; *Nichols v. Gross*, 26 Ohio St. 425; *Barry Co. v. McGlothlin*, 19 Mo. 307.

⁵ *Cochran v. Atchison*, 27 Kan. 729.

joint holders; *Conover v. Earl*, 26 Iowa, 168, as to holders in common. A bill indorsed in blank is handed to the manager of a company in payment of a debt due to the company. The manager may sue on it in his own name: *Law v. Parnell*, 7 Com. B., N. S., 282; *Pettee v. Prout*, 3 Gray, 502; 63 Am. Dec. 778. A bill indorsed in blank is given to D's attorney, who commences an action on it against the acceptor in D's name. D knows nothing of the matter, but after the action has proceeded some way he is told of it, and then gives his consent. D can maintain the action: *Ancona v. Marks*, 31 L. J. Ex. 163; *Craig v. Twomey*, 14 Gray, 486. D, the holder of a bill indorsed in blank, does not wish to sue on it in his own name. He accordingly asks E to sue on it. E consents. E gets a copy of the bill, and it is agreed that he shall have the original when wanted. E commences an action against the acceptor, and after action brought he gets the bill. E cannot maintain this action, for at the time he began it he had neither the actual nor the constructive possession of the bill: *Emmet v. Tottenham*, 8 Ex. 884; *Hovey v. Sebring*, 24 Mich. 233; 9 Am. Rep. 122. A note payable to bearer is handed to the solicitor of a loan society in payment of a debt due to the society. D, a member of the society, instructs the solicitor to commence an action on it in his (D's) name against the maker. D can maintain this action: *Jenkins v. Tongue*, 29 L. J. Ex. 147.

§ 1604. **Defenses.**—When the holder of a bill sues as agent for another, or for the benefit of another, any defense or set-off available against the latter is available against him.¹ Where a note is indorsed by the payee for his own use, an indorsee takes it subject to whatever defenses may be made as against the payee.²

¹ *De la Chaumette v. Bank*, 9 Barn. 276; *Agra Bank v. Leighton*, L. R. 2 & C. 208; *Lee v. Zagury*, 8 Taunt. Ex. 56.
² *Wilson v. Holmes*, 5 Mass. 543; 4
 114; *Thornton v. Maynard*, L. R. 10
 Com. P. 695; *Royce v. Barnes*, 11 Met. Am. Dec. 75.

CHAPTER LXXXII.

DISCHARGE OF INSTRUMENT.

- § 1605. Discharge of instrument — In general.
- § 1606. By payment.
- § 1607. Payment by whom made.
- § 1608. To whom made.
- § 1609. Payment "supra protest."
- § 1610. Payment by mistake to wrong party — Recovery.
- § 1611. Time.
- § 1612. Duty of holder on payment.
- § 1613. Discharge of instrument — Acceptor or payor becoming holder.
- § 1614. By waiver or cancellation.
- § 1615. By renewal.
- § 1616. By alterations.
- § 1617. Discharge of sureties (indorsers) by dealings with principal.

§ 1605. **Discharge of Bill or Note — In General.** — A bill or note is discharged when all rights of action upon it are extinguished. Its negotiability then becomes destroyed, and a subsequent *bona fide* holder for value without notice acquires no right of action upon it.¹

§ 1606. **By Payment.** — Payment discharges a bill or note,² and it cannot again become a valid security;³ and part payment discharges it *pro tanto*.⁴ Where the holder of a check procures it to be certified, this operates as a payment of the debt for which the check was drawn, and the drawer is released from liability.⁵ If the payee of a draft presents and surrenders it to the drawee, and receives during business hours the latter's check for the amount thereof, which is not presented to the bank on which it is

¹ Harmer v. Steele, 4 Ex. I; Burchfield v. Moore, 23 L. J. Q. B. 261; Frevert v. Henry, 14 Nev. 191.

² Mitchell v. Albion, 81 Me. 482. See *post*, Title Contracts.

³ Mitchell v. Albion, 81 Me. 482.

⁴ Graves v. Key, 3 Barn. & Ald. 313; Com. Bank v. Cunningham, 20 Pick. 275. But *aliter* where such payment

is made on the agreement that the payee shall hold the note as security to the guarantor for the amount paid as well as the balance remaining due: Granite Nat. Bank v. Fitch, 145 Mass. 567; 1 Am. St. Rep. 484.

⁵ French v. Irwin, 4 Baxt. 401; 27 Am. Rep. 769.

drawn until the next day, and payment is then refused, the drawer of the draft is discharged from liability thereon.¹ Depositing at the place of payment designated in a note at maturity sufficient funds to pay it is a payment, although the depositary fails, and consequently the funds are lost.² Where a debtor delivers to his creditor the note of a third person drawn to the creditor's order, without indorsing it, the presumption is, that the note is not absolute payment, but only collateral security, and the debtor continues liable without notice of dishonor, unless the neglect to give such notice has occasioned him loss.³ Payment, in order to extinguish a bill of exchange, must be made to the real owner of it.⁴ The drawee of a bill is bound at his peril to ascertain that the person to whom he makes payment is the person entitled. He cannot defend against the payee on the ground that he has paid the amount of the bill to another person of the same name, in good faith and in the usual course of business, with nothing to excite suspicion.⁵ Bills and notes lose their negotiable character after payment as respects the original parties, but a party who knowingly negotiates a bill or note after payment binds himself, and the indorsee may recover of him the amount of the note or bill.⁶

The law does not presume the non-payment of a note at maturity, but its payment, unless the note is produced or evidence is given repelling such presumption where the note cannot be produced.⁷ And the possession of the note by the maker, or the fact that it is found among his papers after his death, is presumptive evidence of its payment.⁸

ILLUSTRATIONS.—The payee of a note indorsed and delivered it before maturity to a bank as collateral security for a demand

¹ Fernald v. Bush, 131 Mass. 591.

⁵ Graves v. American Exchange Bank, 17 N. Y. 205.

² Lazier v. Horan, 55 Iowa, 75; 39 Am. Rep. 167.

⁶ Mabry v. Matheny, 10 Smedes & M. 323; 48 Am. Dec. 753.

³ Hunter v. Moul, 98 Pa. St. 13; 42 Am. Rep. 610.

⁷ George v. Ludlow, 66 Mich. 176.

⁴ Woodward v. Elliott, 13 Ind. 516.

⁸ Potts v. Coleman, 86 Ala. 94.

of the plaintiff; subsequently, but before maturity, the maker paid it to the payee, not knowing of the transfer, and took a receipt. *Held*, that the note was not thereby discharged: *Best v. Crall*, 23 Kan. 482; 33 Am. Rep. 185. A negotiable note was made to the plaintiff by the defendant, who held a smaller note made by the plaintiff, but had it not with him at the time, and it was agreed that the two notes should be set off, one against the other, so far as the smaller would pay the larger. *Held*, that this agreement was not an extinguishment of the smaller note: *Cary v. Bancroft*, 14 Pick. 315; 25 Am. Dec. 393. A person to whom a note had been indorsed as collateral security returned it to the indorser after maturity, and took other security in exchange. *Held*, not a payment: *Emerson v. Cutts*, 12 Mass. 78. By consent of the payee of a note, it was paid to a creditor of the payee in extinguishment of the debt, although it had not been indorsed or delivered to the creditor. *Held*, that the note was discharged: *Groves v. Brown*, 11 Mass. 334. A Nashville bank discounted a note indorsed by a Knoxville bank and the defendant, and made for the benefit of the Knoxville bank. The banks were regular correspondents of each other, and settled their accounts monthly. At maturity the Nashville bank sent the note to the Knoxville bank, with instructions to collect and credit, and the latter, being in funds, although insolvent and failing two days later, entered the amount due to the credit of the Nashville bank. *Held*, a payment, releasing the accommodation indorser: *First National Bank of Nashville v. McClung*, 7 Lea, 492; 40 Am. Rep. 66. Defendant executed his note to plaintiff, payable in ten days at bank. He paid the amount to the bank two days after, but the note was not there. Three days later, the plaintiff sent him printed notice of the time and place of payment, and that it was then in the bank, with a printed memorandum on the back in three languages that a like notice was sent to all the plaintiff's customers that the note might be paid before maturity, with a deduction of interest, and that "the agent" who held the note for collection would allow it on production of the notice. Two days later still, the bank received the note from the plaintiff, and the next day suspended payment, and never paid the amount to the plaintiff. *Held*, that the payment by defendant was effectual, and the note could not be enforced against him: *Osborn v. Baird*, 45 Wis. 189; 30 Am. Rep. 710.

§ 1607. **Payment — By Whom Made.** — In order to operate as a discharge of a bill, payment must be made by or on behalf of the drawee or acceptor.¹ Payment of an

¹ *Wikinson v. Simson*, 2 Moore P. Maule & S. 97; *Jones v. Broadhurst*, C. C. 287; *Callow v. Lawrence*, 3 9 Com. B. 181; *Dodge v. Freedman's*

accommodation bill or note by the person accommodated is regarded as a payment made on behalf of the acceptor or maker, and operates as a discharge.¹ Part payment of a bill by a second indorser will prevent him from suing for the whole amount, and part payment of a bill by a second indorser will entitle him to recover the amount which he paid.² Payment by the drawer or indorser as such is a mere purchase, and is not a discharge of the bill;³ nor is the payment by the last indorser of a note, or by a prior indorser, subsequent indorsers being struck out.⁴

ILLUSTRATIONS.—A bill is accepted by three joint acceptors (not partners). One of them pays it at maturity. The bill is discharged, and cannot be again negotiated. It is immaterial that the acceptor who paid accepted the bill for the accommodation of the other two: *Harmer v. Steele*, 4 Ex. 13. A bill accepted payable at a bank and indorsed in blank by C is sent to D to collect. D improperly discounts it. To regain possession, D goes to the acceptor's bankers, pays in the amount of the bill, and asks to have the bill given up to him when the holder has been paid. This is done. The bill is not discharged, and C can sue the acceptor: *Deacon v. Stodhart*, 2 Man. & G. 317; *Dodge v. Freedman's Trust Co.*, 93 U. S. 386. The acceptor of a bill, originally payable to drawer's order, dishonors it. The drawer pays the holder and gets the bill. He may either sue the acceptor himself, or he may strike out his own and the subsequent indorsements, and again negotiate the bill away: *Callow v. Lawrence*, 3 Maule & S. 95; *Hubbard v. Jackson*, 4 Bing. 390; *Bank v. Senior*, 11 R. I. 376; *Ellsworth v. Brewer*, 11 Pick. 315. A bill drawn by A, payable to C or order, and by C indorsed to D, is dishonored by the acceptor at maturity. The drawer pays D, and gets the bill. He may sue the acceptor, but he cannot reissue the bill: *Williams v. James*, 15 Q. B. 505; *Gardner v. Maynard*, 7 Allen, 456. The C bank discount a bill, which is accepted payable at their house, and then indorse it away. At maturity it is presented to the C

Trust Co., 93 U. S. 379; *Farmers' Bank v. Rathbone*, 26 Vt. 19; 58 Am. Dec. 200; *Dougherty v. Deeny*, 45 Iowa, 443.

¹ *Cook v. Lister*, 32 L. J. Com. P. 127; *Woods v. Woods*, 127 Mass. 141.

² *Rawlings v. Poindexter*, 14 Smedes & M. 66; 53 Am. Dec. 125.

³ *Jones v. Broadhurst*, 9 Com. B. 173; *Kemp v. Balls*, 10 Ex. 607; *Woodward v. Pell*, L. R. 4 Q. B. 55; *French v. Jarvis*, 29 Conn. 347; *Bank v. Senior*, 11 R. I. 376; *Woodman v. Boothby*, 66 Me. 389.

⁴ *Mead v. Small*, 2 Me. 207; 11 Am. Dec. 62.

bank and paid. It is a question of fact whether they paid as the agents and bankers of the acceptor, or whether they took up the bill as indorsers. In the latter case it is not discharged, and they can sue the drawer, or if he be a customer, debit him with the amount of the bill: *Pollard v. Ogden*, 2 El. & B. 459; *Pacific Bank v. Mitchell*, 9 Met. 297; *Dougherty v. Deeny*, 45 Iowa, 443. The indorser of a bill writes to the drawer promising to "retire" it, and accordingly takes it up before maturity. The bill is not discharged: *Elsam v. Denny*, 15 Com. B. 87.

§ 1608. **Payment—To Whom.**—Payment, to operate as a discharge, must be made to the holder or some person authorized to receive payment on his behalf.¹ Payment by the maker to the bearer of a note will not avail as against the owner, where, upon the facts of which the maker had notice, the bearer had no right to receive payment, although the note was drawn payable to bearer.² And it is the duty of one having a matured outstanding note, in which no specific place of payment is appointed, to seek out the persons entitled to receive payment and discharge his debt, without waiting until those so entitled establish their right.³

§ 1609. **Payment Supra Protest.**—A bill or note may be discharged by payment *supra protest*.⁴ A holder refusing payment *supra protest* loses his right against the parties who would have been discharged by such payment.⁵ The payor *supra protest* is entitled to receive from the holder the bill and the protest.⁶ He becomes invested with the rights and duties of the holder, as regards the party for whose honor he pays, and all prior parties liable to him, and all subsequent parties for whose honor payment is made, are discharged.⁷

¹ *Leftley v. Mills*, 4 Term Rep. 175; *Walker v. Macdonald*, 2 Ex. 532; *Mayo v. Moore*, 28 Ill. 428; *Pier v. Bullis*, 48 Wis. 429; *Dodge v. Bank*, 30 Ohio St. 1.

² *Chappelear v. Martin*, 45 Ohio St. 126.

³ *Gale v. Corey*, 112 Ind. 39.

⁴ *Geralopulo v. Wieler*, 20 L. J. Com. P. 105.

⁵ Benjamin's Chalmers's Digest, art. 243.

⁶ *Denston v. Henderson*, 13 Johns. 322.

⁷ *Goodall v. Polhill*, 14 L. J. Com. P. 146; *Wood v. Pugh*, 7 Ohio, 501.

§ 1610. **Payment by Mistake to Wrong Party—Recovery.**—When payment of a bill or note is made by mistake to a person not entitled to receive it, the money so paid may be recovered back in the following cases: Where the party has been led to pay a forged, altered, or canceled instrument by the negligence of the party drawing it, and has not been guilty of negligence himself, he may recover the money so paid from the party drawing it.¹ The drawee, who, without notice of any forgery, has paid a draft to the holder, to whom it was negotiated by the forged indorsement of the payees' names, may

¹ Benjamin's Chalmers's Digest, art. 237. In *Cooke v. United States*, 91 U. S. 389, the court say: "It is undoubtedly also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within the meaning of the rule, because, as every man is presumed to know his own signature, and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he ought to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable, and unreasonable delay is negligence which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in *Gloucester Bank v. Salem Bank*, 17 Mass. 45: 'The party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his action.' When, therefore, a party is entitled to something more than a mere inspection of the

paper before he can be required to pass finally upon its character, as, for example, an examination of accounts or records kept by him for the purposes of verification, negligence sufficient to charge him with a loss cannot be claimed until his examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without it will have the effect of an acceptance and adoption. But if the presentation is made at a time when or at a place where such an examination cannot be had, time must be allowed for that purpose; and if the money is then paid, the parties, the one in paying and the other in receiving payment, are to be understood as agreeing that a receipt and payment under such circumstances shall not amount to an adoption, but that further inquiry may be made, and if the paper is found to be counterfeit, it may be returned within a reasonable time. What is reasonable must in every case depend upon circumstances; but until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay. So, too, if the paper is received and paid for by an agent, the principal is not charged unless the agent had authority to act for him in passing upon the character of the instrument. It is the negligence of the principal that binds, and that of the agent has no effect, except to the extent that it is chargeable to the principal."

recover of the holder the money paid upon the draft.¹ An indorsee having surrendered a note, erroneously believing it to have been paid, may, upon proof thereof, recover against the maker or indorser on the common money counts in the same way as if the note had been lost.² An indorser who pays a bill after protest may recover back the amount paid by him, where the payment was made when he was legally exonerated and in ignorance of such exoneration.³ The payor may recover the money from the party to whom it was paid by mistake, where the latter did not act *bona fide* in demanding payment,⁴ or where the payor was not guilty of negligence in making the payment,⁵ or where the position of the party receiving payment has not been altered before the discovery of the mistake and notice thereof.⁶ After accepting and paying a bill, the drawee cannot recover back the amount of it from the payee on the ground that he had paid it under a mistake as to the reliability of the drawer's security, which had proved to be fictitious.⁷

ILLUSTRATIONS.—A draws a check on his bankers for £50, carelessly leaving a blank space before the words and figures "fifty." The holder fills it up as a check for £350, and obtains payment. The banker can charge A with the amount so paid: *Young v. Grote*, 4 Bing. 253; *Arnold v. Cheque Bank*, L. R. 1 Com. P. D. 586; *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183. A draws in the ordinary way a check for £3. It is altered to £200. The alteration is not apparent. A's banker pays it. He can only charge A with £3: *Hall v. Fuller*, 5 Barn. & C. 750; *Trigg v. Taylor*, 27 Mo. 245; 72 Am. Dec. 263. A draws a bill on B, and indorses it in blank. Subsequently, intending to cancel it, he tears it into four pieces, and throws the pieces away. C picks up the pieces, pastes them

¹ *Star Fire Ins. Co. v. Bank*, 60 N. H. 442.

² *Eagle Bank v. Smith*, 5 Conn. 71; 13 Am. Dec. 37.

³ *Ray v. Bank*, 3 B. Mon. 510; 39 Am. Dec. 479.

⁴ *Martin v. Morgan*, 3 Moore, 635; *Kendal v. Wood*, L. R. 6 Ex. 243; *First Nat. Bank v. Ricker*, 71 Ill. 439;

22 Am. Rep. 104; *Nat. Bank v. Bangs*, 106 Mass. 444; 8 Am. Rep. 349.

⁵ Benjamin's Chalmers's Digest, art. 237.

⁶ *Welch v. Goodwin*, 123 Mass. 71; 25 Am. Rep. 24; *Merchants' Bank v. Eagle Bank*, 101 Mass. 288.

⁷ *First Nat. Bank v. Burkham*, 32 Mich. 328.

together, and presents the bill to B, and obtains payment. *Held*, that if the marks of cancellation are apparent, B cannot recover the money so paid from A: *Scholey v. Ramsbottom*, 2 Camp. 485. *Aliter*, if the marks be not apparent: *Ingham v. Primrose*, 7 Com. B., N. S., 82. A bill held under a forged indorsement is presented to B for acceptance. B accepts it, payable at his bankers'. The bankers pay it. They cannot charge B with the amount: *Robarts v. Tucker*, 16 Q. B. 560; *First Nat. Bank v. Tappan*, 6 Kan. 465; 7 Am. Rep. 568. A check is presented and paid. Directly after the payment the bankers discover that the drawer's account was overdrawn. They cannot recover the money so paid from the holder of the check: *Chambers v. Miller*, 32 L. J. Com. P. 30; *Boylston Bank v. Richardson*, 101 Mass. 287; *Oddie v. Bank*, 45 N. Y. 735; 6 Am. Rep. 160. A bill purporting to be drawn by A on B is paid by B. Subsequently, B discovers that A's signature was a forgery. B cannot recover the money from the holder, to whom he paid it: *Price v. Neal*, 3 Burr. 1355; *Nat. Park Bank v. Bank*, 46 N. Y. 77; 7 Am. Rep. 310; *Bank v. F. & M. Bank*; 10 Vt. 141; *Ellis v. Ohio Trust Co.*, 4 Ohio St. 652. But see *Goddard v. Bank*, 4 N. Y. 147; *Allen v. Bank*, 59 N. Y. 12; holding *aliter*, if paid before any opportunity to inspect the bill. C, the holder of a bill purporting to be accepted payable at a bank, indorses it to D for collection. D obtains payment, and hands the money over to C. A week after the payment, the bank discovers that the acceptance was a forgery. *Held*, they cannot recover the money from C: *Smith v. Mercer*, 6 Taunt. 76. A bill purporting to bear the indorsement of C is held by F. It is dishonored. X pays it *supra protest* for C's honor. The same day he discovers that C's indorsement was a forgery, and gives notice to F. *Held*, that X can recover the money from F: *Wilkinson v. Johnston*, 3 Barn. & C. 428; *Goddard v. Bank*, 4 N. Y. 147; *Carpenter v. North Bank*, 123 Mass. 66; *Phillips v. im Thurn*, L. R. 1 C. P. 463. C, the indorser of a bill, pays D, the holder, in ignorance that he has been discharged by D's omission to present it for payment. A week after, he discovers this fact. *Held*, that C can recover the money he paid from D: *Milns v. Duncan*, 6 Barn. & C. 671; *Farmers' Bank v. Small*, 2 T. B. Mon. 88. C is the holder of a bill purporting to be accepted by B, payable at his banker's. The bank pay the bill. Next day they discover that the acceptance was a forgery, and give notice to C. They cannot recover the money from C: *Cocks v. Masterman*, 9 Barn. & C. 902; *Com. Bank v. First Nat. Bank*, 30 Md. 11. A bill held by C, purporting to be accepted by B, is presented to B for payment. B pays it, and subsequently discovers that his signature is forged. He

cannot recover the money from C: *Mather v. Maidstone*, 18 Com. B. 295; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *United States Bank v. Georgia Bank*, 10 Wheat. 333.

§ 1611. **Payment—At What Time.**—To operate as a discharge, the payment must be made at or after the maturity of the bill or note.¹ Payment by the drawee or acceptor previous to maturity is a mere purchase of the bill, and it still remains negotiable.² Payment of a note, though not presented till after it is due, will discharge the maker, if ignorant of any want of title in the holder.³

§ 1612. **Duty of Holder on Payment.**—The holder must deliver up the bill or note when it is paid in due course,⁴ unless it is a non-negotiable note,⁵ or has been destroyed.⁶ Where the drawer of a draft paid the amount of it to the indorsee, who had not the possession of the draft, but agreed to get and surrender it, and gave a receipt in full of it, it was held that this did not protect the drawer against a suit on the draft by the *bona fide* holder, to whom the indorsee had transferred it.⁷

§ 1613. **Discharge of Instrument—Acceptor Becoming Holder.**—A bill which has been negotiated is discharged when the acceptor becomes the holder thereof at or after its maturity,⁸ unless he holds in an official capacity; as, for example, administrator of the holder.⁹ If two persons make a promissory note, and one of them afterwards obtains possession of the note as his own property from the payee, the note is discharged.¹⁰ Indorsing a note to

¹ *Burbridge v. Manners*, 3 Camp. 194; *Beaumont v. Greathead*, 2 Com. B. 494.

² *Morley v. Culverwell*, 7 Mees. & W. 174.

³ *Proctor v. McCall*, 2 Bail. 298; 23 Am. Dec. 136.

⁴ *Hansard v. Robinson*, 7 Barn. & C. 94; *Otisfield v. Mayberry*, 63 Me. 197; *Crowe v. Clay*, 9 Ex. 604; *Ocean Bank v. Fant*, 50 N. Y. 476; *Crandall v. Schroepel*, 1 Hun, 557; *Arnold v. Dresser*, 8 Allen, 435; *Jones v. Broadhurst*, 9 Com. B. 182.

⁵ *Charnley v. Grundy*, 14 Com. B. 614; *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180.

⁶ *Wright v. Maidstone*, 24 L. J. Ch. 623.

⁷ *Wilcox v. Aultman*, 64 Ga. 544; 37 Am. Rep. 92.

⁸ *Benjamin's Chalmers's Digest*, art. 238.

⁹ *Williams on Executors*, 7th ed., 1313.

¹⁰ *Cox v. Hodge*, 7 Blackf. 146.

the payor is an extinguishment of the note, and it can not be revived by his indorsing it to a third person, but if so indorsed for value a new obligation would be created.¹ If W., the payee of a note, indorses it to A., and subsequently purchases the note back and delivers it with the blank indorsement to P., this is a good indorsement to P., and W. is bound by it.² One who has acquired an indorsed note from the maker cannot recover against the indorser without alleging that the instrument was for accommodation.³ The acceptor of a bill of exchange, having it in his possession, may before maturity transfer to a *bona fide* holder, and no presumption of payment arises from the fact of his possession before maturity.⁴ The negotiability of a note is not impaired by its being paid and taken up by an indorser in cases where those only who are bound to pay at all events can be sued in consequence of such paper being again put in circulation.⁵ If one not a party to a note, but bound for its payment at maturity, actually so pays it, the note is thereby discharged, and cannot be reissued by such party.⁶

¹ Long v. Bank, 1 Litt. 290; 13 Am. Dec. 234.

² Woodson v. Gordon, Peck, 196; 14 Am. Dec. 743.

³ Callahan v. First National Bank of Louisville, 78 Ky. 604; 39 Am. Rep. 262.

⁴ Witte v. Williams, 8 S. C. 290; 28 Am. Rep. 294.

⁵ Cochran v. Wheeler, 7 N. H. 202; 26 Am. Dec. 732.

⁶ Citizens' Bank v. Lay, 80 Va. 436, the court saying: "In *Lancey v. Clark*, 64 N. Y. 209, 21 Am. Rep. 604, the defendant made his note for the accommodation of the firm of Lambert and Lincoln, for whom it was discounted. Before the note matured, Lincoln wrote to the plaintiff to take up the note and to furnish money for that purpose. The plaintiff sent the money to Lincoln, who placed it in bank to his individual credit, and on the day the note fell due took up the note with his individual check. He

did not assume to act for the plaintiff, or ask to have the note transferred to any one. He asked to have the note protested, so that he could hold the indorser and maker after protest. After he had thus paid and taken it, he sent it to the plaintiff. In an action on the note, it was held that the plaintiff did not take title from the bank, but from Lincoln, and subject to any defense against it in the hands of the latter; that the bank could not be made a seller without its knowledge or consent, and did not transfer the note, but only took payment, and that the plaintiff was not entitled to recover. The court said: 'The plaintiff did not take title from the bank. It matters not that he furnished the money, and that Lincoln promised to use it in taking up the note for him. It matters not that the note was protested so that the indorser and maker could be held, or that the bank did not intend absolutely to discharge and cancel the note. The ques-

ILLUSTRATIONS. — A bill payable after date and accepted by three joint acceptors is held by C. C, before the bill matures, indorses it to B, one of the acceptors. If B retains the bill till its maturity, it is discharged: *Harmer v. Steele*, 4 Ex. 1; *Mainwaring v. Newman*, 2 Bos. & P. 120; *Neale v. Turton*, 4 Bing. 149; *Hall v. Kimball*, 77 Ill. 161; *McGee v. Prouty*, 9 Met. 547; 43 Am. Dec. 409; *Witte v. Williams*, 8 S. C. 290; *Stewart v. Hidden*, 13 Minn. 431. B is the maker of a note payable on demand. The holder dies, having appointed B his executor. The note is discharged: *Freakley v. Fox*, 9 Barn. & C. 130. B is the maker of a note payable on demand. B dies, having appointed C, the holder, his executor. The note is not discharged unless C have assets available for the payment of it, and he can validly indorse it away at any time before he has such assets: *Lowe v. Peskett*, 16 Com. B. 500; *Mitchell v. Rice*, 6 J. J. Marsh. 625. B, X, and Y make a joint and several note payable on demand to B's wife, in consideration of money lent by her as administratrix to B. X and Y sign as sureties for B. On B's death, his widow can sue X and Y: *Richards v. Richards*, 2 Barn. & Adol. 447; *Beecham v. Smith*, El. B. & E. 442. A, the payee of a note, indorsed it to B, who in the course of trade reindorsed it to A, and then A indorsed it to plaintiff. *Held*, that the reindorsement from B to A created no liability on the part of B to A, nor to plaintiff: *Howe Machine Co. v. Hadden*, 8 Biss. 208. The holder of a second mortgage took up a note which was secured by a first mortgage on the same premises. *Held*, that he did not thereby pay the note or release the maker and indorser from their obligation to pay: *Mattison v. Marks*, 31 Mich. 421; 18 Am. Rep. 197.

§ 1614. **By Waiver or Cancellation.**—A bill or note is also discharged where the holder, at or after maturity, absolutely and unconditionally renounces his rights

tion is, Did the bank transfer or sell the note to the plaintiff? . . . All the bank did was to take payment of the note, and deliver it up to a party paying and liable to pay, after protesting it, so that he could make such use of it as the law and the facts would authorize. It did not transfer or intend to transfer it. The plaintiff, therefore, took no title to it from the bank, but he took it from Lincoln, and cannot therefore enforce it against the defendant.' The same principle was asserted in *Eastman v. Plumer*, 32 N. H. 238. In that case the defendant executed the note upon which the suit

was brought as surety. At its maturity it was taken up by the principal debtor with money furnished for the purpose by the plaintiff. Whereupon the note was surrendered, but the plaintiff was not known in the transaction by the holder to whom the money was paid. It was held that the note was satisfied, and that the action was not maintainable. To the same effect is the opinion of Judge Hughes, of the United States district court, in *Dooley v. F. & M. Ins. Co.*, 3 Hughes, 221. See also 2 Daniel on Negotiable Instruments, sec. 1222."

against the acceptor or maker,¹ as by giving up the note to the maker.² So the liability of any party to a bill may be released by the holder at any time.³ But such a release given before maturity is inoperative against a subsequent holder for value without notice.⁴ The cancellation of a signature is *prima facie* evidence that the liabilities of the party whose signature is canceled have been discharged, but the cancellation may be shown to have been made by mistake, and is then inoperative.⁵ Though the holder of a note voluntarily, although gratuitously, cancels and surrenders it to the maker, this discharges the maker, unless there is fraud or mistake.⁶

§ 1615. **By Renewal of Bill or Note.**—Where a bill or note is given in renewal of a former one, and the holder retains the former one, the renewal, in the absence of special agreement,⁷ operates merely as a conditional payment thereof. If the renewed bill be paid in due course, or otherwise discharged, the original bill is likewise discharged;⁸ but if the renewed bill be dishonored, then the liabilities of the parties to the original bill revive, and they may be sued thereon.⁹ When there is an agreement

¹ Benjamin's Chalmers's Digest, art. 239.

² Miller v. Tharel, 75 N. C. 148.

³ Foster v. Dawber, 6 Ex. 839.

⁴ Ingham v. Primrose, 7 Com. B., N. S., 82.

⁵ Brett v. Marston, 45 Me. 401; Raper v. Birkbeck, 15 East, 17; Wilkinson v. Johnston, 3 Barn. & C. 428; Novelli v. Rossi, 2 Barn. & Adol. 757; Warwick v. Rogers, 5 Man. & G. 340, 373; Prince v. Oriental Bank, L. R. 3 App. C. 325.

⁶ Larkin v. Hardenbrook, 90 N. Y. 333; 43 Am. Rep. 176.

⁷ Lewis v. Lyster, 2 Crompt. M. & R. 704; Lumley v. Musgrave, 4 Bing. N. C. 15; Arnold v. Camp, 12 Johns. 409; 7 Am. Dec. 328; Wilbur v. Jernegan, 11 R. I. 133; Archibald v. Argall, 53 Ill. 307.

⁸ Dillon v. Rimmer, 1 Bing. 100;

Soward v. Palmer, 2 Moore, 274; Lumley v. Hudson, 4 Bing. N. C. 15.

⁹ Ex parte Barclay, 7 Ves. Jr. 597; Norris v. Aylett, 2 Camp. 329; Kendrick v. Lomax, 2 Crompt. & J. 405; Sloman v. Cox, 1 Crompt. M. & R. 472; Welch v. Allington, 23 Cal. 322; First Nat. Bank v. Morgan, 6 Hun, 346. See Cornwall v. Gould, 4 Pick. 444. The fact that, upon renewal of a note, the holder retains the original note does not impair his right of action on the renewed note: Perrin v. Royal, 42 Ind. 132. An agreement upon the part of a bank to carry a note is not an agreement to suspend the right of action upon and to extend the time of payment of the note itself; but simply that it will, from time to time, according to the mode of discounting paper, discount a like note, which it will accept in place of one then held, if pre-

to renew, the application for renewal must be made within a reasonable time of the maturity of the original bill, but it need not be made before its maturity.¹ When the holder of a renewed bill could not have maintained an action on the original bill because there was no consideration for it,² or the consideration was illegal,³ or because he was privy to some fraud connected therewith,⁴ he cannot sue on the renewed bill.⁵ A bill given in renewal of another bill operates in the same way as a bill given in respect of any other debt. The ordinary effect of giving a bill is that the remedy for the debt is suspended until the dishonor of the bill. The bill operates as conditional payment, the condition being that the debt revives if the bill cannot be realized.⁶ It is immaterial whether the bill be payable on demand or *in futuro*.⁷ But the contrary presumption, that a negotiable bill⁸ or note is received in extinguishment and satisfaction of a pre-existing debt, prevails in Maine, Massachusetts, and Vermont, and other states.⁹ In a recent Illinois case it is said that the weight of authority is, that the intention with which the new note is accepted will control as to whether the original

sented when the latter becomes due, and the discount paid; and in case of failure of the parties to the note to present a new note when the one held becomes due, the latter becomes payable according to its terms, and all parties thereto are at once liable for its payment: *Second Nat. Bank v. Poucher*, 56 N. Y. 348.

¹ *Maillard v. Page*, L. R. 5 Ex. 312; *Innes v. Munroe*, 1 Ex. 473; *Torrance v. Bank*, L. R. 5 P. C. 246, as to construction of agreements to renew.

² *Southall v. Rigg*, 11 Com. B. 481; *Hill v. Buckminster*, 5 Pick. 391; *Copp v. Sawyer*, 6 N. H. 386.

³ *Chapman v. Black*, 2 Barn. & Ald. 588; *Hay v. Ayling*, 16 Q. B. 423; *Holden v. Cosgrove*, 12 Gray, 216; *Nat. Bank v. Eyre*, 52 Iowa, 114; *Gates v. Union Bank*, 12 Heisk. 325.

⁴ *Lee v. Zagury*, 8 Taunt. 114; *Sawyer v. Wiswell*, 9 Allen; 39.

⁵ See, however, two apparent, but

not real, exceptions: *Mather v. Maidstone*, 18 Com. B. 273; *Flight v. Reed*, 1 Hurl. & C. 703.

⁶ *Haines v. Pearce*, 41 Md. 221; *Huse v. McDaniel*, 33 Iowa, 406; *Griffith v. Grogan*, 12 Cal. 317; *Stevens v. Park*, 73 Ill. 387; *Kermeyer v. Newby*, 14 Kan. 164; *Bank of New Hanover v. Bridges*, 98 N. C. 67; 1 Am. St. Rep. 317.

⁷ *Currie v. Misa*, L. R. 10 Ex. 163, 164.

⁸ But see *Alcock v. Hopkins*, 6 Cush. 484.

⁹ *Fowler v. Bush*, 21 Pick. 230; *Appleton v. Parker*, 15 Gray, 173; *Varner v. Nobleborough*, 2 Greenl. 121; 11 Am. Dec. 48; *Stephens v. Thompson*, 28 Vt. 77; *Galliot v. Planters' Bank*, 1 McMull. 209; 36 Am. Dec. 257. *Aliter* in case of checks: *Marrett v. Brackett*, 60 Me. 524; *Weddigen v. Boston F. Co.*, 100 Mass. 422. See, for a fuller discussion of this subject, *ante*, Title Contracts—Payment.

note or draft is paid and discharged by the acceptance of another in renewal of it, or not; and this may be shown by proof of an express agreement of the parties as to the effect of the renewal upon the indebtedness evidenced by the former note or bill, or by proof of the attendant circumstances from which the intentions of the parties can be inferred. Where a subsequent promissory note is given for the same consideration as a former one, it is a question of fact for the determination of the jury whether the former note is thereby satisfied. If the subsequent note is executed and accepted by the parties for that purpose, the satisfaction is complete.¹ An indorsement, "Received, renewed," with date attached, made by holder, means that the interest for a renewal has been received, and that the note is to be the same as if made in the same terms anew from that date.²

§ 1616. **By Alterations.**—A material alteration in a bill or note discharges all parties who do not consent to it from liability on the instrument.³

§ 1617. **Discharge of Sureties or Indorsers.**—Where the relationship of principal and surety exists between the parties to a bill, or the parties to a bill transaction, and the holder, having notice thereof, engages to give time to or voluntarily discharges the principal, the surety or sureties are thereby discharged.⁴ If a note is made payable at a bank and is sent there for collection, the indorser is discharged by a failure of the bank to apply an unappropriated deposit of the makers to its payment.⁵

¹ *Belleville Bank v. Bomman*, 124 Ill. 200.

² *Lime Rock Bank v. Mallett*, 34 Me. 547; 56 Am. Dec. 673.

³ See Title Contracts—Alterations.

⁴ *Oriental Corp. v. Overend*, L. R. 7 Ch. 142; L. R. 7 H. L. 348; *Hall v. Bank*, 71 Ga. 715; *Pitt v. Congdon*, 2 N. Y. 352; 51 Am. Dec. 299; *Mann v. Brown*, 71 Tex. 241. See Title Con-

tracts—Discharge. A discharge by the payee of the acceptor of a bill of exchange will not operate as a discharge of the drawer when there are no funds of the drawer in the acceptor's hands: *Sargent v. Appleton*, 6 Mass. 85; 4 Am. Dec. 90.

⁵ *Commercial Bank v. Henninger*, 105 Pa. St. 496.

A surety on a promissory note may plead in bar to an action on the note a judgment discharging the principal on account of the illegality of the note.¹ But he is not discharged by a usurious agreement between the maker and the payee for an extension of time.² Upon the death of one of the makers of a joint note who signed as surety only, his estate is absolutely discharged from liability on the note.³ *Prima facie*, the acceptor of a bill is the principal debtor, and the drawer and indorsers are, as regards him, sureties, and the drawer of a bill is the principal as regards the indorsers, and the first indorser is the principal as regards the second and subsequent indorsers, and so on in order;⁴ but evidence for the purpose is admissible to show the real relationship of the parties, and it is immaterial that the holder was ignorant of the relationship when he took the bill, provided he had notice thereof at the time of his dealings with the principal.⁵ One who executes a note, apparently as principal, but really as surety, cannot avoid liability to the payee, who was ignorant of the true relation, by reason of the agreement of the surety with the principal for extension of the time of payment.⁶ The purchaser of an overdue joint and several note is not bound to inquire whether any of the makers are sureties; and if he, without notice that there are any sureties, gives day of payment to the maker, the sureties are not thereby discharged.⁷ A release of the drawer of the bill will not discharge the acceptor, where the bill is not accommodation paper, but is drawn and accepted against the drawer's account for goods consigned to the acceptor; the acceptor is the party primarily liable, and the drawer is considered

¹ Gill v. Morris, 11 Heisk. 614; 27 Am. Rep. 744.

² Meiswinkle v. Jung, 30 Wis. 361; 11 Am. Rep. 572.

³ Getty v. Binsse, 49 N. Y. 385; 10 Am. Rep. 379.

⁴ Cook v. Lister, 32 L. J. Com. P. 127.

⁵ Erwin v. Lancaster, 6 Best & S. 577; In re Goodman, 5 Dill. 140; Guild v. Butler, 127 Mass. 386.

⁶ McCloskey v. Indianapolis Manufacturers and Carpenters' Union, 67 Ind. 86; 33 Am. Rep. 76.

⁷ Nichols v. Parsons, 6 N. H. 30; 23 Am. Dec. 706.

only as his surety or guarantor;¹ nor where the bill was taken for value and before maturity, without notice that it was given for accommodation, although notice be subsequently acquired that it was so given.² By releasing or giving time to an accommodation indorser, the maker is not discharged;³ nor by giving time to the drawer on a note accepted for his accommodation, the acceptor is not discharged.⁴ A discharge of prior indorsers releases subsequent indorsers.⁵

¹ *Farmers' etc. Bank v. Rathbone*, 26 Vt. 19; 58 Am. Dec. 200. *Murray v. Judah*, 6 Cow. 484; Com. Bank v. Cunningham, 24 Pick. 270;

² *Farmers' etc. Bank v. Rathbone*, 26 Vt. 19; 58 Am. Dec. 200. 35 Am. Dec. 323.

³ *Seymour v. Minturn*, 17 Johns. 169; 8 Am. Dec. 380; *Bank v. Walker*, 18 Am. Dec. 149.

⁴ *Lambert v. Sandford*, 2 Blackf. 137; ⁵ *Newcomb v. Raynor*, 21 Wend. 108; 34 Am. Dec. 219.

TITLE XX.

**COPYRIGHTS, TRADE-MARKS,
AND PATENTS.**

TITLE XX.

COPYRIGHTS, TRADE-MARKS, AND PATENTS.

CHAPTER LXXXIII.

COPYRIGHTS.

- § 1618. Copyright at common law.
- § 1619. What is a publication.
- § 1620. Stage representation — Playright.
- § 1621. Property in private letters.
- § 1622. Copyright by statute.
- § 1623. Mode of and requisites to obtaining statutory copyright.
- § 1624. Jurisdiction of courts in copyright.
- § 1625. Who has right to take out copyright.
- § 1626. What may and may not be copyrighted.
- § 1627. What is an infringement — Abridgments and compilations.
- § 1628. Right to make extracts — Reviewers.
- § 1629. Translations into another language.
- § 1630. Rules as to granting injunctions in cases of infringement.
- § 1631. Statutory penalties for infringements.
- § 1632. Contracts and licenses to print and publish — Assignment of copyright.

§ 1618. **Copyright at Common Law.** — At common law, an author has the sole first right of printing and publishing his writings; in other words, the common-law copyright exists for the benefit of the author in all his unpublished manuscripts, and he may restrain by injunction their publication without his consent.¹ An alien

¹ *Millar v. Taylor*, 4 Burr. 2303; *Donaldson v. Beckett*, 4 Burr. 2408; *Wheaton v. Peters*, 8 Pet. 591; *Rees v. Peltzer*, 75 Ill. 475; *Parton v. Prang*, 3 Cliff. 537; *Boucicault v. Fox*, 5 Blatchf. 87; *French v. Maguire*, 55 How. Pr. 471; *Grigsby v. Breckenridge*, 2 Bush, 480; 92 Am. Dec. 509; *Isaacs v. Daly*, 1 Cent. L. J. 141; *Aronson v. Baker*, 43 N. J. Eq. 365; *Crowe*

can enjoin the publication of his work which he has not published or copyrighted.¹ But when the author has once published his writings, he loses his private rights therein, and they become public property and subject to the free use of the public.²

§ 1619. **What is a Publication.** — The publication of a work for private circulation or for private purposes is not such a publication as will defeat the common-law copyright in a literary production;³ nor permission by a lecturer to his students to take copies of his manuscripts for their use;⁴ nor is the public delivery of a lecture or sermon.⁵ Publication of a novel based on the play is not an abandonment of the common-law copyright in the play.⁶ The owner of a copyrighted painting by publishing lithographic copies thereof does not lose the right to restrain others from copying these copies.⁷ The publication of an oratorio, by the composer, in book form, with the score for the piano, the vocal parts, and marginal references to the particular instruments to be employed in its performance with full orchestral accompaniment, does not give the right to a person unauthorized by the composer to perform the oratorio as set for an orchestra;⁸ but the consent of an author to the publication of his work abroad is an abandonment of his copyright at home;⁹ and

v. Aiken, 2 Biss. 208. The fact that the plan, arrangement, and combination of a copyrighted work originated in the brain of its author may be proved by some other person than such author: *Bullinger v. Mackey*, 15 Blatchf. 550.

¹ *Palmer v. De Witt*, 47 N. Y. 532; 7 Am. Rep. 480.

² *Jefferys v. Boosey*, 4 H. L. 838; *Reade v. Conquest*, 9 Com. B., N. S., 768; *Wheaton v. Peters*, 8 Pet. 591; *Rees v. Peltzer*, 75 Ill. 475; *Parton v. Prang*, 3 Cliff. 537; *Bartlett v. Crittenden*, 5 McLean, 32; *Stowe v. Thomas*, 2 Wall. Jr. 547.

³ *Prince Albert v. Strange*, 2 De

Gex & S. 686; *White v. Geroch*, 2 Barn. & Ald. 298.

⁴ *Bartlette v. Crittenden*, 4 McLean, 300.

⁵ *Crowe v. Aiken*, 2 Biss. 208; *Palmer v. De Witt*, 47 N. Y. 542; 7 Am. Rep. 480; *Keene v. Kimball*, 16 Gray, 545; 77 Am. Dec. 426; *Bartlette v. Crittenden*, 4 McLean, 300.

⁶ *Shook v. Rankin*, 3 Cent. L. J. 210.

⁷ *Schumacher v. Schwencke*, 30 Fed. Rep. 690.

⁸ *Thomas v. Lennon*, 16 Cent. L. J. 108. And see *Boosey v. Fairlie*, L. R. 7 Ch. Div. 301; *Aronson v. Baker*, 43 N. J. Eq. 365.

⁹ *Shook v. Rankin*, 8 Ch. L. 569.

sending a number of copies of a work to booksellers and private individuals for examination before acquiring a copyright, and in one instance accepting the purchase-money, constitutes a publication.¹

ILLUSTRATIONS. — A person compiled maps of the city of Chicago, of a particular design, from the public records, into an atlas, and, without taking out any copyright under the act of Congress, made several copies of the original in a form suitable for comprising atlases, sold several, and placed one copy in the hands of the city for public use, where any part or the whole of it could be copied and used by any citizen, placing no restrictions on their use. *Held*, that the maps had become public property: *Rees v. Peltzer*, 75 Ill. 475.

§ 1620. **Stage Representation — Playright.** — At common law, the representation of a play upon the stage is not a dedication of it to the public, nor have the spectators the right to secure its reproduction by phonographic or other means, and no restrictive notice to spectators is necessary to secure the author's rights.² All the authorities seem to be agreed that the representation upon the stage is not a publication, but an exception, it is said in some of the cases, exists, viz.: That an auditor who is able to retain the words in his memory may subsequently reproduce or publish them without the author's consent. This exception is mentioned in nearly all the cases cited in the last paragraph, and was expressly sanctioned by the supreme court of Massachusetts in *Keene v. Kimball*,³ decided in 1860. But in 1882, in the case of *Tompkins v. Halleck*,⁴ the question was again considered by the same court, and the exception laid down in *Keene v. Kimball* unanimously overruled.⁵ A person

¹ *Gottsberger v. Aldine Book Pub. Co.*, 33 Fed. Rep. 381.

² *Crowe v. Aiken*, 2 Biss. 208; *Boucicault v. Fox*, 5 Blatchf. 87; *Macklin v. Richardson*, Amb. 694; *Boucicault v. Hart*, 13 Blatchf. 47; *Keene v. Wheatley*, 9 Am. Law Reg. 33; *Palmer v. De Witt*, 47 N. Y. 532; 7 Am. Rep. 480; *Keene v. Kimball*, 16 Gray, 545; 77

Am. Dec. 426; *Shook v. Rankin*, 3 Cent. L. J. 211; *Shook v. Rankin*, 8 Chic. L. N. 569.

³ 16 Gray, 545; 77 Am. Dec. 426.

⁴ 133 Mass. 32; 43 Am. Rep. 480.

⁵ The court, in its opinion, say: "It is not easy to understand why the author, by admitting the public to the performance of his manuscript

will be enjoined from using the title of a dramatic composition which has been copyrighted, even though the body of the play intended to be presented under that title may be different from the copyrighted play.¹ Where an author sells the exclusive right to use an operetta in America, and the purchasers are in possession of the manuscript before there is any publication in this country or Europe, the author cannot thereafter sell the right to a third person to perform it in this country, or dedicate it to the public by publication, so as to defeat the purchaser's prior exclusive right.²

§ 1621. **Property in Private Letters.**—The writer of a private letter to another still retains the copyright in it at common law, and no person, not even the receiver, has a right to publish it without his permission.³ Whether

play any more concedes to them the right to exercise their memory in getting possession of his play for the purpose of subsequent representation, than he does the privilege of using writing or stenography for that purpose. The spectator of a play is entitled to all the enjoyment he can derive from its exhibition. He may make it afterwards the subject of conversation, of agreeable recollection, or of just criticism; but we cannot perceive that in paying for his ticket of admission he has paid for any right to reproduce it. The mode in which the literary property of another is taken possession of cannot be important. The rights of the author cannot be made to depend merely on his capacity to enforce them, or those of the spectator on his ability to assert them. One may abandon his property, or may dedicate it to the use of the public; but while it remains his, the fact that another is able to get possession of it in no way affects his rights." Followed in *Aronson v. Baker*, 43 N. J. Eq. 365.

¹ *Shook v. Wood*, 10 Phila. 373.

² *Goldmark v. Kreling*, 35 Fed. Rep. 661.

³ *Woolsey v. Judd*, 4 Duer, 379; *Bartlette v. Crittenden*, 4 McLean, 301; *Denis v. Leclerc*, 1 Mart. (La.)

297; 5 Am. Dec. 712; *Folsom v. Marsh*, 2 Story, 100, Mr. Justice Story saying: "The author of any letter or letters (and his representatives), whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and that no persons, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account or for their own benefit. But, consistently with this right, the persons to whom they are addressed may have, nay, must by implication possess, the right to publish any letter or letters addressed to them, upon such occasions as require or justify the publication or public use of them, but this right is strictly limited to such occasions. Thus a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper to establish his right to maintain the suit or defend the same. So if he be aspersed or misrepresented by the writer, or accused of improper conduct in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach.

all kinds of private letters will be protected is a matter on which there has been some difference of opinion. In a New York case, Chancellor Walworth held that the publication of a private letter would not be enjoined if it had no value as a literary publication.¹ But Judge Story's language in *Folsom v. Marsh*² admits no such exception, and the great preponderance of authority is to the effect that not only literary compositions, but all kinds of letters, business or social, are within the rule.³ But it is essential that the writer should have written the letter as his own, and not as the mere agent of another.⁴ The receiver of a letter has the exclusive property in it, except for the purposes of publication.⁵ The writer is not entitled either to reclaim it, nor is the receiver bound to keep it for his inspection.⁶ The receiver may, therefore, recover it from a third party, or from the writer, to whom it has been loaned.⁷ The receiver of a letter, though marked "private," or "confidential," may be compelled to produce it in court.⁸

ILLUSTRATIONS. — An advertising solicitor entered into a contract with a specialist to furnish him with sixty thousand letters which were in the possession of the Voltaic Belt Company, of

If he attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori*, if he attempt to publish them for profit, for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. In short, the person to whom letters are addressed has but a limited right or special property (if I may so call it) in such letters, as a trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character."

¹ *Hoyt v. Mackenzie*, 3 Barb. Ch. 350; 49 Am. Dec. 178.

² 2 Story, 100.

³ 2 Story's Eq. Jur. 946; *Folsom v. Marsh*, 2 Story, 100; *Woolsey v. Judd*, 4 Duer, 379; *Eyre v. Higbee*, 35 Barb. 502; 22 How. Pr. 198; *Grigsby v. Breckinridge*, 2 Bush, 480; 92 Am. Dec. 509; *Denis v. Leclerc*, 1 Mart. (La.) 297; 5 Am. Dec. 712; *Howard v. Gunn*, 32 Beav. 462; *Hopkinson v. Burghley*, L. R. 2 Ch. App. 447.

⁴ *Howard v. Gunn*, 32 Beav. 462.

⁵ *Grigsby v. Breckinridge*, 2 Bush, 480; 92 Am. Dec. 509; *Hopkinson v. Burghley*, L. R. 2 Ch. App. 447; *Tefft v. Marsh*, 1 W. Va. 38; *In re Thomason*, 20 Beav. 545; *In re Wheatcroft*, L. R. 6 Ch. Div. 97.

⁶ *Grigsby v. Breckinridge*, 2 Bush, 480; 92 Am. Dec. 509.

⁷ *Oliver v. Oliver*, 11 Com. B., N. S., 139.

⁸ *Hopkinson v. Burghley*, L. R. 2 Ch. App. 447.

Marshall, Michigan, that had been written to that company in response to its advertisements of the curative qualities of the instruments and articles in which it dealt. The solicitor paid five hundred dollars to the company for such letters, and delivered them to the specialist, who agreed to pay him therefor twelve hundred dollars, and did pay him five hundred dollars, but refused to pay him the balance, claiming that the letters had already been used by other specialists, and were valueless. The solicitor sued to recover the balance. *Held*, that the receiver of private letters has not such an interest therein that they can be made the subject of a sale without the writer's consent, and that the contract in this case was void: *Rice v. Williams*, 32 Fed. Rep. 437.

§ 1622. **Copyright by Statute.**—The first English statute which secured to an author the rights of literary property after publication was 8 Anne, chapter 19, which gave him the sole right of publication for twenty-one years. In this country, the framers of the federal constitution provided that Congress should have power "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." In pursuance of this power, Congress, in 1790, passed our first copyright act. In 1870 the present act was passed, by which an author has an exclusive right to the publication of his writings for twenty-eight years from the time of taking out his copyright; with a right of renewal for fourteen years at the expiration of the first period.

§ 1623. **Mode of and Requisites of Obtaining Statutory Copyright.**—To obtain a copyright under the statute, the title-page of the work must first be filed with the librarian of Congress,¹ but this title may be printed with the pen as well as with type.² After the publication, and within ten days thereafter, two copies of the work must be delivered to the librarian of Congress.³ The strict pursuance of these statutory conditions is requisite to the validity

¹ U. S. Rev. Stats., sec. 4956; *Parkinson v. Laselle*, 3 Saw. 330. The real title and the title filed must agree: *Daly v. Brady*, 39 Fed. Rep. 265.

² *Chapman v. Ferry*, 18 Fed. Rep. 539.

³ *Parkinson v. Laselle*, 3 Saw. 330.

of the copyright,¹ though it has been held that the deposit of the copies of the book with the librarian before publication will not destroy the copyright.² It is sufficient if the copies required to be deposited ten days after publication are deposited after the printing, but before the formal publication.³ Where it was proved that the party claiming a copyright for a song deposited two copies in the mail, and got a receipt from the librarian of Congress acknowledging the receipt of two copies of the publication by its title in full, with the date over the official signature of the librarian, this was held evidence that two copies were delivered to the librarian as required by the act of Congress.⁴ Where a printed copy of a book then complete was deposited at the same time that the title-page was deposited, it was held that these facts, in connection with the fact of a prior sale, warranted the inference of an actual publication of the book prior to the date of such deposit, and that the copyright was therefore invalid, because the title was not entered before publication.⁵ A memorandum reciting that such deposit had been made, written under the certificate, after the signature and seal, is not competent evidence that the books had been delivered.⁶ In determining whether the title of a book has been duly deposited; the inquiry is, whether the book was published under the same title, substantially, as that deposited. If the title of the published book was deposited, that is sufficient; the law does not require that everything in the paper deposited as a title should be reproduced on the title-page of the book afterwards published.⁷

¹ *Wheaton v. Peters*, 8 Pet. 591; *Ewer v. Coxe*, 4 Wash. C. C. 487; *Marsh v. Warren*, 14 Blatchf. 263; *Boucicault v. Hart*, 13 Blatchf. 47; *Higgins v. Keuffel*, 30 Fed. Rep. 627; *Trow City Directory v. Curtin*, 36 Fed. Rep. 829; *Falk v. Howell*, 34 Fed. Rep. 739; *Thompson v. Hubbard*, 131 U. S. 123.

² *Chapman v. Ferry*, 18 Fed. Rep. 539.

³ *Chapman v. Ferry*, 18 Fed. Rep. 539.

⁴ *Blume v. Spear*, 30 Fed. Rep. 629.

⁵ *Baker v. Taylor*, 2 Blatchf. 82.

⁶ *Merrell v. Tice*, 104 U. S. 557.

⁷ *Donnelley v. Ivers*, 18 Fed. Rep. 592; 20 Blatchf. 381; 18 Rep. 389.

The statute requires that notice that the work is copyrighted must be given by inserting in every copy of the work, if it be a book, on the title-page, or the page next to the title-page, the following words: "Entered according to the act of Congress, in the year —, by A B, in the office of the librarian of Congress, at Washington"; or, at his option, the word "copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A B."¹ This form must be strictly followed. Thus the following has been held not sufficient: "Entered according to the act of Congress in the office of the librarian of Congress, by N. Hart Jackson, as author aforesaid, and the copyright thereof duly assigned to Sheridan Shook and Albert M. Palmer as proprietors thereof," the date 1875 being at the bottom of the first page, where the date of publication is generally found;² "Entered according to act of Congress, in the year 1878, by H. A. Jackson."³ So where in some copies issued neither the year nor name was printed, and in others the name was omitted, it was held that the copyright was lost.⁴ And the requirement as to the notice extends to editions printed by a grantee of the copyright, and his failure to print the notice prevents his right of action even against his grantor for an infringement.⁵ But notice is good for a work in several volumes if printed in the proper place in the first volume only.⁶ And "Copyright, 1882, by N. Sarony," printed on each copy of a photograph, is sufficient.⁷ It is not necessary that in a second or subsequent edition of

¹ 18 U. S. Stats. at Large, c. 301, sec. 1, pt. 3. Or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model, or design intended to be completed as a work of fine arts, by inscribing upon some visible portion thereof, or of the substance upon which the same shall be mounted, the same words.

² *Tompkins v. Rankin*, 3 Cent. L. J. 443.

³ *Jackson v. Walkie*, 29 Fed. Rep. 15.

⁴ *Thompson v. Hubbard*, 131 U. S. 123.

⁵ *Id.*

⁶ *Dwight v. Appleton*, 1 N. Y. Leg. Obs. 195.

⁷ *Burrow Giles Lit. Co. v. Sarony*, 111 U. S. 53.

a book the notice of copyright prescribed by statute should specify the date of the original copyright, in addition to the date of the subsequent one.¹ The requirement that a copyrighted engraving shall have the information that it is copyrighted "impressed on the face thereof" is sufficiently complied with if such information be engraved on the plate and printed from it in such a position as not to be covered when the picture is properly framed with a reasonable margin.²

ILLUSTRATIONS. — A title-page was deposited in 1846, and the notice on the title-page stated that it was deposited in 1847. *Held*, fatal to the copyright: *Baker v. Taylor*, 2 Blatchf. 82.³ An edition of a song was issued having a front cover, with an engraving thereon, and a list of seven songs, including the song in question, by a part of its title, over the name of the publisher, who claimed the copyright, and on the page where the music commenced the full title was printed, with the words, "Copyright, 1878," etc. *Held*, that this was a sufficient notice to the public of a claim of copyright, as required by act: *Blume v. Spear*, 30 Fed. Rep. 629. A registered a copyright label in the patent office by the title of "Water-proof drawing ink," consisting of these words in one line, in an oblong formed of double lines, no notice of copyright or name of the owner being printed thereon, except by the words, "Registered, 3,693, 1883." *Held*, that under the act of Congress of 1874, the label should at least have contained the word "copyright," with the year in which and the person by whom the copyright was taken out, instead of the statement of an entry in the office of the librarian of Congress, and the notice was hence insufficient: *Higgins v. Keuffel*, 30 Fed. Rep. 627.

§ 1624. **Jurisdiction of Courts in Copyright.** — Whatever right in the nature of copyright after publication exists in this country is created by and exists only to the extent and upon the conditions specified in the acts of Congress, and hence the federal courts alone have jurisdiction.⁴ But the statutes do not give exclusive jurisdiction to the

¹ *Lawrence v. Dana*, 4 Cliff. 1; 2 Am. L. T. Rep., N. S., 402.

² *Rossiter v. Hall*, 5 Blatchf. 362.

³ But the contrary was ruled where the error shortened instead of length-

ened the term: *Myers v. Callaghan*, 10 Biss. 139; affirmed in 128 U. S. 617.

⁴ *Dudley v. Mayhew*, 3 N. Y. 9.

federal courts in the protection of the rights of authors at common law in their manuscripts, or deprive state courts of jurisdiction over such actions.¹ A state court has jurisdiction of an action to determine the rights of parties to an agreement to have and perform a play.²

§ 1625. **Who has Right to Take out Copyright.** — The United States statute gives the right to take out copyright to the “author or proprietor” as to books, etc., and the inventor or designer as to charts, cuts, engravings, etc.³ But a trustee may take out a copyright in his name for the benefit of another person.⁴ An action for the infringement of a copyright may be maintained by the holder of the legal title thereof, though the beneficial ownership be in another.⁵ The person need not be the sole creator of the work in order to be capable of taking out the copyright.⁶ Where literary matter is prepared gratuitously for another, and a copyright obtained by the person for whom the service has been performed, such copyright is valid, notwithstanding the absence of a written agreement by the person who prepared the matter.⁷ Where the editor of a second or subsequent edition of an annotated work makes notes which may be separated and distinguished from those contained in the original, he is entitled to a copyright for them; but if they are so connected with the original that they cannot be separated, they infringe the original.⁸ One who merely employs another to compile a work is not the “author.”⁹ A photographer who employs a large number of assistants is not the “author”

¹ *Palmer v. De Witt*, 47 N. Y. 532; 7 Am. Rep. 480; 40 How. Pr. 293; 5 Abb. Pr., N. C., 13; 36 How. Pr. 22; *Sweeny*, 530; *Woolsey v. Judd*, 4 Duer, 379; *Jones v. Thorne*, 1 N. Y. Leg. Obs. 408; *Boucicault v. Hart*, 13 Blatchf. 47; *Isaac v. Daly*, 1 Cent. L. J. 141; *Aronson v. Baker*, 43 N. J. Eq. 365.

² *Widmer v. Greene*, 56 How. Pr. 91.

³ U. S. Rev. Stats., sec. 4952.

⁴ *Little v. Gould*, 2 Blatchf. 366.

⁵ *Hanson v. Jaccard Jewelry Co.*, 32 Fed. Rep. 202.

⁶ *Schuberth v. Shaw*, 19 Am. Law Reg., N. S., 248.

⁷ *Lawrence v. Dana*, 4 Cliff. 1.

⁸ *Lawrence v. Dana*, 4 Cliff. 1.

⁹ *Atwill v. Ferrett*, 2 Blatchf. 39.

of a photograph made by one of his assistants, within the copyright act.¹ An artist who is employed by the United States to engrave a chart of which the original manuscript was the property of and furnished by the government has no pretense of right of copyright in the engraved plates or impressions therefrom.² The person must be a "resident" or a "citizen" of the United States.³ Therefore a non-resident alien cannot take out a copyright.⁴ An alien, to qualify as a "resident," must show that at the time he recorded the title he had come to dwell within the United States with the intention of making it permanently his home.⁵

ILLUSTRATIONS. — A person employed by another as a performer and stage-manager agreed to write a play which was to be performed in his, the employer's, theater as long as it should continue to draw good audiences. *Held*, that the person writing the drama was the proper person to take out the copyright, and that the employer had no right or interest in it, except the privilege of having it performed in his theater: *Roberts v. Myers*, 23 Law Rep. 396. A person accompanied an expedition of the government to Japan, as an artist, with the understanding that all sketches and drawings he might make were to be the exclusive property of the government, he himself having signed the shipping articles, and received pay in the capacity of a master's mate. *Held*, not "an author or proprietor" of the drawings and engravings furnished to and used by the government in such a sense as to be capable of acquiring an exclusive right to them: *Heine v. Appleton*, 4 Blatchf. 125.

§ 1626. **What may and may not be Copyrighted.** — Abstracts of title may be copyrighted;⁶ or a blank form of application for a license to sell liquor at retail, composed of three blanks, — a "petition," a "bond and warrant," and a "justification," — all intended to be filled up and filed by the applicant;⁷ or a compilation from public

¹ *Nottage v. Jackson*, 32 Week. R. 106.

² 7 Op. Att. Gen. 656.

³ U. S. Rev. Stats., sec. 4952.

⁴ *Keene v. Wheatley*, 9 Am. Law Reg. 33; *Yuengling v. Schile*, 20 Blatchf. 452; nor his assignee: *Id.*

⁵ *Boucicault v. Wood*, 2 Biss. 34; *Carey v. Collier*, 56 Niles Reg. 262.

⁶ *Banker v. Caldwell*, 3 Minn. 94.

⁷ *Brightley v. Littleton*, 37 Fed. Rep. 103.

documents, showing the date and order of battles fought during the civil war, together with a list of the casualties;¹ or a guide to post-offices and railroad stations, with shipping directions by freight and express lines;² or photographs;³ or maps;⁴ or the head-notes made by the reporter of judicial opinions and statements of facts and abstracts of the arguments of counsel;⁵ or sheets of music;⁶ or a single sheet containing digrams representing a system of taking measures for and cutting ladies' dresses, with instructions for practical use.⁷

A libelous or an immoral book cannot be copyrighted;⁸ nor a book which is itself a piracy;⁹ nor blank account-books;¹⁰ nor an advertising card devised for the purpose

¹ *Hanson v. Jaccard Jewelry Co.*, 32 Fed. Rep. 202.

² *Bullinger v. Mackey*, 15 Blatchf. 550.

³ *Burrow Giles Lit. Co. v. Sarony*, 111 U. S. 53.

⁴ *Farmer v. Calvert Lith. Co.*, 1 Flip, 228.

⁵ *Wheaton v. Peters*, 8 Pet. 591; *Gray v. Russell*, 1 Story, 11; *Drone on Copyright*, 159, 160; *Butterworth v. Robinson*, 5 Ves. 709; *Saunders v. Smith*, 3 Mylne & C. 711; *Sweet v. Shaw*, 3 Jur. 217; *Sweet v. Maugham*, 11 Sim. 51; *Hodges v. Welsh*, 2 Ir. Eq. 266; *Sweet v. Benning*, 16 Com. B. 459; *Backus v. Gould*, 7 How. 798; *Little v. Gould*, 2 Blatchf. 165, 362; *Little v. Hall*, 18 How. 165; *Paige v. Banks*, 7 Blatchf. 152; 13 Wall. 608; *Chase v. Sanborn*, 4 Cliff. 308; *Banks v. McDivitt*, 13 Blatchf. 163; *Callaghan v. Myers*, 128 U. S. Sup. Ct. 617, holding that all outside of the written opinion of the court may be copyrighted, viz.: The title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index; the order of arrangement of the cases, the division into volumes, the numbering and paging of the volumes, the table of cases cited, the subdivision of the index into titles, the distribution of the subjects of the head-notes, and the cross-references. But not (as to *syllabi*) where the judges prepare their own head-notes, as in New Hampshire;

Chase v. Sanborn, 4 Cliff. 306; and *Ohio: Banks v. Manchester*, 23 Fed. Rep. 143; affirmed in 128 U. S. 244. A statute directing the reporter to publish the decisions of the supreme court of errors and copyright the volumes does not prohibit any one else from publishing the opinions separately or collectively, but restricts the exclusive right of publication to the reports compiled and edited by the reporter: *State of Connecticut v. Gould*, 34 Fed. Rep. 319.

⁶ *Clementi v. Golding*, 2 Camp. 25; *Clayton v. Stone*, 2 Paine, 382.

⁷ *Drury v. Ewing*, 1 Bond, 540.

⁸ *Daly v. Palmer*, 6 Blatchf. 256; *Stockdale v. Onwhyn*, 5 Barn. & C. 173; *Hirne v. Dale*, 2 Camp. 27, note b; *Fores v. Johnes*, 4 Esp. 97; *Gale v. Leckie*, 2 Stark. 107; *Lawrence v. Smith*, 1 Jac. 471. The fact that printed playing-cards may be used for gambling does not preclude a design for them from being copyrighted and protected by injunction from infringement. To warrant refusing the benefit of the copyright law on the ground of immorality in the work entered, it must be shown that the thing is immoral *per se*, — is incapable of being innocently used: *Richardson v. Miller*, 12 Pat. Off. Gaz. 3.

⁹ *Carey v. Faden*, 5 Ves. 24; *Barfield v. Nicholson*, 2 Sim. & St. 1.

¹⁰ *Baker v. Selden*, 101 U. S. 99.

of showing paints of various colors;¹ nor boundaries of townships;² nor an inchoate or projected work;³ nor the putting together in one tune different parts copied from older musical compositions;⁴ nor mere spectacles or arrangements of scenic effects having no literary character;⁵ nor a method of advertising;⁶ nor pictures to be painted on labels to be used as trade-marks;⁷ nor a system of book-keeping;⁸ nor the opinions delivered by

¹ *Ehret v. Pierce*, 18 Blatchf. 302. A painting only seven inches by four, painted for a corporation from a design made by its president, from a wood-cut, may be copyrighted by the corporation; nor is it material that it could be readily lithographed and used as an advertising label: *Schumacher v. Schwencke*, 23 Blatchf. 373; 25 Fed. Rep. 466. A chromo-lithograph, or other print which is intrinsically a work of art, embodying imaginative design and authorship (here, a picture of King Gambrinus, superintending distribution of glasses of lager-beer among thirsty persons, drawn so as to represent various ranks in life, adapted to be hung in saloons as a striking advertisement of the lager-beer manufactured by plaintiff, whose name, etc., were conspicuously printed underneath), is a subject of copyright, notwithstanding it is designed and used for advertising purposes: *Yuenling v. Schile*, 12 Fed. Rep. 97; 20 Blatchf. 452.

² *Farmer v. Calvert Lith. Co.*, 1 Flap. 228.

³ *Centennial Catalogue Co. v. Porter*, 2 Week. Not. 601.

⁴ *Reed v. Carusi, Taney*, 72.

⁵ *Martinetti v. Maguire*, 1 Abb. 356; *Serrana v. Jefferson*, 33 Fed. Rep. 347. A mechanical stage contrivance whereby a tank filled with water, instead of a canvas imitation, represents a river, is not protected by a copyright of the play in which it is introduced: *Serrana v. Jefferson*, 33 Fed. Rep. 347.

⁶ *Ehret v. Pierce*, 18 Blatchf. 302.

⁷ *Schumacher v. Wogram*, 35 Fed. Rep. 210.

⁸ *Baker v. Selden*, 101 U. S. 99. In this case the court say: "There is no doubt that a work on the subject of book-keeping, though only explanatory

of well-known systems, may be the subject of a copyright; but then it is claimed only as a book. Such a book may be explanatory either of old systems or of an entirely new system, and, considered as a book, as the work of an author conveying information on the subject of book-keeping, and containing detailed explanations of the art, it may be a very valuable acquisition to the practical knowledge of the community. But there is a clear distinction between the book as such and the art which it is intended to illustrate. The mere statement of the proposition is so evident that it requires hardly any argument to support it. The same distinction may be predicated of every other art as well as that of book-keeping. A treatise on the composition and use of medicines, be they old or new; on the construction and use of plows or watches or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective, — would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein. The copyright of the book, if not pirated from other works, would be valid without regard to the novelty or want of novelty of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein when no examination of its novelty has ever been officially made would be a surprise and a fraud upon the public. That is the province of letters patent, not of copyright. The claim to an invention or

judges.¹ While a compilation of the statutes of a state may be so original as to entitle the author to a copyright, on ac-

discovery of an art or manufacture must be subjected to the examination of the patent-office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government. The difference between the two things, letters patent and copyright, may be illustrated by reference to the subjects just enumerated. Take the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject (as regular physicians generally do), he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture, or composition of matter. He may copyright his book if he pleases, but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries. The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By publishing the book without getting a patent for the art, the latter is given to the public. The fact that the art described in the book by illustrations of lines and figures which are reproduced in practice in the application of the art makes no difference. Those illustrations are the mere language employed by the author to convey his ideas more clearly. Had he used words of description instead of diagrams, which merely stand in the place of words, there could not be the slightest doubt that others, applying the art to practical use, might lawfully draw the lines and diagrams which were in the author's mind, and which he thus described by words in his book. The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain

them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book. And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application. Of course these observations are not intended to apply to ornamental designs or pictorial illustrations, addressed to the taste. Of these it may be said that their form is their essence, and their object the production of pleasure in the contemplation. This is their final end. They are as much the product of genius and the result of composition as are the lines of the poet or the historian's periods. On the other hand, the teachings of science and the rules and methods of useful art have their final end in application and use; and this application and use are what the public derive from the publication of a book which teaches them. But as embodied and taught in a literary composition or book their essence consists only in their statement. This alone is what is secured by the copyright. The use of another of the same methods of statement, whether in words or illustrations, in a book published for teaching the art would undoubtedly be an infringement of the copyright."

¹ *Wheaton v. Peters*, 8 Pet. 591; *Gray v. Russell*, 1 Story, 11; *Banks v. Manchester*, 23 Fed. Rep. 143; affirmed in 128 U. S. 244. The state cannot have the protection of a copyright in the opinions of its judges: *Banks v. West Publishing Co.*, 27 Fed. Rep. 50; affirmed in U. S. Sup. Ct.

count of the skill and judgment displayed in the combination and analysis, he cannot obtain a copyright for the publication of the laws alone, nor can the legislature of the state confer any such exclusive privilege upon him,¹ nor can there be a copyright in the title of a book.² An author cannot acquire any greater right in a *nom de plume*, or assumed name, than he has in his Christian name, and he cannot have a trade-mark in his *nom de plume* so as to prevent the application of the rule that the publication of a literary product without copyright is a dedication to the public, after which any one may republish it, and in connection with the author's name;³ nor can newspapers be copyrighted.⁴ The word "chart," as used in the copyright law, does not include sheets of paper exhibiting tabulated or methodically arranged informa-

¹ Davidson v. Wheelock, 27 Fed. Rep. 61.

² Davidson v. Wheelock, 27 Fed. Rep. 61; Jollie v. Jaques, 1 Blatchf. 627; Putnam v. Pollard, 10 Cent. L. J. 319; Osgood v. Allen, 1 Holmes, 185, the court saying: "The copyright protected by the statute is the copyright in the book, the word 'book' being used to describe any literary composition. Though a printed copy of the title must be sent to the librarian of Congress before publication, yet this is only as a designation of the book to be copyrighted, and the right is not perfected under the statute until the required copies of such copyright book are, after publication, also sent. It is only as a part of the book, and as the title to that particular literary composition, that the title is embraced within the provision of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of the mind of the author in the book. The right secured by the act, however, is the property in the literary composition, — the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary com-

position; it may not be, and certainly the statute does not require that it should be, the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage, which only identifies, and frequently does not in any way describe, the literary composition itself, or represent its character. By publishing, in accordance with the requirements of the copyright law, a book under the title of the life of any distinguished statesman, jurist, or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title itself is original, and the product of the author's own mind, and is appropriated by the infringement, as well as the whole, or a part of, the literary composition itself, in protecting the other portions of the literary composition, courts would probably also protect the title. But no case can be found, either in England or in this country, in which, under the law of copyright, courts have protected the title alone, separate from the book which it is used to designate."

³ Clemens v. Belford, 14 Fed. Rep. 728; 11 Biss. 459; 27 Alb. L. J. 293; 29 Ind. Rev. Rec. 53; 15 Rep. 227.

⁴ Clayton v. Stone, 2 Paine, 382.

tion. It refers to marine maps, and is classed with "maps" and other words of artistic import.¹

ILLUSTRATIONS. — An editor of an Adams's Latin Grammar made alterations in and additions to it, including notes collected from various sources. *Held*, that as the collection and preparation of such notes required labor and intellectual exertion, and the plan and arrangement and combination of them were new, he was to be deemed the author of them, in their form and arrangement, and was entitled to a copyright for them: *Gray v. Russell*, 1 Story, 11; 2 Law Rep. 294. While Collins's novel *The New Magdalen* was appearing serially two rival dramatists began preparing dramatic versions of it. One of them entered his version for copyright by sending in the title "The New Magdalen." *Held*, that his doing this did not give him any prior right over the other in the use of that title: *Benn v. Leclercq*, 18 Int. Rev. Rec. 94.

§ 1627. **What is an Infringement — Abridgments and Compilations.** — A *bona fide* abridgment of a work is not an infringement of the copyright in the original work.² But it is an infringement if so much is taken that the value of the original work is lessened so as to be injurious to the author. "The general principle is, that the proper object of the copyright is the peculiar expression of the author's ideas, meaning by this, the structure of the work, the sequence of his remarks, and, above all, his language. . . . If this view be correct, it follows that any abridgment of the work in the original author's language is an infringement of his right; and, indeed, any quotation will be *pro tanto* a violation, unless excused on the ground of its inconsiderable extent."³ A distinction exists between an abridgment and a compilation. An abridgment necessarily adopts the same arrangement and conveys the same knowledge in a condensed form; but a compiler

¹ *Taylor v. Gilman*, 24 Fed. Rep. 632. *Webb v. Powers*, 2 Wood. & M. 497.

² *Gyles v. Wilcox*, 2 Atk. 141; *Newbery's Case*, Lofft. 775; *Doddsley v. Kinnersley*, Amb. 403; *Tonson v. Walker*, 3 Swanst. 672; *Whittingham v. Wooler*, 2 Swanst. 428; ³ *Copinger on Copyright*, 37; *Greene v. Bishop*, 1 Cliff. 186; *Saunders v. Smith*, 3 Mylne & C. 711; *Bromhall v. Holcombe*, 3 Mylne & C. 737; *Lawrence v. Dana*, 4 Cliff. 1.

can neither adopt the arrangement, nor convey by his extracts the same knowledge contained in the form in which the compilation is made.¹ Compilations are not original in their character, the compilations being of facts from common and universal sources of information, such as are contained in directories, digests, guide-books, maps, and statistical tables. While the compiler of such book does not have a monopoly of the subject of which the book treats, any other person being free to make a similar book, yet the subsequent investigator must investigate for himself, from the original sources open to all. He will not be allowed to use the labors of the previous compiler, saving his own time by copying the results of the previous compiler's study.² In the case of a previous copyrighted directory, the only legitimate use which a subsequent compiler can make of it is to verify the correctness of the results reached by his own independent efforts to collect the information,³ or to direct himself to the persons from whom such information is obtained.⁴ The law requires that the subsequent compiler shall do for himself what the first compiler has done.⁵

In a very recent case it was held that where the value of two society directories depends upon the judgment of the authors in the selection of names of persons of a certain social standing, each directory is original to the extent that the selection is original. Where the compiler of such directory uses a previous directory of the same character to save himself the trouble of making an independent

¹ *Story v. Holcombe*, 4 McLean, 306.

² *Jarrold v. Houlston*, 3 Kay & J. 708; *Kelley v. Morris*, L. R. 1 Eq. 697; *Scott v. Stanford*, L. R. 3 Eq. 718; *Lewis v. Fullerton*, 2 Beav. 6; *Holten v. Arthur*, 1 Hem. & M. 603; *Hogg v. Kirby*, 8 Ves. 215; *Matthewson v. Stockdale*, 12 Ves. 270; *Longman v. Winchester*, 16 Ves. 269; *Gray v. Russell*, 1 Story, 11; *Folsom v. Marsh*, 2 Story, 100; *Emerson v. Davies*, 3 Story, 768. "The compiler of a digest, a road-book, a

directory, or a map, can search and survey for himself in the fields which all laborers are premitted to occupy, but he cannot adopt as his own the products of another's toil": *Banks v. McDavitt*, 12 Blatchf. 163.

³ *Kelly v. Morris*, L. R. 1 Eq. 697; *List Pub. Co. v. Keller*, 30 Fed. Rep. 773.

⁴ *Morris v. Wright*, L. R. 5 Ch. App. 279.

⁵ *List Pub. Co. v. Keller*, 30 Fed. Rep. 773.

selection of the persons listed, though only to a very limited extent, he infringes the first compiler's copyright.¹ In determining the fact of infringement of a copyright of a law report, the court will consider the order of the cases and the paging of the books infringing the original edition.² Where parts of a series of forms are identical with those of a former copyrighted series, except for a word or two inserted in several places, the whole series showing a substantial identity, and the counsel employed to draw up the second series acknowledges having had the first before him while so doing, the second series is an infringement.³ Taking, in a new map, the boundaries of townships from another map, without going to the common source, is an infringement.⁴ But where the owner of a copyright for maps of certain wards of "the city of New York, surveyed under the direction of insurance companies of said city, which exhibit each lot and building and the classes, as shown by the different coloring and characters set forth in the reference," brought his bill to restrain the publication of similar maps of the city of Philadelphia, it was held that the bill could not be sustained.⁵

And to infringe a copyright the defendant must have actually copied or "pirated" the production of plaintiff, and not merely, while ignorant of it, have made something similar.⁶ The mere fact that a dramatic composition bears the same title as a prior dramatic composition does not, if this circumstance is wholly accidental, and if the compositions are in other respects dissimilar, constitute the latter composition an infringement of the copyright of the proprietor of the former.⁷ Perforated strips of paper to be used in organettes, and by which a certain

¹ List Pub. Co. v. Keller, 30 Fed. Rep. 772.

² Myers v. Callaghan, 20 Fed. Rep. 441; 128 U. S. 617.

³ Brightley v. Littleton, 37 Fed. Rep. 103.

⁴ Farmer v. Calvert Lith. Co., 1 Flip. 228.

⁵ Perris v. Hexamer, 99 U. S. 674.

⁶ S. S. White Dental Co. v. Sibley, 38 Fed. Rep. 751.

⁷ Isaacs v. Daly, 1 Cent. L. J. 141.

tune is produced, are not a violation of the copyrighted sheet-music of the same tune.¹ A key for the use of teachers to a copyrighted school-book in which are transcribed substantial portions of the original work is an infringement of the copyright.² A copyright of a photograph artistically designed to illustrate a musical composition is infringed by stamping an imitation in raised figure on leathern chair bottoms and backs.³ A chromo-printed Berlin wool-work pattern is not an infringement of an engraving from the same design.⁴ A copyright for a design for playing-cards may be infringed by the manufacture of cards strikingly similar to the copyrighted design in its main or distinctive features, although the cards manufactured differ from the copyrighted design in other particulars. It is no answer to the charge of infringement that the whole of the design has not been copied, if those features of it have been appropriated which substantially embrace the novelty of the conception and the value of the application of the art of the designer.⁵

When a close resemblance is the necessary consequence of the use of common materials, the existence of the same errors in the two publications affords one of the surest tests of copying. The improbability that both compilers would have made the same mistakes, if both had derived their information from independent sources, suggests such a presumption of copying by the later compiler from the first that it can be overcome only by clear evidence to the contrary.⁶

¹ *Kennedy v. McTammany*, 33 Fed. Rep. 584.

² *Reed v. Holliday*, 19 Fed. 325.

³ *Falk v. Howell*, 37 Fed. Rep. 202.

⁴ *Dicks v. Brooks*, 11 Cent. L. J. 368.

⁵ *Richardson v. Miller*, 12 Pat. Off. Gaz. 3.

⁶ *Mawman v. Tegg*, 2 Russ. 393; *Spiers v. Brown*, 31 L. T. 16; *Lawrence v. Dana*, 4 Cliff. 1; *List Pub. Co.*

v. Keller, 30 Fed. Rep. 773, the court saying: "The List contains a selection of about six thousand names and addresses of persons residing in New York City out of the three hundred and thirteen thousand names which appear in the general city directory. The Social Register contains about three thousand five hundred names and addresses of persons resid-

It is no defense that some of the appropriated parts had been previously used by others, from whose works they were taken by defendant, nor that plaintiff's work was written for a presidential campaign, while defendant's was written for young people; nor that the plaintiff was not designated by the subject of the book as his special biographer.¹

ILLUSTRATIONS.—A published a life of Washington containing 866 pages, of which 353 pages were copied from Sparks's Life and Writings of Washington, 64 pages being official letters and documents, and 255 pages being private letters of Washington, originally published by Mr. Sparks under a contract with the owners of the original papers of Washington, *held*, that the work was an invasion of the copyright of Mr. Sparks: *Folsom v. Marsh*, 2 Story, 100. A gratuitously prepared for B certain notes to two editions of a book, the copyright of which B owned. The notes were copyrighted by B; but it was agreed that in any subsequent edition of the book B would make no use of the notes prepared by A and copyrighted as aforesaid. B procured a subsequent edition of the book to be published, with notes by C, which were alleged to infringe the notes of A. Upon suit by A, it was ruled that the publication of the edition with notes by C, the same being an infringement as charged, was a violation of A's rights in the premises: *Lawrence v. Dana*, 4 Cliff. 1. The plaintiff wrote an arithmetic, the plan, arrangement, and illustrations of which he claimed to be new. *Held*, that copying therefrom was a violation of his copyright, although the materials and the several particulars of his plan had existed before in separate forms, and in separate works, inasmuch as they had never before been united in one combination in the same manner: *Emerson v. Davies*, 3 Story, 768; 8 L. R. 270; 4 West. L. J. 261. The paging of B's volumes of law reports and A's was substantially the same throughout. The list of cases preceding each report was the same. B's editors testified that their

ing in New York City, and of this number over two thousand eight hundred appear in the List. The fact that two thousand eight hundred of the names and addresses in the defendant's book originally appeared in the complainant's book would, standing alone, be quite inconclusive. But when it is shown that thirty-nine errors in complainant's book, consisting of misprints, erroneous addresses,

insertion of names of persons who never existed, and insertions of names of deceased persons, are reproduced in the defendant's book, although it was not published until more than a year after the complainant's book was published, a strong presumptive case of piracy is made out."

¹ *Gilmore v. Anderson*, 38 Fed. Rep. 846.

work was independent of that of A's editor, but A's volumes were all used in editing and annotating, in some instances words and sentences being followed without change, in others changed only in form. Though there was a considerable difference between the head-notes, it was evident that A's had been freely used. There were errors common to both sets of reports. *Held*, an infringement: *Callaghan v. Myers*, 128 U. S. 617. A was the exclusive owner of the manuscript copy of the operetta *Nanon*. D produced a play under the title of "Genée's *Nanon*," claiming to have adapted it from an old French story of the name. The characters, scenes, and situations were similar, the changes being colorable only. *Held*, that A was entitled to an injunction: *Goldmark v. Kreling*, 35 Fed. Rep. 661. B sold a copyright insurance map to H. & M., who employed D to correct it, by reason of changes from time to time in buildings, etc., affecting risks. D, in making such corrections, used pasters on complainant's map, and retraced portions of said map, and in some instances reproduced whole sheets of said map by re-lithographing it. *Held*, that while D could correct the map by putting thereon their pasters of such corrections, it was an infringement to retrace any material part of complainant's map, or to reproduce any material part thereof in making such corrections: *Sanborn Map and Pub. Co. v. Dakin Pub. Co.*, 39 Fed. Rep. 266. C published and copyrighted a book of engravings illustrating certain unpatented articles manufactured by them. D manufactured similar articles from designs taken from C's illustrations, and published a book of engravings illustrating its manufactures, in which several pictures were very like those in C's book. *Held*, not an infringement of C's copyright: *Lamb v. Grand Rapids School Furniture Co.*, 39 Fed. Rep. 474. Some of the parts of defendant's book were quotations from conversations, letters, and speeches; in others, prominent words of statements in plaintiff's book were taken, and used with others to convey the same idea; in others, the substance of the expression was taken, with little variation of language; and in some instances portions of considerable length were copied *verbatim*. Defendant wrote his book with plaintiff's book constantly before him, and so much of the ideas, language, and mode of expression was carried into defendant's book as to show that plaintiff's book was not used for information only, but in parts was appropriated. *Held*, an infringement: *Gilmore v. Anderson*, 38 Fed. Rep. 846.

§ 1628. **Right to Make Extracts—Reviewers.**—A person has a right to make extracts from a copyrighted

work to a limited extent only.¹ Therefore, a reviewer, if he makes extracts too freely, may become an infringer.²

§ 1629. **Translations into Another Language.**—A translation of a work in another language is copyrightable.³ To translate a work is no infringement of the copyright, although the author has previously had it translated into the same language, and secured a copyright for that translation.⁴

§ 1630. **Rules as to Granting Injunctions in Case of Infringement.**—It has been held that the court will not in all cases grant an injunction to restrain the selling of an infringement of a copyrighted work, but will take into consideration the relative harm done complainant in refusing the injunction, in comparison with the damage which would be sustained by the defendant if it was granted. If the latter seems greatly to exceed the former, the complainant will be given damages, but not an injunction.⁵ If a plaintiff fails to show that the copy of a book which he produces is a copy of the book which he has copyrighted, and the copyright of which he alleges has been infringed, he is not entitled to a preliminary injunction.⁶ An account of profits may be decreed under the

¹ *Story v. Holcombe*, 4 McLean, 306; *Folsom v. Marsh*, 2 Story, 106; *Rowarth v. Wilkes*, 1 Camp. 94, 97; *Wilkins v. Aikin*, 17 Ves. 422; *Cary v. Kearsley*, 5 Esp. 170.

² "The extracts must not be made too freely. Sufficient may be taken to form a correct idea of the whole; but no one is allowed, under the pretense of quoting, to publish either the whole or the principal part of another man's composition; and therefore a review must not serve as a substitute for the book reviewed. If so much be extracted that the article communicates the same knowledge as the original work, it is an actionable violation of literary property": *Story v. Holcombe*, 4 McLean, 306.

³ *Millar v. Taylor*, 4 Burr. 2303;

Barnet v. Chetwood, 2 Mer. 441; *Prince Albert v. Strange*, 2 De Gex & S. 693; *Wyatt v. Barnard*, 3 Ves. & B. 77; *Emerson v. Davies*, 3 Story, 768, 780; *Shook v. Rankin*, 6 Biss. 480.

⁴ *Stowe v. Thomas*, 2 Wall. Jr. 547. If a foreigner translates an English work, and then the foreign work is retranslated into English, it is an infringement of the original copyright: *Murray v. Bogue*, 17 Jur. 219.

⁵ *Scribner v. Stoddart*, 19 Am. Law. Reg. 433; *Forbush v. Bradford*, 21 Month. Law Rep. 471; *Chase v. Sanborn*, 4 Cliff. 306; *Drone on Copyright*, 524; *Hanson v. Jaccard Jewelry Co.*, 32 Fed. Rep. 202; *Webb v. Powers*, 2 Wood. & M. 497.

⁶ *Humphrey's etc. Co. v. Armstrong*, 30 Fed. Rep. 66.

general prayer for relief. Delay in bringing suit is no defense to the suit when brought, where there is no proof of acquiescence in or of failure to object to the acts constituting infringement, and defendant's conduct has not been induced by any act or omission of those interested in the copyright.¹

ILLUSTRATIONS. — A publisher published and sold books in violation of a copyright; repurchased and resold them. *Held*, that he was chargeable with the profit from both sales: *Myers v. Callaghan*, 24 Fed. Rep. 636; 128 U. S. 617. F. was the author and proprietor of a book of 1024 pages, entitled "A History of Detroit and Michigan; or, The Metropolis Illustrated." E.'s publication was a pamphlet of 274 pages, entitled "The Industries of Detroit," the first seventy pages of which were mainly historical, and contained about one hundred short extracts from the complainant's book. The remaining two hundred pages consisted of advertisements only. *Held*, that as three fourths of the extracts from F.'s book, and practically all to which he could lay claim as original matter, were contained in the first eleven pages of the pamphlet, and that to enjoin the whole would cast a disproportionate pecuniary loss on E., the injunction should extend only to this portion: *Farmer v. Elstner*, 33 Fed. Rep. 494. B. & Co., publishers in Scotland, issued the ninth edition of the Encyclopædia Britannica. S. & Co. commenced a cheap reprint. B. & Co. then procured some articles to be written for the work by authors in the United States, entered those articles for copyright in the names of their American agents as proprietors, published them in separate form to secure due American copyright, and embodied them in the ninth and tenth volumes. They then sued to enjoin publication of them in the S. & Co. reprint. *Held*, that the lawfulness and good faith of this device to protect the encyclopedia, which except for the few American contributions might lawfully be reprinted here, from republication was too doubtful, and the damage to be incurred by plaintiffs from the reprinting of the American articles, considered as separate works, was too uncertain to warrant granting an injunction: *Scribner v. Stoddart*, 19 Am. Law Reg. 433

§ 1631. Statutory Penalties for Infringement. — Under the federal statute, any person, without the consent of the author or proprietor of a copyrighted book, who shall print,

¹ *Gilmore v. Anderson*, 38 Fed. Rep. 846.

publish, or import it, or knowingly shall sell, or expose for sale, any copy thereof, shall forfeit every copy to such proprietor, and shall pay him such damages as the court shall give in a civil action instituted therefor. Larger penalties are provided in the case of the pirating of maps, charts, musical productions, paintings, statuary, and dramatic compositions, and the other productions which the statute protects.¹ The penalty and forfeiture imposed by Revised Statutes, section 4965, for violation of copyright, are not enforceable upon a bill in equity for want of any enactment allowing it, but only by action at law. Nor is a court of equity, on a bill to enjoin an infringement, authorized to compel a surrender of the plates used in printing the pirated work, as a means of enforcing its decree of injunction.² The penalty in section 4965 of one dollar for each sheet of a copyrighted plate "found in the possession" of the defendant is not recoverable from one who was only the employee of the proprietor of the establishment owning such sheets, and who had possession only as such employee.³ Where a number of chromos, all bearing the word "copyrighted," in violation of section 4963, were struck off each day on several succeeding days, such chromos being of the same kind, except that each respective issue bore the name of a different firm by way of advertisement, the penalty was held recoverable for each issue.⁴

§ 1632. Contracts and Licenses to Print and Publish—Assignment of Copyright.—An agreement by an author that a publisher shall have for a certain sum the copyright forever passes the right both to the original

¹ U. S. Rev. Stats., secs. 4964, 4965, 4966. But the penalties, etc., must be sued for within two years after the cause of action arises: *Id.*, sec. 4968. The action abates by the death of the defendant: *Ex parte Schercker*, 3 S. C. Rep. 423.

² *Chapman v. Ferry*, 12 Fed. Rep. 693; 8 Saw. 191. See *Taft v. Stephens Lithographing Co.*, 37 Fed. Rep. 726.

³ *Thornton v. Schreiber*, 124 U. S. 612.

⁴ *Taft v. Stephens Lithographing and Engraving Co.*, 39 Fed. Rep. 781.

term and the renewal thereof.¹ Where, under an agreement to publish a book, the publisher takes the copyright in his own name, and with the consent of the author, the copyright is in him only for the purposes of such contract. He has no right to assign it, nor to publish the work, except upon the terms of such contract.² The assignment of an interest in a copyrighted book must be in writing;³ it must be recorded in the office of the librarian of Congress within sixty days after its execution; otherwise, it is void as against subsequent purchasers or mortgagees without notice and for a valuable consideration.⁴ Under a contract between author and publisher whereby the publisher agrees to publish the work and pay the author, for the copyright, seven and a half cents for every copy of the book published, the publisher does not obtain the exclusive right to publish the work.⁵ A contract to reprint a book in violation of another's copyright in it is void, and the printer can recover nothing for his labor.⁶ One who makes a plate from which a copy forming an important, substantial, and material part of an illustrated newspaper that is copyrighted can be produced, and sells it to the proprietors of a rival illustrated newspaper, with the knowledge that it will be published in that paper, is a joint tort-feasor with such publishers, and is guilty of infringement of the copyright.⁷ In the absence of notice of the terms of the contract between an author and the agents employed by him, for the sale of his books by subscription at a certain price, a publisher may buy or contract to buy such books from agents who have lawfully obtained them by purchase from the author or his

¹ *Paige v. Banks*, 7 Blatchf. 152; 13 Wall. 608.

² *Pulte v. Derby*, 5 McLean, 328.

³ *Gould v. Banks*, 8 Wend. 562; 24 Am. Dec. 91. The rights of an author before publication may be transferred by parol: *Callaghan v. Myers*, 128 U. S. 618.

⁴ Rev. Stats., sec. 4955.

⁵ *Willis v. Tibbals*, 33 N. Y. Sup. Ct. 220.

⁶ *Nichols v. Ruggles*, 3 Day, 145; 3 Am. Dec. 262.

⁷ *Harper v. Shoppell*, 28 Fed. Rep. 113.

publishers, and may advertise them for sale and sell them at any price he may see fit.¹ One owner in common of a copyright, who, at his sole expense, prints and sells the book, is not liable in the absence of an agreement to account to his co-owner.² An injunction will issue to prevent a publisher from falsely offering for sale a book as the work of an author when it is not so.³ An author who is known to the public under a *nom de plume* has the right to prevent the publication of matter which he did not write in connection with his *nom de plume*, and purporting to be written by him. No person has the right to hold another out to the world as the author of literary matter which he never wrote.⁴

The grant of an "exclusive right to take orders for and sell" a book within a certain territory will not be construed as a covenant that no other person shall sell the book in competition with the grantee, but only as a covenant that this shall not be done with the consent or connivance of the grantor.⁵ Where the owner of a copyright has sold copies of the work covered thereby, on the representation that the edition is limited, and that the work will not be reprinted, neither he nor his assignee can reprint the work or authorize a purchaser of the copyright so to do.⁶

¹ *Clemens v. Estes*, 22 Fed. Rep. 899.

² *Carter v. Bailey*, 64 Me. 458; 18 Am. Rep. 273.

³ *Harte v. De Witt*, 1 Cent. L. J. 360.

⁴ *Clemens v. Belford*, 14 Fed. Rep. 728; 11 Biss. 459; 27 Alb. L. J. 293; 27 Int. Rev. Rec. 53; 15 Rep. 227.

⁵ *Webster v. Ellsworth*, 36 Fed. Rep. 327.

⁶ In *re Rider*, Sup. Ct. R. I., 1888, the court saying: "If the doctrine, recognized and applied in this case (*Pulte v. Darby*, 5 McLean, 328), that property in a copyright is subject to contract obligations with an author, be correct,—and it seems to be well settled (see *High on Injunctions*, sec. 713; *Clements v. Estes*, 22 Fed. Rep.

899),—we see no reason why it should not also be subject to contract obligations with a purchaser. A title to a copyright carries no authority, to break the faith of a contract. Suppose one man should buy the entire edition of a work, at a high price, under an agreement that no more should be printed. Can there be any doubt that as against his interest a publisher would be restrained from putting out more copies afterwards, in violation of the agreement? But the principle is the same whether the purchaser be one or many. We have not found a case which exactly resembles this one. Limited editions are not common. It is not often that authors or publishers are willing to confine the sales of a pub-

ILLUSTRATIONS.—Plaintiffs purchased the copyright of B.'s publication, called "Beeton's Christmas Annual," and B. agreed, in consideration of a salary, to permit the plaintiffs to use his name, and bound himself to give his services to them, and not to engage in other business or enterprise. *Held*, that B. would be restrained from allowing his name to be advertised in connection with a rival publication: *Ward v. Beeton*, 23 Week. Rep. 533. The owner of the copyright of a book made it known to defendant and generally that it would be sold only by subscription. The owner sent to his agent copies to be delivered to subscribers, the agent, however, not becoming the owner of these copies. The agent without authority sold the copies to a bookseller, who sold them to defendant. *Held*, that defendant should be enjoined from selling these copies, but that the injunction could not be extended so as to prevent other unlawful dealings in the future: *Henry Bill Pub. Co. v. Smythe*, 27 Fed. Rep. 914. An artist designed and painted a picture, called "The Close of the Day," which he sold to Prang, supposing, as he alleged in his bill in this suit, that the latter purchased it simply as a painting to be added to his private collection; but Prang published a chromo-lithograph of it in his series of Prang's chromos, and the artist sued to enjoin this publication, claiming that the mere corporal sale of the painting did not pass the right to publish the picture. *Held*, that whether the right to publish passes by a sale of the original, is a question of intention; no particular formalities are necessary; and that as the painting was sold and delivered unconditionally, without any reservation of the right of publication, the presumption was, the transfer of the entire beneficial property was intended, and therefore the complainant was not entitled to the injunction prayed: *Parton v. Prang*, 3 Cliff. 537; 2 Pat. Off. Gaz. 619.

lication to a given number. When they do so, the publication is usually of a kind that is not adapted to popular sale, but suits the taste of only a

small number of buyers, and about which questions of a republication, for this reason, do not arise."

CHAPTER LXXXIV.

TRADE-MARKS.

- § 1633. What is a trade-mark — How acquired.
- § 1634. Ground on which law protects trade-marks.
- § 1635. What may be a trade-mark — In general.
- § 1636. Words not original — Words in common use.
- § 1637. Geographical names.
- § 1638. Generic names — Name descriptive of article of trade.
- § 1639. Symbols and numbers.
- § 1640. Right to trade-mark in one's own name.
- § 1641. Names of corporations — Business firm names.
- § 1642. Names of newspapers and books.
- § 1643. What is an infringement.
- § 1644. Trade-mark intended to deceive not protected.
- § 1645. What persons entitled to protection.
- § 1646. Relief — Damages — Injunction — Account of profits.
- § 1647. Delay and acquiescence.
- § 1648. Assignment of trade-mark — Conveyances of.
- § 1649. Statutory provisions as to registration.

§ 1633. **What is a Trade-mark—How Acquired.**—A trade-mark is a distinctive mark or device affixed to or accompanying an article intended for sale, for the purpose of indicating that it is manufactured, selected, or sold by a particular person or firm.¹ A name alone is not a trade-mark, where it is applied to designate, not the article of a particular maker or seller, but the kind or description of thing sold.² The right of a person to a trade-mark is acquired by priority of adoption and use.³ If the name

¹ Rapalje and Lawrence's Law Dict.; *Burke v. Cassin*, 45 Cal. 467; 13 Am. Rep. 204; *Newman v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588.

² *Leclanche Battery Co. v. Western Electric Co.*, 23 Fed. Rep. 276. See *post*, § 1638.

³ *Browne on Trade-marks*, 46, 52; *Walton v. Crawley*, 3 Blatchf. 448; *Stokes v. Landgraff*, 17 Barb. 608. "What time is required for the perfection of title? . . . The moment one who has selected a symbol to indicate his merchandise applies the

mark to his goods, the act is complete. The avowal of his intention to adopt, his registration of the mark, and notice to the whole world, do not constitute adoption; but apply the mark to the articles for sale, and *eo instanti*, the act is complete": *Browne on Trade-marks*, sec. 52; *Wheeler v. Johnston*, 13 Ir. L. T. Rep. 87; *Glen etc. Mfg. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 278; *Meresole v. Tynberg*, 4 Abb. Pr., N. S., 410; *Thornton v. Crowley*, 47 N. Y. Sup. Ct. 527.

or symbol has ever been used before as applicable to a like article, it cannot be exclusively appropriated.¹ But an exclusive right to the title "Chatterbox," used as a name for characterizing a series of juvenile books, is not defeated, on the ground of a prior appropriation, by the publication, in 1852, for two successive months, of a monthly newspaper called "Chatteris Chatterbox," not intended for young people; nor by the publication, in 1807, in a volume of poems called "Original Poems for Infant Minds," of a poem called "The Chatterbox"; nor by the publication, in 1861, of a book called "The Favorite Scholar," containing a prose story called "Little Chatterbox."² It is not essential to property in a trade-mark that it should indicate any particular person as the maker of the article to which it is attached. It may represent to the purchaser the quality of the thing offered for sale, and in that case is of value to any person interested in putting the commodity to which it is applied upon the market.³ The adoption of a trade-mark must be by actually placing it upon or attaching it to the manufactured article, so as to be visible, i. e., the trade-mark must be actually used.⁴

ILLUSTRATIONS.—A adopted in 1878, and registered in the patent-office in 1883, the name of "Kaiser" as a trade-mark for natural mineral water, and used it in foreign commerce, selling the water in bottles labeled "Kaiser Natural Mineral Water," with the words "Kaiser Water Schwalheim" blown in the glass. For many years mineral water known as "Kaiserquelle," or "Kaiserbrunnen,"—which in English means "Kaiser spring," "Kaiser fountain,"—had been sold in various places in Europe, with the addition of the name of the place where the spring from

¹ Van Beil v. Prescott, 82 N. Y. 630; Stachelberg v. Ponce, 128 U. S. 686.

² Estes v. Worthington, 31 Fed. Rep. 154.

³ Godillot v. Harris, 81 N. Y. 263.

⁴ Candee v. Deere, 54 Ill. 439, 5 Am. Rep. 136, the court saying: "It is the actual use of the trade-mark affixed to the merchandise of the manufacturer,

and this alone, which can impart to it the element of property. The mere declaration of a person, however long and however extensively published, that he claims property in a word as his trade-mark cannot even tend to make it his property": Upton on Trade-marks, 178; St. Louis Piano Co. v. Merkel, 1 Mo. App. 305.

which the water was obtained was located. *Held*, that the word "Kaiser" was not a valid trade-mark, as other parties had acquired and exercised the right to use it: *Luyties v. Holendeer*, 30 Fed. Rep. 632.

§ 1634. Ground on Which Law Protects Trade-marks.

— The ground upon which a court of equity interferes by injunction to prevent the infringement of a trade-mark is, that the public is being deceived by the false use made of it. Therefore, many cases hold that there is no property in a trade-mark as such,¹ and that it is only when it appears that there is some misrepresentation on the part of the infringer, calculated to mislead or deceive the public as to what the article really is, that there is a jurisdiction in the court to interfere.² But in others, again, the right in a trade-mark is spoken of as property.³ When the second bearer of a name which has become the distinguishing part of a trade-mark used by another manufacturer uses the same name as a part of his own trade-mark with proper distinguishing devices, it is not a sufficient reason for enjoining the latter against the use of the name that the goods of both manufacturers become known in the market by the same name. He is not to be injuriously affected by any use the public may make of a mark which the law allows him to use.⁴

¹ *Collins Co. v. Brown*, 3 Kay & J. 423.

² *Williams v. Johnston*, 2 Bosw. 1; *Coffeen v. Brunton*, 4 McLean, 516; *Amoskeag Mfg. Co. v. Spear*, 2 Sand. 599; *Singer Mfg. Co. v. Wilson*, 24 Week. Rep. 1023; *Osgood v. Allen*, 1 Holmes, 185. "The leading principle upon which the law of trade-mark is based is, that the honest, skillful, and industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption that has found favor with the people, and who, by affixing to it some name, mark, device, or symbol which serves to distinguish it as his, and to distinguish it from all others, has furnished his individual guaranty and assurance of the

quality and integrity of the manufacture, shall receive the first reward of his honesty, skill, industry, or enterprise, and shall in no manner and to no extent be deprived of the same by another who to that end appropriates and applies to his productions the same or a colorable imitation of the same name, mark, device, or symbol, so that the public are or may be deceived or misled into the purchase of the productions of the one supposing them to be those of the other": *Liggett etc. Tobacco Co. v. Hynes*, 19 Cent. L. J. 109; *Wolfe v. Barnet*, 24 La. Ann. 97; 13 Am. Rep. 111.

³ *Gilman v. Hunnewell*, 122 Mass. 148.

⁴ *William Rogers Mfg. Co. v. Simpson*, 54 Conn. 857.

§ 1635. What may be a Trade-mark—In General.—

In the most general sense of the word, 'trade-mark' denotes any means of showing that a certain trade or occupation is carried on by a particular person or firm, including, therefore, not only trade-marks in the narrower sense of the word, but also trade names and marks which are not in themselves or in their origin distinctive, but become known by custom and reputation, as showing that goods and implements of trade are made, sold, or employed by a particular person or firm. Thus colored lines in the hem or fringe of cloth may, by the custom of a particular place or trade, be understood to show that the cloth is made by a particular firm.¹ So where A ran a line of omnibuses between two places, B was restrained by injunction from running on the same line of route omnibuses having upon them such names, words, or devices as to form a colorable imitation of the names, words, and devices on A's omnibuses.² A sign over a door of a store may be claimed as a trade-mark;³ or the name of a hotel;⁴ or the painting a barrel with a red rim and a glazed surface on the head, with the letters "A A A" and a Maltese cross.⁵ A property right may be acquired in devices, emblems, and title-pages of an almanac by adoption and use.⁶ If a person puts on his plows the same letters, words,

¹ *Singer etc. Co. v. Wilson*, 2 Ch. Div. 441; *Ewing v. Johnston*, 13 Ch. Div. 434.

² *Knott v. Morgan*, 2 Keen, 213.

³ *Peterson v. Humphrey*, 4 Abb. Pr. 394; *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *Colton v. Thomas*, 2 Brewst. 308.

⁴ *Woodward v. Lazar*, 21 Cal. 449; 82 Am. Dec. 751; *Howard v. Henriques*, 3 Sand. 725.

⁵ *Cook v. Starkweather*, 13 Abb. Pr., N. S., 392. In *Liggett etc. Tobacco Co. v. Hynes*, 19 Cent. L. J. 109, the court said: "Now, while there is no trade-mark in the shape of the plugs of tobacco of complainant, and consequently the defendant could make his plugs in any shape he pleased without

being guilty of an infringement, yet, when he makes his plugs in such a way as to give them the general appearance of the complainant's, and puts on any device of such a character and of such shape and appearance as that the customer generally, when he sees the shape and appearance of the plug and the device on it, will be deceived into the belief that it is complainant's tobacco that he is buying, there is a state of case presented by blending the size, nature, structure, and appearance of the plug with the device which would not exist if we viewed either the plug of tobacco or the device separately."

⁶ *Robertson v. Berry*, 50 Md. 591; 33 Am. Rep. 328.

and numerals in the same colors and in the same places as another had before put on his plows, there may be an infringement of a trade-mark which equity will enjoin, even though the letters, words, and numerals do not in themselves belong to the latter's trade-mark proper.¹ Carriage proprietors authorized to use a hotel name as a badge on their carriages and the caps of their drivers, under an agreement with the hotel owner whereby they have the privilege of carrying passengers to and from the house, have the exclusive right to the use of such name to indicate that they have the patronage of the house in transporting passengers, and may, without proof of special damage, maintain an action against one who uses the same badge for the purpose of falsely holding himself out as having such patronage in order to divert custom from the plaintiffs.² It has been held in New York that a manufacturer has no right to the exclusive use of a particular colored paper or kind of paper for covering or inclosing his goods in a particular form.³ Letters or figures affixed to merchandise by a manufacturer for the purpose of denoting its quality only cannot be appropriated by him to his exclusive use as a trade-mark; as, for example, the letters "A. C. A.," used on ticking.⁴ A trade-mark, to be valid, must indicate the ownership or origin of the article on which it is used. The mere device of a drum, without more, cannot be the subject of a trade-mark.⁵ The color of a label, apart from a name or device, cannot be the subject-matter of a trade-mark;⁶ nor can there be a valid trade-mark in a piece of tin used as a tag for tobacco.⁷ A manufacturer of chewing-gum cannot obtain a trade-mark for the form of the sticks in which the gum is made, nor for the peculiar

¹ *Avery v. Meikle*, 81 Ky. 73.

² *Marsh v. Billings*, 7 Cush. 322; 54 Am. Dec. 723.

³ *Faber v. Faber*, 49 Barb. 357; 3 Abb. Pr., N. S., 115.

⁴ *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51.

⁵ *White v. Schlect*, 14 Phila. 88.

⁶ *Fleischmann v. Starkey*, 25 Fed. Rep. 127.

⁷ *Lorillard v. Pride*, 28 Fed. Rep. 434.

shape and decoration of the boxes in which it is put upon the market, nor for the particular manner in which the gum is arranged in the boxes.¹ The exclusive use of a tin pail with a bail or handle on it, the tin ornamented with a geometrical pattern, and used to contain paper collars for sale, and sold with the collars, cannot be claimed as a trade-mark.² An entire label will not be protected as a trade-mark, where it contains the name of the article manufactured, a statement of the mode of its use, and a laudation of its qualities; only so much of the label will be protected as indicates that the complainants are the manufacturers or vendors of such article.³

ILLUSTRATIONS. — Plaintiff painted his cabs yellow, and placed on them a certain distinguishing device, which was very nearly copied on defendant's cabs, which were also painted yellow. *Held*, that an injunction should be granted: *New York Cab Co. v. Mooney*, 15 Abb. N. C. 152. A business sign had a row of beer-barrels painted on it, with the letters "P. B." on the heads, the words "Depot of the celebrated" above, and the words "Philadelphia beer" below. *Held*, not a trade-mark: *Eggers v. Hink*, 63 Cal. 445; 49 Am. Rep. 96. Plaintiff used on the bottles in which it sold liquid bluing a bright metallic cap of tin, extending down over about half of the rim at the mouth of the bottle, the cap having six perforations. *Held*, that defendant should be restrained from using for the sale of his bluing a similar cap on bottles of the same shape and appearance as those of plaintiff: *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 388. A real-estate auctioneer for many years had sold suburban property on the installment plan, and had always used in his business, and for several years had printed in connection with his advertisements, a representation of a flag with stars on the upper and lower borders. *Held*, entitled to an injunction against the use of the like arrangement of stars upon the representation of a flag used in the advertisements of another person in the same business: *Johnson v. Hitchcock*, 3 N. Y. Sup. Ct. 680. A label bore the head of an elk, with the word "elk" in large letters, together with the words "Patented by the Elk Cigar Factory, June 15, 1875." *Held*, a valid trade-mark, when applied to a box of cigars which is also stamped with the district in which the cigars are manufactured: *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359.

¹ *Adams v. Heisel*, 31 Fed. Rep. 279.

³ *Falkinburg v. Lucy*, 35 Cal. 52; 95

² *Harrington v. Libby*, 14 Blatchf. 128. Am. Dec. 76.

§ 1636. **Words not Original—Words in Common Use.**—Words or devices may be adopted as trade-marks which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if, at the time of the adoption, they were not used to designate the same or similar articles of production.¹ The words which compose the trade-mark need not all be new or original; it is enough that the combination be new, and be descriptive of the origin of the goods and their ownership.² Thus the following words have been protected: "Cocoaine,"³ "Congress water,"⁴ "Cough cherries,"⁵ "Eureka fertilizer,"⁶ "Eureka shirt,"⁷ "Insurance oil,"⁸ "La Favorita" flour,⁹ "Magnetic balm,"¹⁰ "Parabola needles,"¹¹ "Royal baking powder,"¹² "Persian thread,"¹³ "Pride cigars,"¹⁴ "Sapolio,"¹⁵ "Sliced" animals, birds, or other objects,¹⁶ "Valyoline,"¹⁷ "Vegetable pain-killer,"¹⁸ "Yankee soap,"¹⁹ and "Anti-washboard," as applied to soap.²⁰

§ 1637. **Geographical Names.**—Geographical names which point out only the place of production, and not the producer, cannot be appropriated exclusively so as to prevent others from using them and selling articles pro-

¹ *Osgood v. Allen*, 1 Holmes, 185; *Thornton v. Crowley*, 47 N. Y. Sup. Ct. 527.

² *Wolfe v. Barnett*, 24 La. Ann. 97; 13 Am. Rep. 111.

³ *Burnett v. Phalon*, 3 Keyes, 594.

⁴ *Congress etc. Spring Co. v. High Rock Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82.

⁵ *Stoughton v. Woodard*, 39 Fed. Rep. 902.

⁶ *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes, 115.

⁷ *Ford v. Foster*, L. R. 7 Ch. 611.

⁸ *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286.

⁹ *Holt v. Menendez*, 23 Fed. Rep. 869; 128 U. S. 515.

¹⁰ *Smith v. Sixbury*, 25 Hun, 232.

¹¹ *Roberts v. Sheldon*, 8 Biss. 398.

¹² *Royal Baking Powder Co. v. Sher-*

rell, 59 How. Pr. 17. This case has since been reversed by the court of appeals, and is authority for the directly opposite principle: See 93 N. Y. 331.

¹³ *Taylor v. Carpenter*, 3 Story, 458; 2 Sand. Ch. 603; 11 Paige, 292; 43 Am. Dec. 114.

¹⁴ *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589.

¹⁵ *Morgan v. Schwachhofer*, 55 How. Pr. 37.

¹⁶ *Selchow v. Baker*, 93 N. Y. 59; 45 Am. Rep. 169.

¹⁷ *Lamard v. White's Golden Lubricator*, 38 Fed. Rep. 922.

¹⁸ *Davis v. Kendall*, 2 R. I. 566.

¹⁹ *Williams v. Adams*, 8 Biss. 452.

²⁰ *O'Rourke v. Central City Soap Co.*, 26 Fed. Rep. 576.

duced in the districts they describe under these appellations.¹ But where an article from being manufactured at a certain place has gained a reputation in the market, another cannot, for the purpose of availing himself of that reputation, apply the geographical term already adopted to describe his product which is not manufactured there.² And although the name of the place where it is made serves in no possible way to indicate its quality or composition, yet where the manufacturer has given it a geographical name which he was the first to use in connection with the article, it may, from long use in such connection, acquire a secondary meaning, and instead of designating the place where the article is made, indicate its origin, or that it is the product of a particular manufacturer, or made according to his method. A distinction should be made between the use of a geographical name indicating a particular manufacture of a certain person, and its use in describing a natural product of a particular locality.³ Under this rule the following trade-marks have been sustained, viz.: "Akron cement,"⁴ "Alderney" oleomargarine,⁵ "Anatalia liquorice,"⁶ "Bethesda water,"⁷ "Durham" tobacco,⁸ "Glenfield starch,"⁹ "St. Louis lager-beer,"¹⁰ "Seixo wine,"¹¹ "Vienna bread."¹² And the fol-

¹ *Osgood v. Allen*, 1 Holmes, 185; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 417; *Delaware etc. Canal Co. v. Clark*, 13 Wall. 311; *Candee v. Deere*, 54 Ill. 439; 5 Am. Rep. 125; *Lea v. Wolf*, 15 Abb. Pr., N. S., 1; *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; 15 Am. Rep. 599.

² *Newman v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588; *Congress Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291; 6 Am. Rep. 82; *Seixo v. Provezende*, L. R. 1 Ch. 192; *McAndrew v. Bassett*, 4 De Gex & S. 380; *Glen etc. Mfg. Co. v. Hall*, 61 N. Y. 226; 19 Am. Rep. 279; *Lee v. Wolfe*, 15 Abb. Pr., N. S., 1; *Kinney v. Basch*, 16 Am. Law Reg., N. S., 596; *Pike Mfg Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896; *Southern White Lead Co. v. Coit*, 39 Fed. Rep. 492.

And see *Lee v. Haley*, L. R. 5 App. 155.

³ *Metcalf v. Brand*, 86 Ky. 331; 9 Am. St. Rep. 282.

⁴ *Newman v. Alvord*, 51 N. Y. 189; 10 Am. Rep. 588.

⁵ *Lauferty v. Wheeler*, 11 Daly, 194.

⁶ *McAndrew v. Bassett*, 10 Jur., N. S., 492.

⁷ *Dunbar v. Glenn*, 42 Wis. 118; 24 Am. Rep. 395.

⁸ *Blackwell v. Dibrell*, 3 Hughes, 151.

⁹ *Wotherspoon v. Currie*, L. R. 5 H. L. 508.

¹⁰ *Anheuser Busch Brewing Ass'n v. Piza*, 24 Fed. Rep. 149.

¹¹ *Seixo v. Provezende*, L. R. 1 Ch. 192.

¹² *Fleischmann v. Schuckmann*, 62 How. Pr. 92.

lowing, it has been held, could not be acquired as trade-marks, viz.: "Brooklyn white lead,"¹ "Glendon iron,"² "Kaiser," applied to mineral water,³ "Lackawanna coal,"⁴ and "Worcestershire sauce."⁵ Montserrat being the name of an island from which both parties import lime-juice, one person, in the absence of fraud, is not entitled to the exclusive use of the word "Montserrat" as a designation for lime-juice, although his article may have acquired a high reputation for purity and strength, while that of another may be of an inferior quality.⁶

§ 1638. Generic Names—Name Descriptive of Article of Trade—A generic name, or a name merely descriptive of an article of trade, or its qualities or ingredients, cannot be adopted as a trade-mark, so as to give a right to the exclusive use of it. The office of a trade-mark is to point distinctively to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products cannot become the subjects of exclusive use; for, from the nature of the case, any other producer may employ, with equal truth and the same right, the same marks for like products.⁷ In a New York case it was doubted whether a dealer in lard could appropriate the figure of a hog to stamp on his packages of lard, to the exclusion of other dealers.⁸ And it has been held that the following could not be claimed as trade-marks, viz.: "Acid phosphate,"⁹ "Antiquarian book-store,"¹⁰ "Cherry pectoral,"¹¹ "Cresylic,"¹² "Dessic-

¹ Brooklyn White Lead Co. v. Masury, 25 Barb. 417.

² Glendon Iron Co. v. Uhler, 75 Pa. St. 467; 15 Am. Rep. 899.

³ "Kaiserquelle" having been in use prior thereto: Luyties v. Hollendeer, 30 Fed. Rep. 632.

⁴ Delaware etc. Canal. Co. v. Clark, 13 Wall. 311.

⁵ Lea v. Wolf, 13 Abb. Pr., N. S., 389; reversed 15 Abb. Pr., N. S., 1.

⁶ Evans v. Von Laer, 32 Fed. Rep. 153.

⁷ Osgood v. Allen, 1 Holmes, 185; Gilman v. Hunnewell, 122 Mass. 148;

Thompson v. Winchester, 19 Pick. 214; Canal Co. v. Clark, 13 Wall. 311; Caswell v. Davis, 58 N. Y. 233; 17 Am. Rep. 233; Smith v. Walker, 57 Mich. 456.

⁸ Popham v. Cole, 66 N. Y. 69; 23 Am. Rep. 23.

⁹ Rumford Chemical Works v. Muth, 35 Fed. Rep. 524.

¹⁰ Choynski v. Cohen, 39 Cal. 501; 2 Am. Rep. 476.

¹¹ Ayer v. Rushton, 7 Daly, 9.

¹² Carbolic Soap Co. v. Thompson, 25 Fed. Rep. 625.

cated codfish,"¹ "Ferro-phosphorated elixir of calisaya bark,"² "Fruit" vinegar,³ "Gold medal,"⁴ "Goodyear rubber,"⁵ "Iron bitters,"⁶ "Iron-clad boots,"⁷ "Mammoth wardrobe," to designate a clothing store,⁸ "Rye and rock,"⁹ Samaritan" medicines,¹⁰ "Schnapps,"¹¹ "Selected shore mackerel,"¹² "Snowflake" crackers,¹³ "Sweet," as prefixed to "Caporal" in naming cigarettes,¹⁴ "Taffy tolu."¹⁵ So it has been held that the word "Singer" as descriptive of a particular kind of sewing-machine could not be claimed as a trade-mark after the patent had expired, and any one was at liberty to manufacture the machine;¹⁶ so of the words "Fairbanks's patent," applied to scales,¹⁷ or the word "Linoleum,"¹⁸ or the words "Goodyear rubber,"¹⁹ or the words "International Bank."²⁰ But where a word is coined and used as a trade-mark, and stamped on articles manufactured from a certain substance, the fact that such word subsequently becomes the common appellative of such substance cannot impair the rights acquired in the word, and while others can use it to designate the product, they cannot apply it in any way as a trade-mark.²¹

¹ *Town v. Stetson*, 5 Abb. Pr., N. S., 218.

² *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233; and see *Hegeman v. Hegeman*, 8 Daly, 1.

³ *Alden v. Gross*, 25 Mo. App. 123.

⁴ *Taylor v. Gillies*, 59 N. Y. 331; 17 Am. Rep. 333.

⁵ *Goodyear Rubber Mfg. Co. v. Goodyear Rubber Co.*, U. S. Sup. Ct., 1888.

⁶ *Brown Chemical Co. v. Stearns*, 37 Fed. Rep. 360.

⁷ *Hecht v. Porter*, 9 Pac. L. J. 569 (Cal.).

⁸ *Gray v. Koch*, 2 Mich. N. P. 119.

⁹ *Van Beil v. Prescott*, 82 N. Y. 630; 46 N. Y. Sup. Ct. 542.

¹⁰ *Desmond's Appeal*, 103 Pa. St. 126; 49 Am. Rep. 118.

¹¹ *Wolfe v. Burke*, 7 Lans. 151; *Burke v. Cassin*, 45 Cal. 467; 13 Am.

Rep. 204; *Wolfe v. Gouillard*, 18 How. Pr. 64.

¹² *Trask Fish Co. v. Wooster*, 28 Mo. App. 408.

¹³ *Larrabee v. Lewis*, 67 Ga. 561; 44 Am. Rep. 735.

¹⁴ *Hornbostel v. Kinney*, 52 N. Y. Sup. Ct. 41.

¹⁵ *Colgan v. Danheiser*, 35 Fed. Rep. 150.

¹⁶ *Singer Mfg. Co. v. Wilson*, 24 Week. Rep. 1023; *Singer Mfg. Co. v. Lassen*, 8 Biss. 151; *Singer Mfg. Co. v. Stanage*, 2 McCrary, 512; *Brill v. Singer Sewing Mach. Co.*, 41 Ohio St. 127; 52 Am. Rep. 74.

¹⁷ *Fairbanks v. Jacobus*, 14 Blatchf. 337.

¹⁸ *Linoleum Mfg. Co. v. Nairn*, 26 Week. Rep. 463.

¹⁹ See *ante*, note 5.

²⁰ *Koehler v. Sanders*, 48 Hun, 48.

²¹ *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94.

ILLUSTRATIONS. — Plaintiffs had been accustomed to label certain gin imported by them, "Club-house gin"; defendants thereafter labeled their gin "Club-house. J. S. Daley," and painted upon boxes containing it, "London club-house gin. Sole importer, Wm. H. Daley." It appeared that "club-house" was intended to imply a superior quality of gin, like "Imperial," "Royal," etc. *Held*, that no injunction could be granted to restrain defendants from their use of the word "club-house": *Corwin v. Daly*, 7 Bosw. 222. G., having a patent for an improvement in stoves, acquiesced during the existence of the patent in the manufacture and sale by M. of stoves containing said improvement, with the name "Charter Oak" upon them. After the patent had expired, G., claiming the name "Charter Oak" as a trade-mark, sought to restrain the use of it by M. *Held*, that M. should not be restrained so long as he did not represent the stoves bearing said name as made by G.: *Filley v. Child*, 16 Blatchf. 376. Plaintiff made corsets which he called "Ball's health-preserving corset." Defendant called his corsets "Schillings's health-preserving corset." *Held*, that plaintiff could not claim the exclusive use of the word "health-preserving," and that as the labels and boxes used by defendant were not quite similar to plaintiff's labels and boxes, plaintiff was not entitled to relief against defendant: *Ball v. Siegel*, 116 Ill. 137; 56 Am. Rep. 767. Plaintiff adopted and used the capital letters "LL" as a stamp or mark upon cotton sheetings of a certain class manufactured by it. The letters were used in connection with the words "Lawrence Mills," and also sometimes in connection with the figure of a rampant bull or a bull's head. The defendant manufactured cotton sheeting of a similar class, upon which it stamped the words "Cumberland LL sheeting—4—4." The letters "LL" were commonly known in the trade to indicate sheetings of a particular grade and class; they had been used for some time by another manufacturer before the plaintiff made use of the same, and that they had also been used by several other manufacturers for a number of years without objection by the plaintiff. The plaintiff had stamped the same letters upon other goods of its manufacture inferior in grade to the sheetings, to distinguish which they were claimed as a trade-mark. *Held*, that the plaintiff was not entitled to the exclusive use of the letters: *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 31 Fed. Rep. 776. A patented printing-press was called by the patentee the "Universal," and the presses were stamped with that name and the names of the manufacturers, who made them for the patentee or his licensees. *Held*, that after the expiration of the patent the patentee was not entitled to be protected in the use of the word "Universal" as a trade-mark: *Gally v. Mfg. Co.*, 30 Fed. Rep. 118.

§ 1639. **Symbols and Numbers.**—A manufacturer may adopt any mark or device he pleases to distinguish his goods as his, and thereby secure the profit resulting from the fact that they are of his own manufacture.¹ For example, he may adopt a series of arbitrary numbers, though not used in connection with his name,² or an arbitrary number to designate his place of business in a street,³ or a particular label or wrapper,⁴ or a particular form of package.⁵ But he cannot appropriate to his exclusive use numbers already in use and known to the trade as applied to the same styles of goods.⁶ The following have been protected, viz.: “303” on the pens of a pen-maker;⁷ “523” on hosiery, in combination with a wreath and an eagle;⁸ and a crest.⁹ The sign “ $\frac{1}{2}$ ” on a package of tobacco, denoting that two kinds of tobacco were mixed in the proportion of half and half, is not a valid trade-mark, but it is if printed in a particular form, size, color, or style.¹⁰ The words “Conserves alimentaires,” with the coat of arms of the city of Paris, placed on packages put up in Paris of an article known as “julienne,” compounded of vegetables, and used for making julienne soup, may constitute a trade-mark to be protected.¹¹

ILLUSTRATIONS. — A trade-mark consisted chiefly of an eagle with outstretched wings perched on a mortar in which rested a pestle. *Held*, that it was infringed by use of the same symbol, although another name than the plaintiff’s appeared conspicuously on the labels; this, too, notwithstanding the general use of similar symbols among apothecaries: *Hegeman v. O’Byrne*,

¹ *Gillott v. Esterbrook*, 48 N. Y. 376; 8 Am. Rep. 553.

² *Collins v. Reynolds Card Mfg. Co.*, 7 Abb. N. C. 17; *India Rubber Co. v. Rubber Comb Co.*, 45 N. Y. Sup. Ct. 258. And see *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270.

³ *Glen etc. Mfg. Co. v. Hall*, 61 N. Y. 226.

⁴ *Metcalfe v. Brand*, 86 Ky. 331; 9 Am. St. Rep. 282.

⁵ *Trask Fish Co. v. Wooster*, 28 Mo. App. 408.

⁶ *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338; 2 Am. St. Rep. 898.

⁷ *Gillott v. Esterbrook*, 48 N. Y. 376; 8 Am. Rep. 553.

⁸ *Lawrence Mfg. Co. v. Lowell Mills*, 129 Mass. 325; 37 Am. Rep. 362.

⁹ *Beard v. Turner*, 13 L. T., N. S., 747.

¹⁰ *Kinney v. Allen*, 4 Am. L. T. Rep. 258.

¹¹ *Godillot v. Hazard*, 44 N. Y. Sup. Ct. 427.

9 Daly, 264. A proprietary medicine label received its distinctive character chiefly from a device consisting of the letter "B" arranged in triple groups. *Held*, a device subject to protection against colorable imitations: *Foster v. Blood Balm Co.*, 77 Ga. 216.

§ 1640. **Right to Trade-mark in One's Own Name.**—A person has a right in his own name as a trade-mark as against a person of a different name.¹ But he cannot have such a right, as against another person of the same name, unless the latter uses a form of stamp or label so like the plaintiff's as to represent that his goods are the plaintiff's manufacture.² The name of a man used as a trade-mark, separated from the business in connection with which the man has used it, cannot be the subject of sale.³ But where a man has given his own name to a particular manufacturer, and sells the use of his name in the manufacture of those particular goods, a court of equity will restrain him from advertising goods of the same quality under his own name, though actually made by him.⁴ Thus where one named "Oakes" sold the exclusive right to manufacture and sell "Oakes's candies," he was restrained from manufacturing and selling candies made by him as "Oakes's candies."⁵ Where one has

¹ *Gilman v. Hunnewell*, 122 Mass. 148; *Millington v. Fox*, 3 Mylne & C. 338; *Dent v. Turpin*, 2 Johns. & H. 139; *Standing v. Standing*, 19 Leg. Int. 85; *Ayer v. Hall*, 3 Brewst. 509; *Stonebreaker v. Stonebreaker*, 33 Md. 252; *Fulton v. Sellers*, 4 Brewst. 42. But see *Gouraud v. Trust*, 3 Hun, 627; 6 *Thomp. & C.* 133.

² *Frazer v. Frazer Lub. Co.*, 121 Ill. 147; 2 Am. St. Rep. 147; *Gilman v. Hunnewell*, 122 Mass. 148; *Sykes v. Sykes*, 3 Barn. & C. 541; *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 209; *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *Rogers v. Taintor*, 97 Mass. 291; *Meneely v. Meneely*, 62 N. Y. 489; 20 Am. Rep. 491; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Hallett v. Cumston*, 110 Mass. 29; *Meriden*

Britannia Co. v. Parker, 39 Conn. 450; 12 Am. Rep. 401; *Phelan v. Collender*, 6 Hun, 111; *Decker v. Decker*, 52 How. Pr. 218; *England v. New York Pub. Co.*, 8 Daly, 375. The family name of a manufacturer cannot be made a trade-mark, so as to exclude other manufacturers of the same name from its use in the manufacture and sale of similar articles, unless unfair means are adopted to mislead purchasers into the belief that the article is of the other manufacture: *Marshall v. Pinkham*, 52 Wis. 572; 38 Am. Rep. 756.

³ *Skinner v. Oakes*, 10 Mo. App. 45.

⁴ *Frazer v. Lubricating Co.*, 18 Ill. App. 450; 121 Ill. 147; 2 Am. St. Rep. 73; *Russia Cement Co. v. Le Page*, 147 Mass. 206; 9 Am. St. Rep. 685.

⁵ *Probasco v. Bouyon*, 1 Mo. App. 241.

parted with the right to use his own name as a trade-mark, he cannot by marrying confer upon his wife any higher rights in the use of his own name than he himself had.¹

ILLUSTRATIONS.—Defendant's firm, consisting of C. B. Rogers and two others named Rogers, began the making of plated ware, which they stamped "C. Rogers and Brothers, A 1," in such a way as to resemble closely plaintiff's mark, used for twenty-five years on goods of like manufacture, "Rogers and Brother, A 1." The word "Rogers" had value as a trade-mark in connection with such ware. *Held*, that plaintiff was not entitled to an injunction: *Rogers v. Rogers*, 53 Conn. 121; 55 Am. Rep. 78. The proprietor of an article used his name as a trade-mark. His sons used for a similar article a similar trade-mark, but describing themselves therein as his sons. *Held*, that he was entitled to an injunction against them, where, though they were his sons, they bore a different name, and although the general appearance of the trade-mark and of the packages upon which it was placed was not an imitation of plaintiff's: *Gouraud v. Trust*, 3 Hun, 627; 6 Thomp. & C. 133. Frank Leslie applied for an injunction to restrain the defendant from the publication of a serial entitled "Frank Leslie Junior's Sporting and Dramatic Times," on the ground that it was an infringement on the plaintiff's rights as the publisher of several serials entitled by a name of which "Frank Leslie" formed a part, and which had become widely known; and it appeared that the defendant's paper was published by the son of Frank Leslie in conjunction with others, and that he had taken the name of Frank Leslie, Junior, at his father's request, and for a number of years was known and called by that name; that he afterwards assumed the name of Henry Leslie on threats of disinheritance by his father, and under the belief that he had been enjoined by order of court from using the former name, and that on learning no such order of court had been made, reassumed the name of Frank Leslie, Junior. *Held*, that the injunction should be denied: *England v. N. Y. Pub. Co.*, 8 Daly, 375.

§ 1641. Names of Corporations—Business Firm Names.

—A corporation has a trade-mark in its corporate name.² In dealing with corporations, an unlawful imitation of a name is subject to the same rules of law which apply

¹ *Skinner v. Oakes*, 10 Mo. App. 45. *Amoskeag Mfg. Co. v. Garner*, 55 Barb. 151; *Holmes v. Holmes etc. Mfg. Co.*, 37

² *Newby v. R. R. Co.*, 1 Deady, 609; *Conn.* 278; 9 Am. Rep. 325.

where the parties are unincorporated firms or companies.¹ A corporation may acquire a property right to the use of a name other than its original corporate name as a trade-mark, or as incidental to the good-will of a business, as well as an individual; and if it has acquired such a right, it cannot be deprived thereof by the assumption of such name subsequently by another corporation, whether the latter selects its name by the act of corporators who organize under the general laws of the state, or the name is selected for it in a special act by a legislative body.² There may be a trade-mark in a business firm name.³ An injunction will lie at the suit of one against another, his former copartner, restraining the continuance of the use of the signs containing the old firm name, without sufficient alterations or additions to give distinct notice of a change in the firm.⁴ The conductor of an enterprise for the innocent amusement of the public may have an injunction to restrain the unauthorized use of the name or designation adopted by him, upon the same principles which govern the granting of injunctions to prevent the use of trade-marks; as, for example, "Christy's Minstrels."⁵ The phrase "New York dental rooms" may become a trade-mark to describe the place of business of a dentist doing business in St. Louis.⁶

ILLUSTRATIONS.—The lessee of a building used as a clothing store called it "Tower Palace," and put a sign to that effect. He moved away. *Held*, that he could not prevent the subsequent use of the term to designate the building, although attempting to carry it with him to designate his new place of business: *Armstrong v. Kleinhaus*, 82 Ky. 303; 56 Am. Rep. 894. A corporation chartered in Michigan was doing business in Chicago. Another company was incorporated in Illinois

¹ Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94; Plant Seed Co. v. Michel Plant and Seed Co., 23 Mo. App. 579.

² Goodyear etc. Co. v. Goodyear, 21 Fed. Rep. 277. Thus the "Goodyear Rubber Company" was held entitled to have another party enjoined from

using the name "Goodyear's Rubber Mfg. Co.": 21 Fed. Rep. 276.

³ See also Title Partnership — Good-will.

⁴ Peterson v. Humphrey, 4 Abb. Pr. 394.

⁵ Christy v. Murphy, 12 How. Pr. 77.

⁶ Sanders v. Utt, 16 Mo. App. 322.

under the same name, and filed a bill to restrain the use thereof by the former, alleging that the corporation no longer existed. *Held*, that this was not a sufficient ground therefor; the defendants might nevertheless do a partnership business under any name not interfering with any earlier party's use thereof: *Ottoman Cahvey Co. v. Dane*, 95 Ill. 203. The "Drummond Tobacco Company," a corporation, sought to enjoin the incorporation of another company under the name of "The Drummond-Randle Tobacco Company." *Held*, that, in the absence of a showing that injury to the plaintiff would result, equity would not interfere: *Drummond Tobacco Co. v. Randle*, 114 Ill. 412. The proprietor of a hotel had established a high reputation for his house under a certain name, and the same name was used by another person for another house. *Held*, that the latter could be enjoined against using such name: *Howard v. Henriques*, 3 Sand. 725. In an action to enjoin the defendants from using on their marks and labels as druggists the words "Established 1780" which had been conspicuously displayed for many years on the labels, bill-heads, etc., of a drug-house to whose business the plaintiffs had succeeded, *held*, that the words were a species of trade-mark, and should be protected accordingly: *Hazard v. Caswell*, 57 How. Pr. 1. On the retirement of a partner from a firm, his copartners continued the business at the old place, and the retiring partner embarked in the same line of business, and on the same side of the same street, and within about forty feet from the old store, and put up a sign bearing, in the first line, his own name; in the second line, the words, "of the late firm of"; and in the third, the name of the old firm; the second line being in letters of good size, yet but little more than a third the height of the letters in the third line. *Held*, that an injunction should issue to restrain the use of the firm name: *Smith v. Cooper*, 5 Abb. N. C. 274. The plaintiff hired a lot of land and erected upon it a hotel, which he conducted under the name of "What Cheer House." Pending his term he bought an adjoining lot and put up a building thereon, and continued for some time to occupy both buildings as the "What Cheer House," removing the sign to the new building. In November he surrendered the leased lot and building and continued the business of the "What Cheer House" in the new building. In January following, the defendants bought the first lot and opened a hotel under the name of the "Original What Cheer House," the word "original" being in small letters, likely to be overlooked. *Held*, that the plaintiff had established an exclusive right to the name as the trade-mark for his new house, and was entitled to protection in the exclusive use of that name: *Woodward v. Lazar*, 21 Cal. 448; 82 Am. Dec. 751. Plaintiffs, composing the firm of Devlin & Co., clothing dealers,

brought an action to restrain defendant from using their firm name in the same business, and procured an injunction restraining him from displaying said firm name upon signs, etc., and restricting him to the use of his own "proper christian and surname conjoined" without any deceptive or misleading devices. Defendant thereupon displayed a sign upon which were the words "Devlin's Clothing"; above the word "Devlin's" were the defendant's initials, "J. S.," with the number of his shop, "826," on each side. *Held*, that a finding that the sign was arranged and intended to deceive was justified, and that an order adjudging defendant guilty of contempt was proper: *Devlin v. Devlin*, 69 N. Y. 212; 25 Am. Rep. 173.

§ 1642. **Names of Newspapers and Books.**—So the name of a newspaper will be protected from imitation designed to mislead the public.¹ But no intentional deception appearing, the publication of a newspaper under the name of "The Northwest News" does not infringe the rights of publishers of a paper long published at the same place under the name of "The New Northwest."² And the title of a book will be protected as a trade-mark, and the publication of a colorable imitation restrained.³

ILLUSTRATIONS. —The plaintiffs had long published a newspaper entitled "The National Police Gazette." *Held*, that a preliminary injunction should be granted in an action to restrain the defendants from continuing the publication of a paper entitled the "United States Police Gazette," and printed in a way actually to deceive purchasers and readers: *Matsell v. Flanagan*, 2 Abb. Pr., N. S., 459.

§ 1643. **What is an Infringement.**—A trade-mark to infringe another need not be a fac-simile of it. The imitation of the original one need not be exact.⁴ It is suffi-

¹ *Am. Grocer Pub. Ass'n v. Grocer Pub. Co.*, 51 How. Pr. 402; *Matsell v. Flanagan*, 2 Abb. Pr., N. S., 459; *Bell v. Locke*, 8 Paige, 75; 34 Am. Dec. 371. See *Snowden v. Noah*, 1 Hopk. Ch. 347; 14 Am. Dec. 547.

² *Duniway Publishing Co. v. Northwest Printing Co.*, 11 Or. 322.

³ *Potter v. McPherson*, 21 Hun, 559.

⁴ *Filley v. Fassett*, 44 Mo. 173; 100 Am. Dec. 275; *Liggett etc. Tobacco Co.*

v. Hynes, 19 Cent. L. J. 109; *Avery v. Meikle*, 85 Ky. 435; 7 Am. St. Rep. 604. A court of equity is warranted in restraining the use of a label as an imitation of one which has earned a reputation, if the imitation is sufficiently close to enable it to be imposed upon buyers as the original, although there are many differences between the two: *Brown v. Mercer*, 37 N. Y. Sup. Ct. 265.

cient if the resemblance is such as to be apt to deceive an ordinary purchaser, "giving such attention to the same as a purchaser usually gives, and to cause him to purchase the one believing he was purchasing the other."¹ So where the two are so alike that it would require a close inspection to distinguish the difference, this will be regarded as an infringement.² A label bearing six distinct points of resemblance to a label used by another person in the same business, whose goods had acquired a market reputation, is such an imitation as should be enjoined, where it appears two persons were deceived, and defendant's sales increased, without other cause being shown, since the adoption of the label.³ Where a trade-mark consists of a word, it may be used by the manufacturer who has appropriated it in any style of print or on any form of label; and its use by another in any form is unlawful, though it be connected in its use with different words on dissimilar labels.⁴ The similarity which serves to deceive is generally in the name of the manufacturer,⁵ or of the thing itself,⁶ or the color or size or shape of the wrapper

¹ *Gorham Co. v. Wallace*, 14 Wall. 511; *Mfg. Co. v. Trainor*, 101 U. S. 64; *Bradley v. Norton*, 33 Conn. 157; 87 Am. Dec. 200; *Hostetter v. Vowinkle*, 1 Dill. 329; *Talcott v. Moore*, 6 Hun, 106; *Walton v. Crowley*, 3 Blatchf. 440; *Blackwell v. Wright*, 73 N. C. 310; *Rowley v. Houghton*, 2 Brewst. 303; *Thornton v. Crowley*, 47 N. Y. Sup. Ct. 527; *Colman v. Crump*, 70 N. Y. 573; *Linde v. Bense*, 22 Hun, 601; *Taylor v. Carpenter*, 11 Paige, 292; 42 Am. Dec. 114; *Lockwood v. Bostwick*, 2 Daly, 521; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402; 95 Am. Dec. 270; *Colton v. Thomas*, 2 Brewst. 308; *Popham v. Wilcox*, 14 Abb. Pr., N. S., 206; *Brown v. Mercer*, 37 N. Y. Sup. Ct. 265; *Laird v. Wilder*, 9 Bush, 131; 15 Am. Rep. 707; *Frese v. Bachof*, 14 Blatchf. 432; *Apollinaris Brunnen v. Sanborn*, 14 Blatchf. 380; *Filley v. Fassett*, 44 Mo. 169; 100 Am. Dec. 275.

² *Fetridge v. Wells*, 4 Abb. Pr. 144; 13 How. Pr. 385; *McCartney v. Gam-*

hart, 45 Mo. 593; 100 Am. Dec. 397; *Blackwell v. Wright*, 73 N. C. 310; *Bass v. Dauber*, 19 L. T., N. S., 626; *McLean v. Fleming*, 96 U. S. 245; *Enoch Morgan's Sons Co. v. Troxell*, 23 Hun, 633; *Pratt's Appeal*, 117 Pa. St. 401; 2 Am. St. Rep. 677.

³ *McCann v. Anthony*, 21 Mo. App. 83.
⁴ *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589.

⁵ *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125 (white lead); *Emerson v. Badger*, 101 Mass. 82 (razors); *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94.

⁶ *Robertson v. Berry*, 50 Md. 591; 33 Am. Rep. 328 (almanac); *Burnet v. Phelan*, 9 Bosw. 192 (cocoaine); *Carroll v. Eithaler*, 14 Phila. 424 (Lone Jack tobacco); *Glen Corn Mfg. Co. v. Ludeling*, 22 Fed. Rep. 823 (Indian corn); *Electro-silicon Co. v. Trask*, 59 How. Pr. 189 (polishing-powder); *Estes v. Worthington*, 31 Fed. Rep. 154 ("Chatterbox," a book); *Potter v. McPherson*, 21 Hun, 559 (copy-books).

or bottle or box in which it is packed.¹ The following have been held to be infringements: "Dr. Morse's celebrated syrup" of "Morse's compound syrup of yellow dock root";² "Hemey's new and revised edition of Jousse's Royal Standard Piano-forte Tutor" of "Hemey's Royal Modern Tutor for the Piano-forte."³ A trade-mark consisting of the words "Conserves alimentaires" over a coat of arms of Paris, and on either side the monogram "A. G." in a circle, and underneath the words "Paris" and "julienne," with directions for use, is infringed by like packages with a like device, except that the monogram has "F." instead of "A."⁴ A label for bottled beer, the prominent feature of which was a diagonal red band, is infringed by a band so similar as to be likely to mislead.⁵ But, on the other hand, where the form of the label or mark and its shape and size, or the words themselves and their arrangement, so differ from the original that no person using reasonable care would be deceived into believing that they were the same, there is no infringement.⁶ To justify a ruling on demurrer that one of two trade-marks is so entirely dissimilar from the other that it is not and cannot be an infringement of it, the dissimilarity should be so marked as to leave no doubt in the mind of the court.⁷

¹ *Enoch Morgan's Sons v. Schwachofer*, 5 Abb. N. C. 265 (soap); *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 293 (baking-powder); *Moxie Nerve Tonic Co. v. Sumbach*, 32 Fed. Rep. 205; *Lee v. Wolf*, 13 Abb. Pr., N. S., 387; 15 Abb. Pr., N. S., 1 (*Worcestershire sauce*); *Taylor v. Carpenter*, 3 Story, 458; *Williams v. Brooks*, 50 Conn. 278; 47 Am. Rep. 642 (*hair-pins*); *Parlett v. Guggenheimer*, 67 Md. 542 (*chewing-tobacco*); *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 388 (*liquid blue*).

² *Alexander v. Morae*, 14 R. I. 153; 51 Am. Rep. 369. The name was blown in the glass and resembled perfectly A's bottles in size and shape. The labels used by A and B were dif-

ferent, and A's bottles were wrapped in a paper cover, while B's were not.

³ *Metzler v. Wood*, 26 Week. Rep. 577.

⁴ *Godillot v. Harris*, 81 N. Y. 263.

⁵ *Anheuser-Busch Brewing Ass'n v. Clarke*, 26 Fed. Rep. 410.

⁶ *McLean v. Fleming*, 96 U. S. 245; *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22; *Talcott v. Moore*, 6 Hun, 106; *Ellis v. Zeilen*, 42 Ga. 91; *Blackwell v. Wright*, 73 N. C. 310; *Brown Chemical Co. v. Myer*, 31 Fed. Rep. 453; *Freze v. Bachof*, 13 Blatchf. 234; *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589; *Hurricane Lantern Co. v. Miller*, 56 How. Pr. 234; *Falkenberg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76.

⁷ *Leidersdorf v. Flint*, 50 Wis. 401.

A trade-mark for a stove-polish, "The Rising Sun," with vignette of the sun, is not infringed by the words "Rising Moon," with vignette of the moon.¹ The word "tempest" does not infringe the word "hurricane."² A sign, "Great I X L Auction Co.," does not infringe on a sign, "I X L General Merchandise Auction Store."³ Identity of instructions printed upon a label is not an infringement of a trade-mark.⁴ A trade-mark on a label on matches is not infringed by a label put on the matches of another maker where the only point of resemblance is that on each label there is a representation of a bee-hive, and that the letters on both are printed on a black ground, and the appearance of the bee-hives is so dissimilar as not to be readily mistaken the one for the other.⁵ A defendant enjoined from using any label bearing the words "Best Brewing Company" cannot use the words "The Best Brewing Co.," or "The Best Brewing Co.'s export beer."⁶ Where a certain trade-mark is habitually placed on certain goods exported abroad, from which a certain name has been acquired for the goods in the foreign markets, an injunction will be granted to restrain the export of goods under another trade-mark which may deceive the ultimate purchaser abroad, though it would not deceive Englishmen nor the dealers in the foreign markets. And this will be so, though the probable deception depends upon the name acquired by the goods, and not upon a comparison of the marks side by side.⁷ Where both parties are manufacturers of liquid bluing, the defendant may be restrained from using for the sale of the bluing manufactured by him old bottles of the plaintiff having plaintiff's name upon them.⁸ So where both parties are dealers in lime-juice,

¹ *Morse v. Worrell*, 10 Phila. 168.

² *Hurricane etc. Co. v. Miller*, 56 How. Pr. 234.

³ *Lichtenstein v. Mellis*, 8 Or. 464; 34 Am. Rep. 592.

⁴ *Hurricane Patent Lantern Co. v. Miller & Co.*, 56 How. Pr. 234.

⁵ *Partridge v. Menck*, 2 Barb. Ch. 101; 47 Am. Dec. 281.

⁶ *U. S. v. Roche*, 1 McCrary, 385.

⁷ *Ewing v. Johnston*, 27 Week. Rep. 575.

⁸ *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 388.

the defendant has no right to sell lime-juice in bottles stamped with complainants' name.¹ "If the effect of the simulated trade-mark is to deceive the public into the belief that the article upon which it is placed is the article of some other manufacturer, there is a deception, whether it was the actual intention of the person using the simulated trade-mark to deceive or not, as the principle of law applies that persons are held to have intended the necessary, natural, and probable consequences of their acts."² The introduction of the word "improved" into the name of an article manufactured by the defendant will not justify its use.³

ILLUSTRATIONS.—The plaintiff had for several years made wagons at Eldora, and painted on them in one general style the words "Shaver wagon, Eldora." The defendant, his brother, had been his employee and later his partner in that business. The firm was dissolved, and the plaintiff acquired its property and continued the business. Two years after, the defendant set up the same business in the same town, and painted the same words on his wagons, in the plaintiff's general style, but with slight changes in form, and adding his own initials. The resemblance was calculated to deceive the public. *Held*, that the defendant should be restrained: *Shaver v. Shaver*, 54 Iowa, 208; 37 Am. Rep. 194. The plaintiff manufactured and sold chocolate under the description of "German sweet chocolate," having obtained authority to use it from Samuel German, the original proprietor. The defendant, with intent to get plaintiff's customers, manufactured and sold chocolate under the description of "Sweet German chocolate." *Held*, that the defendant should be restrained therefrom: *Pierce v. Guittard*, 68 Cal. 68; 58 Am. Rep. 1. The only resemblance between the defendant's and complainants' packages was in the color of the labels, the use of the words "Montserrat lime-fruit juice," and the form of the bottles, but the evidence disclosed that most lime-juice bottles were quite similar in size and design. *Held*, no infringement: *Evans v. Von Laer*, 32 Fed. Rep. 153. Plaintiff put upon packages of lard the figure of a fat hog, with his name and the

¹ *Evans v. Von Laer*, 32 Fed. Rep. 153.

² *Liggett etc. Tobacco Co. v. Hynes*, 19 Cent. L. J. 109; *Colman v. Crump*, 70 N. Y. 573; *Hier v. Abrahams*, 82 N. Y. 519; 37 Am. Rep. 589; *Dale v.*

Smithson, 12 Abb. Pr. 237; *Stonebreaker v. Stonebreaker*, 33 Md. 252; *Pratt's Appeal*, 117 Pa. St. 401; 2 Am. St. Rep. 676.

³ *Russia Cement Co. v. Le Page*, 147 Mass. 206; 9 Am. St. Rep. 685.

words "prime leaf lard." Defendant put upon packages of lard a globe with a small, lean boar on top, above which was his name, and beneath it the words "prime leaf lard." Plaintiff claimed that the use of the figure of the boar was an infringement of his trade-mark. The two marks were so unlike in general appearance as not to be calculated to deceive any one. *Held*, that plaintiff was not entitled to relief: *Popham v. Cole*, 66 N. Y. 69; 23 Am. Rep. 22. The plaintiff sold soap in packages in tin-foil and blue paper, labeled on one side in gilt letters, "Sapolio, for cleaning and polishing, manufactured by Enoch Morgan's Sons & Co., 440 West Street, New York," and on the other, "Enoch Morgan's Sapolio," with a well-drawn picture of a human face opposite a pan and reflected in it. The defendant also sold soap in packages of a different shape from the plaintiff's, in tin-foil and blue paper, labeled on one side in gilt letters, "Troxell's Pride of the Kitchen soap," and on the other, "Pride of the Kitchen soap," with a picture of a small monkey looking at himself in a mirror or pan held in his paw. *Held*, no infringement: *Morgan's Sons Co. v. Troxell*, 89 N. Y. 292; 42 Am. Rep. 294.

§ 1644. Trade-mark Intended to Deceive not Protected.

—A trade-mark will not be protected which is intended to deceive, or has a tendency to deceive, the public.¹ Where the first person to use certain words as a trade-mark has forfeited his right to their exclusive use, another person may use the words in connection with other devices to constitute a trade-mark of his own.² "A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article and as to the place at which it is manufactured."³ A court of equity will not enjoin infringement of the plaintiffs' firm name as a trade-mark, if it falsely implies

¹ *Leather Cloth Co. v. Am. L. C. Co.*, 11 H. L. Cas. 523; *Consolidated Fruit Jar Co. v. Dorflinger*, 2 Cent. L. J. 720; *Perry v. Trueffit*, 6 Beav. 66; *Pidding v. How*, 8 Sim. 477; *Connell v. Reed*, 128 Mass. 477; 35 Am. Rep. 397; *Seabury v. Grosvenor*, 53 How. Pr. 192; 14 Blatchf. 262; *Heinbold v. Heinbold Mfg. Co.*, 53 How. Pr. 453; *Laird v. Wilder*, 9 Bush, 131; 15 Am. Rep. 707; *Wolfe*

v. Burke, 56 N. Y. 115; *Heath v. Wright*, 3 Wall. Jr. 141; *Hobbs v. Francis*, 19 How. Pr. 567; *Palmer v. Harris*, 60 Pa. St. 156; 100 Am. Dec. 557; *Buckland v. Rice*, 40 Ohio St. 526.

² *Parlett v. Guggenheimer*, 67 Md. 542; 1 Am. St. Rep. 416.

³ *Manhattan Medicine Co. v. Wood*, 108 U. S. 218.

that they are a corporation.¹ "If a trade-mark represents an article as protected by a patent, when in fact it is not so protected, such a statement *prima facie* amounts to a misrepresentation of an important fact which would disentitle the owner of the trade-mark to relief in a court of equity against any one who pirated it";² so, where a person makes the false representation that the article is patented when in fact the patent has run out.³ But it has been held that mere exaggerated statements in an advertisement of a medicine recommending it to the public will not deprive the owner of the right to protection of his trade-mark.⁴ An assignee or purchaser of a trade-mark from the original proprietor must in the use thereof indicate that he is assignee or purchaser, or he will not be entitled to protection.⁵ The grantee of the original proprietor of a trade-mark forfeits his right to it by using it upon spurious articles, while adopting a new trade-mark for the genuine article.⁶ But that the manufacturers put on labels bearing their brand the names of jobbers to whom they have sold the article does not show any deception of the public, where the purchaser obtained the same goods which he would otherwise have purchased.⁷ And the fact that a trade-mark is put on different brands of the article is immaterial, where the brands have distinguishing marks, so that no deception is practiced.⁸

ILLUSTRATIONS. — A claimed a trade-mark for a cosmetic in the name "Balm of Thousand Flowers," and asked to have B enjoined from selling a cosmetic by the same name. It appeared that the ingredients of A's cosmetic were oil, ashes, and

¹ *McNair v. Cleave*, 10 Phila. 155.

² *Leather Cloth Co. v. Am. L. C. Co.*, 11 H. L. Cas. 523; *Consolidated Fruit Jar Co. v. Dorflinger*, 2 Cent. L. J. 720. But see *Ins. Oil Tank Co. v. Scott*, 33 La. Ann. 946; 39 Am. Rep. 286.

³ *New York Consolidated Card Co. v. Union Playing Card Co.*, 39 Hun, 611.

⁴ *Curtis v. Bryan*, 2 Daly, 312.

⁵ *Stachelberg v. Ponce*, 23 Fed. Rep. 430.

⁶ *Manhattan Med. Co. v. Wood*, 4 Cliff. 461.

⁷ *Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896; *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359.

⁸ *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359.

alcohol, and that there were no extracts or distillations from flowers in it at all. *Held*, that B would not be enjoined: *Fetridge v. Wells*, 4 Abb. Pr. 144. A person claims a trade-mark on the words "East Indian" remedy. It appears that the name is held out to indicate that the remedy is used in the East Indies, and that the formula was obtained there. *Held*, that the plaintiff cannot maintain an action to restrain the infringement of this trade-mark: *Connell v. Reed*, 128 Mass. 477; 35 Am. Rep. 397. A trade-mark of cigars made in New York represented that they were made in Havana. *Held*, that this being false, no injunction would be granted to restrain a counterfeit of the mark: *Palmer v. Harris*, 60 Pa. St. 157; 100 Am. Dec. 557. Plaintiffs were engaged in the dairy business, and made butter of superior quality and established reputation. At rare intervals they purchased milk and cream from others to enable them to supply their customers with butter, and in some instances purchased small amounts of butter for the same purpose. *Held*, not to prevent an injunction restraining an infringement of plaintiff's trade-mark: *Pratt's Appeal*, 117 Pa. St. 401; 2 Am. St. Rep. 676. Plaintiff, claiming to be the owner of a cosmetic known and designated as "Laird's Bloom of Youth, or Liquid Pearl," brought suit to restrain the defendant from using the same name on another compound, and from counterfeiting plaintiff's bottles and labels. It appeared that plaintiff had announced his cosmetic as free from all mineral and poisonous substances, but the evidence tended to prove otherwise. *Held*, that plaintiff was not entitled to protection: *Laird v. Wilder*, 9 Bush, 131; 15 Am. Rep. 707. Plaintiffs manufactured and sold a cordial under the name of "Angostura Bitters," claiming that name as a trade-mark, with labels stating that it was prepared by Dr. S., formerly at Angostura, but now at Port-of-Spain, and that the bottles bore the plaintiff's signature. In fact, Dr. S. died before this suit, never lived at Port-of-Spain, and the bottles bore only the signature of the inventor. The plaintiff sought to enjoin the defendants from manufacturing and selling a cordial under the name of "Angostura Aromatic Bitters." *Held*, that he could not recover: *Siebert v. Abbott*, 61 Md. 276; 48 Am. Rep. 101. A merchant designated his goods by a label which would not be protected in equity as a trade-mark. The words in the label were not literally true, but contained nothing calculated to deceive or injure the public. Another merchant adopted this label, placed it upon inferior goods, which he put upon the market. *Held*, that he was liable to an action in the nature of deceit: *Conrad v. Joseph Uhrig Brew. Co.*, 8 Mo. App. 277. In an action to restrain the infringement of a trade-mark, the complaint alleged that the plaintiffs manufactured brandy, which they sold

in "quart and pint bottles" with their trade-mark thereon. It appeared that the bottles were of the size ordinarily used in the trade, and there was nothing on them to indicate the quantity; that the brandy was imported and entered at the custom-house at the true quantity; it did not appear that the bottles were used in the trade as measures of quantity; that purchasers did not understand their capacity; that plaintiffs ever represented that they contained quarts or pints, or that they ever deceived any one as to their capacity; the court found that defendants wrongfully imitated plaintiff's trade-mark, but the plaintiffs did not use quart or pint bottles as alleged in their complaint, but bottles falsely and deceitfully represented to contain those quantities, and that the trade-mark was designed and used to protect this fraud, and dismissed the complaint; this defense was not set up in the answer nor litigated at the trial. *Held*, erroneous: *Hennessy v. Wheeler*, 69 N. Y. 271; 25 Am. Rep. 188.

§ 1645. **What Persons Entitled to Protection.**—An alien or non-resident is entitled to the protection of his trade-mark as much as a citizen.¹ The owner of goods may have a trade-mark used on the goods, although they are manufactured by another, and the trade-mark includes the name of the manufacturer.² Where an employee originates and names a medical article, but acquiesces in the appropriation of the article and its name by his employers and its sale to the public by them under the name given the article, the property in the trade-mark, if a valid one, is in the employers.³ A union of workmen, as the "Cigar Makers' Union," may have a trade-mark to distinguish cigars made by them.⁴ An official inspector of fish cannot claim property in his official brand as his private trade-mark.⁵ Where one has adopted a word from the French language to designate an article which he is engaged in manufacturing and selling by that name, he acquires by such adoption a property in the use of the word, as applied to the article he has made and

¹ *Collins Co. v. Brown*, 3 Kay & J. 423; *Taylor v. Carpenter*, 11 Paige, 292; 42 Am. Dec. 114.

² *Walton v. Crowley*, 3 Blatchf. 440.

³ *Caswell v. Davis*, 58 N. Y. 223; 17 Am. Rep. 233.

⁴ *Blute v. Simon*, 19 Abb. N. C. 88; *Strasser v. Moonelis*, 55 N. Y. Sup. Ct. 197. See *Allen v. McCarthy*, 37 Minn. 349.

⁵ *Chase v. Mayo*, 121 Mass. 343.

introduced into the market, although the article was previously sold in France by the same name; and an injunction will lie to restrain the use of the name by another manufacturer.¹ A person may be enjoined from using labels stating that another person is the sole agent for the sale of the article.² The owner of a trade-mark may maintain a suit to enjoin its infringement in a state wherein he has granted to another an exclusive license to sell it.³

ILLUSTRATIONS.—One who had an interest in the sale of a compound manufactured expressly for him in a foreign country and imported by him, *held*, entitled to restrain the use by defendant of a name and label similar to that devised by him and used on the compound: *Godillot v. Harris*, 81 N. Y. 263. The Apollinaris Company obtained of its owners in Hungary the exclusive right to import Hunyadi Jados water to the United States, and to sell it there and to use its name as a trade-mark. The Hungarian owners made their European sales in bottles, cautioning the public against their purchase, except in Europe. A bought water of those to whom the Hungarian owners had sold it in Europe, exported it to the United States, and sold it there. *Held*, that he should not be enjoined at the instance of the Apollinaris Company: *Apollinaris Co. v. Scherer*, 23 Blatchf. 459; 27 Fed. Rep. 19.

§ 1646. **Relief — Damages — Injunction — Account of Profits.**—The owner of a trade-mark is entitled to nominal damages for the infringement of his trade-mark, although he has suffered no actual damages.⁴ In torts of misfeasance, like the violation of a trade-mark, servants and agents are liable jointly and severally with their masters.⁵ Vindictive damages are not allowed.⁶ The measure of the plaintiff's damage is usually the profits which the defendant has made from the sales of the arti-

¹ *Rillet v. Carlier*, 61 Barb. 435; 11 Abb. Pr., N. S., 186. *Rodgers v. Novill*, 5 Com. B. 109; *Thomson v. Winchester*, 19 Pick. 214.

² *Coleman v. Flavel*, 12 Saw. 220.

³ *Estes v. Worthington*, 30 Fed. Rep.

⁴ *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205.

465.

⁵ *Taylor v. Carpenter*, 2 Wood. & M. 1.

⁶ *Blofield v. Payne*, 1 Nev. & M. 353;

cle under the pirated trade-mark.¹ He is not limited to the difference between the price for which the spurious goods would sell without and the price of the same goods with the trade-mark impressed on them.² The defendant must pay profits, whether plaintiff would have made them or not, and to the same extent in either case.³ An answer denying knowledge of plaintiff's ownership of the trade-mark, and any intention to do wrong, and averring a single sale of the simulated article, is not frivolous, these allegations being important on the question of damages.⁴ So equity will restrain the future unauthorized use of another's trade-mark.⁵ An injunction should not be granted at the commencement of a suit brought to enjoin the defendants from the use of plaintiff's trade-mark, and to recover damages, etc., unless the legal right of plaintiff and the violation of it by defendants are very clear.⁶ An action to enjoin the use of a trade-mark cannot be resisted by showing that the names used on the trade-mark are false and fictitious;⁷ or that the goods made or sold under the pirated trade-mark are equal in quality or value to the original;⁸ or that the maker of the spurious goods or the jobber who sells them to the retailers informs those who purchase that the article is spurious or an imitation;⁹ or that parties in other states

¹ *Marsh v. Billings*, 7 Cush. 322; 54 Am. Dec. 723; *Hostetter v. Vowinkle*, 1 Dill. 329; *Avery v. Meikle*, 85 Ky. 435; 7 Am. St. Rep. 604; *Peltz v. Eichle*, 62 Mo. 171; *Graham v. Plate*, 40 Cal. 593; 6 Am. Rep. 639; *Barrows v. Knight*, 6 R. I. 434; 78 Am. Dec. 452; *Benkert v. Feder*, 34 Fed. Rep. 534. But see *Addington v. Cullinane*, 28 Mo. App. 238.

² *Benkert v. Feder*, 34 Fed. Rep. 534.

³ *Atlantic Milling Co. v. Rowland*, 27 Fed. Rep. 24.

⁴ *Faber v. D'Utassey*, 11 Abb. Pr. N. S., 399.

⁵ *Taylor v. Carpenter*, 11 Paige, 292; 42 Am. Dec. 114; *Hennessy v. Wheeler*, 69 N. Y. 271; 25 Am. Rep. 188; *Part-*

ridge v. Menck, 2 Barb. Ch. 101; 47 Am. Dec. 281; *Stokes v. Landgraff*, 17 Barb. 608; *Coffeen v. Brunton*, 4 McLean, 516; *Rowley v. Houghton*, 7 Phila. 39; *Morrison v. Case*, 9 Blatchf. 548.

⁶ *Merrimack Mfg. Co. v. Garner*, 2 Abb. Pr. 318; 4 E. D. Smith, 387; *Petridge v. Merchant*, 4 Abb. Pr. 156; *Samuel v. Buger*, 4 Abb. Pr. 88; 24 Barb. 163; 13 How. Pr. 342; *Part-ridge v. Menck*, 2 Barb. Ch. 101; 47 Am. Dec. 281; *Ellis v. Zelein*, 42 Ga. 91.

⁷ *Stewart v. Smithson*, 1 Hilt. 119.

⁸ *Partridge v. Menck*, 2 Barb. Ch. 101; 47 Am. Dec. 281.

⁹ *Coats v. Holbrook*, 2 Sand. Ch. 586.

had infringed the trade-mark.¹ The fact that a trader's goods are known by a variety of different names does not prevent his having a right which will be protected in respect of each of such names and the trade-mark from which they are all derived.²

1647. Delay and Acquiescence. — Delay in seeking relief will not be a bar to an injunction when the proof of the infringement is clear,³ but it may be to an account for past profits.⁴ And an injunction will not be granted to restrain a defendant from the use of a trade-mark, if the proprietor of the trade-mark has, by acts of acquiescence, virtually licensed the defendant to use it.⁵ But neglect to use a trade-mark by a manufacturer for six years, while retaining his molds, authorizes no one to adopt such mark on the same class of goods.⁶ Mere non-user for a year does not constitute an abandonment, although it may entitle others to use the trade-mark during that time.⁷ Abandonment is not made out by showing numerous infringements in which the owners of the same have not acquiesced.⁸

§ 1648. Assignment of Trade-mark—Conveyance of. — The sale of a mere trade-mark apart from the article to which it is affixed confers no right of ownership.⁹ But with the right to manufacture or sell the particular goods to which the trade-mark attaches, the right to use it passes.¹⁰ The invalidity of a trade-mark cannot be set up

¹ *Filley v. Fassett*, 44 Mo. 169; 100 Am. Dec. 275.

² *Ewing v. Johnston*, 27 Week. Rep. 575.

³ *McLean v. Fleming*, 96 U. S. 245. One does not necessarily lose his right to a trade-mark by his forbearance for three years to sue one unlawfully using it; *Blackwell's Durham Tobacco Co. v. McElwee*, 100 N. C. 150.

⁴ *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514; *Low v. Fels*, 35 Fed. Rep. 361. But see

Avery v. Meikle, 85 Ky. 435; 7 Am. St. Rep. 604.

⁵ *Delaware etc. Canal Co. v. Clark*, 7 Blatchf. 112.

⁶ *Mouson v. Boehm*, 50 L. T., N. S., 784.

⁷ *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

⁸ *Williams v. Adams*, 8 Biss. 452.

⁹ *Witthaus v. Braun*, 44 Md. 303; 22 Am. Rep. 44.

¹⁰ *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321.

by a licensee using the trade-mark in defense of an action to recover license fees.¹ The owner of a trade-mark is not estopped from bringing suit to enjoin an infringement of it by the fact that he has made a third party his licensee for the territory in which the defendant carries on the business as to which the infringement is charged.² A trade-mark will pass, though not specially mentioned, by a conveyance of all the assets and effects of a firm.³ A trade-mark which designates an article as made at a particular establishment passes with a transfer of the business, although no particular mention of the trade-mark was made in the agreement as to the purchase of the property.⁴ A sale of the owner's business and its goodwill carries a trade-mark, but does not imply that the vendor will not re-engage in the like business at another place; but he may be restrained from representing himself as successor to the business sold, or as having a right to use the trade-mark.⁵ The mere consent of a person to use his name as a sign or trade-mark will not be regarded as irrevocable, except in a case where the intention is made clear. One who purchases a hotel property bearing the name of another person will not necessarily be regarded as entitled to continue the use of that name, unless he has a positive agreement as to the permanency of its use.⁶ As a trade-mark is not exempted from execution, it is not excepted by a clause assigning all property not exempt from attachment; and hence the assignor may be examined under the statute to ascertain what interest he has in the trade-mark.⁷ On the dissolution of a partnership, either partner may continue to use the trade-marks,

¹ *Hilsen v. Libby*, 44 N. Y. Sup. Ct. 12.

² *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205.

³ *Morgan v. Rogers*, 19 Fed. Rep. 596; *Merry v. Hoopes*, 111 N. Y. 415.

⁴ *The Atlantic Milling Co. v. Robinson*, 18 Rep. 68; *Hegeman v.*

O'Byrne, 10 Week. Dig. 296; *Witthaus v. Braun*, 44 Md. 303; 22 Am. Rep. 44.

⁵ *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149.

⁶ *McCardel v. Peck*, 28 How. Pr. 120.

⁷ *In re Swezey*, 62 How. Pr. 215.

unless he has specifically transferred or expressly divested himself of such right.¹ The exclusive right to the use of a firm trade-mark does not pass to any member of the firm by mere implication, though such member may use it, if he does so in a manner not to deceive the public.² Partners who have sold the good-will of a business and those associated with them will be enjoined from carrying on a rival establishment under a name so familiar as to mislead the public. They will not be prohibited from receiving mail matter addressed to the new name.³

¶ ILLUSTRATIONS.—The sale of a drug-store, with the right to sell certain medicines bearing a certain trade-mark, *held*, not to be a license to use such trade-mark on other medicines: *Hege-man v. O'Byrne*, 10 Week. Dig. 296. The transfer of the wood-cuts of a trade-mark by the plaintiffs to the defendants simply to enable the latter to label articles which they were manufacturing for the plaintiffs and under their supervision, *held*, not to give the defendants any property in the trade-mark so that they might use it in their own business after dissolving connection with the plaintiffs: *Lockwood v. Bostwick*, 2 Daly, 521. A wife who did not succeed to the business of her husband, *held*, not able to give title to use of his name in the manufacture of a proprietary article: *Weston v. Ketcham*, 39 N. Y. Sup. Ct. 54. A and B, partners in the business of manufacturing glass lamp-chimneys, used the word "Silex" as a trade-mark. The firm dissolved, and B sold to A his interest in its real estate and in certain specified personal property. There was no reference to the good-will or to the trade-mark. A continued the business at the same place, using the trade-mark. Four months afterwards, B began business in the same city, using the trade-mark. Upon suit brought by A to restrain such use, *held*, that, assuming that the word "Silex" could be used as a trade-mark, and that the firm of A and B had the exclusive right to use it, A did not acquire such right, and could not maintain his action: *Huwer v. Dannenhoffer*, 82 N. Y. 499. For seventeen years after the death of the senior member of a soap-manufacturing firm, the firm had owned and enjoyed the exclusive use of their original trade-mark. *Held*, that, on the dissolution of the firm and sale by his executors of the manufactory to L., they could not maintain a bill in equity to compel a member to join in an agreement to transfer to L.

¹ *Hazard v. Caswell*, 93 N. Y. 259; 45 Am. Rep. 198.

³ *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215; 52 Am. Rep. 811.

² *Young v. Jones*, 3 Hughes C. C. 274.

the right to use the trade-mark: *Sohier v. Johnson*, 111 Mass. 238. A devise charging the beneficiary with the support of the testator's children, "in view of" his leaving him "the conveniences for carrying on a successful business and the good will which it is believed is established and connected with it," held, not to transfer any right to the exclusive use of the testator's name in the business referred to: *Meneely v. Meneely*, 1 Hun, 367; 3 Thomp. & C. 540. Under a purchase from an assignee for the benefit of creditors, the purchaser acquired the right to use a lot of sacks and wrappers marked with the name of the assigning firm. Held, that this did not preclude a member of that firm from applying its name to a corporation afterwards organized by him: *Iowa Seed Co. v. Dorr*, 70 Iowa, 481; 59 Am. Rep. 446. Two persons, associated in business for the manufacture and sale of a commodity, jointly adopted a trade-mark for it. Held, that they are equally entitled to its use after the dissolution of their connection; and if one of the parties obtain letters of registration in his own name, he may be compelled to transfer an equal interest to his associate: *Taylor v. Bothin*, 5 Saw. 584. The grandfather, and after his death the father, of A and B used it, first together, and then separately. In their suit to enjoin its unauthorized use by defendant, no administration or distribution of the father's estate was shown. Held, that they were entitled to the injunction asked for: *Pratt's Appeal*, 117 Pa. St. 401; 2 Am. St. Rep. 676. A contract between A and B stated that it was for the interest of both that B should have the sale of "Clysmic Water," taken from A's spring of that name, for the purpose of increasing the sale thereof, and it was agreed that, in consideration of payment of a certain royalty, B should have the exclusive right of sale for a term of years. Held, that during this term B had no right to sell other mineral waters under the same name, although he had given the name to these waters before A acquired title to his spring: *Hill v. Lockwood*, 32 Fed. Rep. 389.

§ 1649. **Statutory Provisions as to Registration.**—By the statutes of the United States,¹ any person or corporation, native or foreign, may obtain protection for their trade-marks by registering them in the patent-office. Such registered trade-mark shall remain in force for thirty years from the date of registration, and may be renewed. The imitation of such recorded trade-mark by

¹ U. S. Rev. Stats., tit. 60, cap. 2.

any other person shall render him liable to an action for damages, or the party aggrieved may enjoin him in equity. The right to use the trade-mark is assignable by an instrument recorded in the patent-office within sixty days of its execution. For frauds in connection with trade-marks, various penalties of a criminal nature are prescribed. It has been recently held that the federal constitution gives no power to the federal government to legislate on the subject of trade-marks, except, perhaps, under the general power to regulate commerce.¹ Therefore, the state courts have jurisdiction in trade-mark cases.² It has been held in England that the refusal to register a trade-mark under the statute does not affect the pre-existing right of the owner to protection.³

¹ *Leidersdorf v. Flint*, 7 Cent. L. J. 405; *United States v. Steffens*, 100 U. S. 82; 9 Cent. L. J. 449. *Contra*, *Dumell v. Bohmer*, 10 Chic. L. N. 356.

² *Smail v. Sanders*, 118 Ind. 105.

³ *Ewing v. Johnston*, 27 Week. Rep. 575.

CHAPTER LXXXV.

PATENTS.

- § 1650. Origin and nature of.
- § 1651. Former statutory provisions.
- § 1652. Consolidation act of 1870.
- § 1653. The patent-office and officers.
- § 1654. Printing of papers.
- § 1655. Copies as evidence.
- § 1656. Issuance of patents — Duration — Date.
- § 1657. What inventions patentable.
- § 1658. Patents for foreign inventions.
- § 1659. Requisites of application.
- § 1660. Drawings, when requisite.
- § 1661. Specimens of ingredients — Models.
- § 1662. Oath of applicant.
- § 1663. Examination and issuance of patent.
- § 1664. Time for completing application.
- § 1665. Patent to assignee of inventor — To executor.
- § 1666. Renewal of application.
- § 1667. Assignment of patent.
- § 1668. Rights of purchaser before application.
- § 1669. Patented articles to be marked — Penalties.
- § 1670. Caveats — Filing and effect of.
- § 1671. Rejection of claim, notice of.
- § 1672. Interferences.
- § 1673. Affidavits and depositions — Subpœnas — Witness fees.
- § 1674. Penalty for refusing to testify.
- § 1675. Appeals.
- § 1676. Proceedings on appeal from commissioner — Determination of.
- § 1677. Suits in equity for patent.
- § 1678. Reissue of defective patents.
- § 1679. Disclaimer.
- § 1680. Suits in interference.
- § 1681. Infringement suits.
- § 1682. Pleading in infringement suits.
- § 1683. Infringement where specification too broad.
- § 1684. Previous use in foreign country.
- § 1685. Extension of patents granted prior to March 2, 1861.
- § 1686. Proceedings — Operation of extension.
- § 1687. Patents for designs.
- § 1688. Penalty for using patented design without authority.
- § 1689. Jurisdiction of the federal courts.
- § 1690. Of the state courts.
- § 1691. Injunctions to restrain infringement.

§ 1650. **Origin and Nature of.** — The right to letters patent in the United States rests on that section of the constitution which provides that Congress shall have power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,¹ the word “discoveries” being used in the sense of “inventions.”²

§ 1651. **Former Statutory Provisions.** — The subject of patent rights was taken up by the first Congress at its second session, and an act was then passed, entitled “An act to promote the progress of useful arts.”³ That statute was followed, from time to time, by several others explanatory and supplementary thereof, all of which were, however, repealed by the act of 1836. By this act there was established and attached to the department of state an office denominated the patent-office, presided over by an officer styled the commissioner of patents, whose duty it was, under the direction of the Secretary of State, to superintend and perform all such things respecting the issuing of patents as provided in that act, or as should thereafter be by law, directed to be performed, and who had the custody of all books, papers, and models, and all other things belonging to said office.⁴ The statute likewise provided for the form of issuing patents, the mode of making applications, the examination of inventions, interfering applications, fees, assignments, caveats, damages, pleading, and the extension of patents, the classification of models, and gave jurisdiction to the federal courts. It repealed all acts and parts of acts theretofore passed on the subject, with a saving clause as to pending suits and business.⁵ After the act of 1836 came a number of statutes, mostly amendatory and supplemental to that act, but

¹ Const. U. S., art. 1, sec. 8, c. 8.

² *Grant v. Raymond*, 6 Pet. 218, 240;
Wheaton v. Peters, 8 Pet. 591.

³ 1 U. S. Stats., p. 109.

⁴ 5 U. S. Stats., p. 117, sec. 1, 2.

⁵ *Id.*, sec. 21.

some dealt with matters not within its scope or purview. The first was the act of 1837,¹ which provided for the re-recording of patents and assignments executed and recorded prior to the 15th of December, 1836, when the patent-office building was destroyed by fire, and for obtaining duplicates of the models then destroyed;² also, that whenever any patentee should through inadvertence make his specification too broad, he might disclaim the excess.³ Then followed the act of 1839,⁴ providing for the appointment of two assistant examiners, and the publication of a list of patents. It was also provided that the fact of an invention having been patented in a foreign country more than six months prior to the application here should not be a bar to the issuance of the patent, if the invention had not been introduced into public and common use in the United States prior to such application.⁵ The statute of 1842⁶ provided for the grant of letters patent for designs for printing on fabrics, or for statuary, or for any new and useful pattern, print, or picture to be worked on any article of manufacture, or for any new and original shape or configuration of any article of manufacture.⁷ The act of 1848 took away the power to extend patents from the board, composed of the Secretary of State, the commissioner of patents, and solicitor of the treasury, and vested such power solely in the commissioner of patents.⁸ By the act of 1849⁹ the secretaryship of the interior was created, and the secretary was given supervision of the patent-office. The act of 1861¹⁰ dealt with a number of points of practice in cases in the patent-office, and also enacted that a patent for a design might be granted for a term of either three and a half, seven, or fourteen years, as the applicant might elect, with

¹ U. S. Stats. 1837, c. 45.

² Id., secs. 1-4.

³ Id., sec. 7.

⁴ U. S. Stats. 1839, c. 88.

⁵ Id., secs. 2, 3, 6.

⁶ U. S. Stats. 1842, c. 263.

⁷ Id., sec. 3.

⁸ Id., sec. 1.

⁹ U. S. Stats. 1849, c. 108.

¹⁰ U. S. Stats. 1861, c. 88.

a reduction in the fees for the shorter terms, and also that patentees of designs should be entitled to an extension of their respective patents for the term of seven years; also, that applications for patents must be completed within two years, except in case of unavoidable delay, and that the vendor of any patented article should fix thereon the word "patented" with the date of the patent. The term of a patent was extended to seventeen years, and all extensions abolished.¹ The act of 1863² provided that every patent should be dated as of a day not later than six months after the time at which it was passed and allowed, and notice thereof sent to the applicant or his agent.³ By the act of 1870,⁴ the act of 1836 and all the subsequent acts were repealed, and the entire statutory law relating to patents and copyrights was revised, amended, and consolidated.

§ 1652. **Consolidation Act of 1870.** — This statute, approved on the 8th of July, 1870, and entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyrights" now contains, as embodied in the Revised Statutes of the United States, with some slight amendments and additions, all the statutory law on this branch of jurisprudence in this country.

§ 1653. **The Patent-office and Officers.** — By section 475⁵ it is provided that there shall be in the department of the interior an office known as the patent-office, where all the records, books, models, drawings, specifications, and other papers and things pertaining to patents shall be safely kept and preserved. In such office there shall be a commissioner of patents, one assistant commissioner, and three examiners-in-chief,⁶ and by section 441 the Secretary of the Interior is charged with the supervision of

¹ Id., secs. 11, 12, 13, 16.

² U. S. Stats. 1863, c. 102.

³ Id., sec. 3.

⁴ U. S. Stats. 1870, c. 230.

⁵ U. S. Rev. Stats.

⁶ Id., sec. 476.

the patent-office. The statute likewise prescribes the fees to be paid.¹ Patents are to be issued under the seal of the office; the officers must give bonds, and all officers and employees are made incapable of acquiring or taking, except by inheritance or bequest, any right or interest in any patent issued by the office.² The duties of the commissioner and the examiners-in-chief are prescribed.³ The arrangement of and exhibition of models are provided for, and the disposal of rejected models.⁴ For gross misconduct the commissioner may refuse to recognize any person as a patent-agent.⁵

§ 1654. **Printing of Papers.** — The commissioner may require all papers filed in the office, if not correctly, legibly, and clearly written, to be printed at the cost of the party filing them.⁶ He may likewise print for the public benefit the specifications and drawings of patents to be distributed free or for sale.⁷

§ 1655. **Copies as Evidence.** — Written or printed copies of any records, books, papers, or drawings belonging to the office and of letters patent, authenticated by the seal and certified by the commissioner, are evidence in all cases in which the originals would be evidence, and any person paying the fee may have certified copies thereof.⁸ Also, copies of the specifications and drawings of foreign letters patent only certified are *prima facie* evidence of the fact of the granting of such letters patent, and of the date and contents thereof.⁹ And the copies of specifications and drawings of patents printed for gratuitous

¹ Id., sec. 4934.

² Id., sec. 480. But as to other officers of the United States who may obtain a patent without paying fees when it may be used in the public service, see U. S. Stats. 1883, c. 143.

³ Id., secs. 481, 482.

⁴ Id., secs. 484, 485.

⁵ Id., sec. 487.

⁶ Id., sec. 488.

⁷ Id., secs. 490, 491.

⁸ Id., sec. 892; Brooks v. Jenkins, 3 McLean, 432; Parker v. Haworth, 4 McLean, 370; Pettibone v. Derringer, 4 Wash. C. C. 215; Lee v. Blandy, 2 Fish. Pat. Cas. 89; Woodward v. Hall, Wood. & M. 260; Emerson v. Hogg, 2 Blatchf. 12.

⁹ Id., sec. 893.

distribution, as mentioned in sections 490, 491, are, when duly certified, to be received in all courts as evidence of all matters therein contained.¹

§ 1656. Issuance, etc., of Patents—Duration—Date.

—All patents are issued in the name of the United States under the seal of the patent-office, signed by the Secretary of the Interior, countersigned by the commissioner, and recorded, together with the specifications, in the office.² Every patent must contain a short title or description of the invention or discovery correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the territories thereof, and referring to the specification for particulars; and a copy of the specification and drawings must be annexed to the patent and form a part thereof.³ It must bear date as of a day not later than six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent.⁴

§ 1657. What Inventions are Patentable. — Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor.⁵

¹ Id., sec. 894.

² Id., sec. 4883; *Doughty v. West*, 6 Blatchf. 429.

³ Id., sec. 4884; *Simpson v. Wilson*,

4 How. 709; *Pitts v. Whitman*, 2

Story, 614; *Boyd v. Brown*, 3 McLean, 297.

⁴ Id., sec. 4885.

⁵ Id., sec. 4886; *Kendall v. Winsor*, 21 How. 322; *Hicks v. Kelsey*, 18 Wall.

§ 1658. **Patents for Foreign Inventions.**—No person is debarred from receiving a patent for his invention or discovery, and no patent is invalid by reason of its having been first patented in a foreign country, unless it had been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which had been previously patented in a foreign country shall be so limited as to expire at the same time as the foreign patent, or, if there be more than one, at the same time as the one having the shortest term, and in no case is it to be in force more than seventeen years.¹

§ 1659. **Requisites of Application.**—The application must contain a description of the invention or discovery, and of the manner and process of making, constructing, compounding, and using it, in such full and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, compound, and use it. In case of a machine, it must explain the principle thereof, and the best mode in which the inventor has contemplated applying that principle, so as to distinguish it from other inventions; and he must particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. The specification and claim must be signed by the inventor, and attested by two witnesses.²

§ 1660. **Drawings, when Requisite.**—When the nature of the case admits of drawings, the applicant is to furnish

670; *Ryan v. Goodwin*, 3 Sum. 518; *Bean v. Smallwood*, 2 Story, 411; *Hoffman v. Stiefel*, 7 Blatchf. 58; *Kneass v. Schuylkill Bank*, 4 Wash. 12; *Hotchkiss v. Greenwood*, 4 McLean, 461; *Poillon v. Schmidt*, 3 Fish. Pat. Cas. 476; *Fuller v. Yentzer*, 94 U. S. 238; *Nat. Spring Co. v. Union Car Spring Co.*, 12 Blatchf. 80.

¹ *Id.*, sec. 4887; *O'Reilly v. Morse*,

15 How. 62; *Judson v. Cope*, 1 Fish. Pat. Cas. 615; *Cammeyer v. Newton*, 91 U. S. 225; *Weston v. White*, 13 Blatchf. 361.

² *Id.*, sec. 4888; *Tyler v. Borton*, 7 Wall. 327; *Carlton v. Bokee*, 17 Wall. 463; *Le Roy v. Tatham*, 22 How. 132; *Phillips v. Paige*, 26 How. 164; *Park v. Little*, 3 Wash. 198; *Goulds Mfg. Co. v. Cowing*, 12 Blatchf. 243.

one copy signed by the inventor or his attorney in fact, and attested by two witnesses. Such copy is to be filed in the office, and a copy thereof attached to the patent as a part of the specification.¹

§ 1661. **Specimens of Ingredients — Models.** — When the invention or discovery is of a composition of matter, the applicant, if required by the commissioner, must furnish specimens of the ingredients and of the composition, sufficient for the purpose of experiment.² In all cases which admit of representation by model, the applicant, if required by the commissioner, must furnish a model of convenient size to exhibit advantageously the several parts of his invention or discovery.³

§ 1662. **Oath of Applicant.** — The applicant must make oath that he believes himself to be the original and first inventor or discoverer of the invention for which he solicits a patent; that he does not know and does not believe that the same was ever before known or used; and he is also to state of what country he is a citizen. The oath is to be made before any person in the United States authorized by law to administer oaths, or when the applicant resides in a foreign country, before any minister, *charge d'affaires*, consul, or commercial agent holding commission under the government of the United States, or before any notary public of the foreign country in which the applicant may be.⁴

§ 1663. **Examination and Issuance of Patent.** — On the filing of the application and payment of the fees, the commissioner must cause examination to be made of the alleged new invention or discovery; and if it appears that the claimant is entitled to a patent, it will be issued.⁵

¹ Id., sec. 4889; *O'Reilly v. Morse*, 15 How. 62; *Washburn v. Gould*, 3 Story, 133.

² Id., sec. 4890.

³ Id., sec. 4891; *Hogg v. Emerson*, 6 How. 437; *McCormick v. Talcott*, 20 How. 409.

⁴ Id., sec. 4892; *Crompton v. Belknap Mills*, 3 Fish. Pat. Cas. 536; *Whittemore v. Cutter*, 1 Gall. 429; *Hogg v. Emerson*, 6 How. 437.

⁵ Id., sec. 4893; *Le Roy v. Clayton*, 2 Saw. 493.

§ 1664. Time for Completing Applications.—All applications must be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given him, the application will be regarded as abandoned, unless it is shown to the commissioner that the delay was unavoidable.¹

§ 1665. Patents to Assignee of Inventor—To Executor.—Patents may be granted and issued or reissued to the assignee of the inventor or discoverer; but the assignment must first be entered of record in the office. And in all cases of an application by an assignee for the issue of a patent, the application must be made and the specification sworn to by the inventor or discoverer; and in all cases of an application by an assignee for the issue of a patent, the application must be made and the specification sworn to in like manner; and in all cases of an application for a reissue of any patent, the application must be made and the corrected specification signed by the inventor or discoverer, if he is living, unless the patent was issued and the assignment made before the 8th of July, 1870.² One's right of applying for and obtaining a patent devolves upon his executor or administrator in trust for the heirs at law or his devisees.³

§ 1666. Renewal of Application after Failure to Pay Fees.—A person who fails to make payment of the final fee within six months from the time at which the patent was allowed, and notice thereof, may make an application for a patent for such invention or discovery the same as in the case of an original application. Such second

¹ Id., sec. 4894; *Bell v. Daniels*, 1 Bond, 212.

² Id., sec. 4895; *Gayler v. Leonard*,

10 How. 477; *Swift v. Whisen*, 3 Fish. Pat. Cas. 343.

³ Id., sec. 4896; *Rubber Co. v. Good-year*, 9 Wall. 788.

application must be made within two years after the allowance of the original application, and no person is responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent. Upon the hearing of the renewed applications, abandonment is to be considered as a question of fact.¹

§ 1667. Assignments of Patents.—Every patent, or any interest therein, is assignable in law by an instrument in writing; and the patentee, or his assigns or legal representative, may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance is void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the patent-office within three months from the date thereof.²

§ 1668. Purchaser of Invention before Application may Use and Sell.—Every person who purchases from the inventor or discoverer, or with his knowledge or consent constructs, any newly invented or discovered machine or other patentable article prior to the application by the inventor or discoverer for a patent, or who sells or uses one so constructed, has the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor.³

§ 1669. Patented Articles to be Marked — Penalty.—Notice must be given to the public that an invention is patented, either by fixing thereon the word “patented,”

¹ Id., sec. 4897.

² Id., sec. 4898; *Hartshorn v. Day*, 19 How. 211; *Ennson v. Dodge*, 18 Wall. 414; *Perry v. Corning*, 7 Blatchf. 195; *Celluloid Mfg. Co. v. Goodyear Dental Vul. Co.*, 13 Blatchf. 375; *Pitts*

v. Jameson, 15 Barb. 310; *McKay v. Wooster*, 2 Saw. 373; *Turnbull v. Weir Plow Co.*, 6 Biss. 225.

³ Id., sec. 4899; *Kendall v. Winsor*, 21 How. 322; *Sargent v. Seagrave*, 2 Curt. 555; *Root v. Ball*, 4 McLean, 177.

together with the day and year the patent was granted, or, when from the character of the article this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit for infringement by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued after such notice to make, use, or vend the article so patented.¹ And for falsely marking an article as patented which is not so, or which is patented by another, a penalty of one hundred dollars is provided for each offense, one half to go to the person who shall sue for the same, and the other half to the United States.²

§ 1670. **Caveats—Filing and Effect of.**—An inventor who desires further time to mature his invention may file a caveat setting forth the design thereof, and of its distinguishing characteristics, and praying protection of his right until he shall have matured his invention. Such caveat shall be filed in the confidential archives of the office, and preserved in secrecy, and shall be operative for the term of one year from the filing thereof. If application is made within the year by any other person for a patent with which such caveat would in any manner interfere, the commissioner shall deposit the description, specification, drawings, and model of such application in like manner in the confidential archives of the office, and give notice thereof by mail to the person by whom the caveat was filed. If such person desires to avail himself of his caveat, he must file his description, specifications, drawings, and model within three months from the time of mailing the notice in Washington, with the usual time required for transmitting it to the caveator added thereto,

¹ Id., sec. 4900; *Rubber Co. v. Goodyear*, 9 Wall. 788; *Goodyear v. Allyn*, 6 Blatchf. 33. ² Id., sec. 4901.

and which time must be indorsed on the notice. An alien has a similar privilege, if he has resided in the United States one year next preceding the filing of his caveat, and has made oath of his intention to become a citizen.¹

§ 1671. **Rejection of Claim, Notice of.**—Whenever on examination any claim for a patent is rejected, the commissioner shall notify the applicant thereof, giving him briefly the reasons for such rejection, together with such information and references as may be useful in judging of the propriety of renewing his application or of altering his specification; and if after receiving such notice the applicant persists in his claim for a patent, with or without altering his specification, the commissioner shall order a re-examination of the case.²

§ 1672. **Interferences.**—Whenever an application is made for a patent which, in the opinion of the commissioner, would interfere with any pending application, or with any unexpired patent, he must give notice thereof to the applicants or applicant and patentee, as the case may be, and must direct the primary examiner to proceed to determine the question of priority of invention. And the commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time, not less than twenty days, as the commissioner shall prescribe.³

§ 1673. **Affidavits — Depositions — Subpoenas — Witness Fees.**—Affidavits and depositions in cases before the commissioner may be taken before any officer authorized by law to take depositions to be used in the courts of the United States, or of the state where the officer resides.⁴

¹ Id., sec. 4902; *Bell v. Daniels*, 1 Bond, 212; *Weston v. White*, 13 Blatchf. 447.

² Id., sec. 4903.

³ Id., sec. 4904.

⁴ Id., sec. 4905.

The clerk of any United States court for any district or territory wherein testimony is to be taken for use in any contested case pending in the office must, on the application of any party thereto, issue a subpœna for any witness residing or being within such district or territory, commanding him to appear at any time and place in the subpœna stated, but such place must not be more than forty miles from the place where the witness is served.¹ Witnesses are allowed the same fees as witnesses in the United States courts.²

§ 1674. Penalty for Refusing to Testify.—When a witness duly subpœnaed neglects or refuses to appear, or refuses to testify, the judge of the court whence the subpœna issued may enforce obedience to process, or punish disobedience, as in other like cases, provided his fees and traveling expenses to and fro and one day's attendance are tendered him at the time of service of the subpœna; and he is not bound to disclose any secret invention or discovery made or owned by himself.³

§ 1675. Appeal from Primary Examiner.—Every applicant for a patent or for its reissue, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences, in such case, to the board of examiners-in-chief,⁴ and from there to the commissioner in person,⁵ and from there (except a party to an interference) to the supreme court of the district of Columbia sitting in bank.⁶

§ 1676. Proceedings on Appeal from Commissioner—Determination of.—Notice must be given to the commissioner, and by him to all parties interested. Certified copies of all the original papers and evidence in the case, and the

¹ Id., sec. 4906.

² Id., sec. 4907.

³ Id., sec. 4908.

⁴ Id., sec. 4909.

⁵ Id., sec. 4910.

⁶ Id., sec. 4911.

commissioner's grounds of decision, must be filed. The commissioner and the examiners may be examined under oath.¹ The court, on petition, must hear and determine the appeal, and revise the decision appealed from in a summary way, on the evidence produced before the commissioner, at such early and convenient time as the court may appoint; and the revision is to be confined to the points set forth in the reasons of appeal. After hearing the case the court must return to the commissioner a certificate of its proceedings and decision, which are to be entered of record in the office, and are to govern the proceedings in the case. But no such decision is to preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question.²

§ 1677. **Suit in Equity for Patent.** — When a patent on application is refused, either by the commissioner or the supreme court of the District of Columbia, the applicant has his remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention as specified in his claim, or for any part thereof. And such adjudication, if it be in favor of the right of the applicant, authorizes the commissioner to issue the patent, on the applicant filing in the office a copy of the adjudication and otherwise complying with the requirements of law. In all cases where there is no opposing party, a copy of the bill is to be served on the commissioner; and all the expenses of the proceeding are to be paid by the applicant, whether the final decision is in his favor or not.³

§ 1678. **Reissue of Defective Patents.** — When any patent is inoperative or invalid by reason of a defective

¹ Id., sec. 4913.

² Id., sec. 4914.

³ Id., sec. 4915.

or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent intention, the commissioner must, on the surrender of the patent and payment of the duty, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. The surrender takes effect upon the issue of the amended patent. The commissioner may cause several patents to be issued for distinct and several parts of the thing patented, upon demand of the applicant for a reissue of each of such reissued letters patent. The specifications and claim in every such case are subject to revision and restriction in the same manner as original applications. Every patent so reissued, together with the corrected specification, has the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter can be introduced into the specification, nor in case of a machine patent can the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake.¹

§ 1679. Disclaimer.—When through mistake and without fraud a patentee has claimed more than that of

¹ *Id.*, sec. 4916; *Shaw v. Cooper*, 7 M. 126; *Cahart v. Austin*, 2 Cliff. 528; *Pet. 292*; *Wilson v. Rousseau*, 4 How. 646; *Commissioner v. Whitely*, 4 Wall. 522; *Carlton v. Bokee*, 17 Wall. 463; *Woodward v. Stone*, 3 Story, 753; *Woodworth v. Edwards*, 3 Wood. & Potter v. Holland, 4 Blatchf. 206; *Russell v. Dodge*, 93 U. S. 460; *Tarr v. Webb*, 10 Blatchf. 96; *Calkins v. Bertram*, 6 Biss. 494.

which he was the original or first inventor or discoverer, his patent is valid for all that part which is truly and justly his own, provided it is a material part of the thing patented; and any such patentee, his heirs or assigns, may, on payment of the fee required by law, make disclaimer of such parts of the thing patented as he does not choose to claim by virtue of the patent or assignment, stating therein the extent of his interest in such patent. Such disclaimer is to be in writing, attested by one or more witnesses, and recorded in the office; and it is thereafter to be considered as part of the original specification to the extent of the interest possessed by the claimant and of those claiming under him after the record thereof. But no disclaimer affects any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it.¹

§ 1680. Suits relating to Interfering Patents.—When there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee and all parties interested under him by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment affects the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment.²

¹ Id., sec. 4917; *Silsby v. Foote*, 14 How. 218; *Seymour v. McCormick*, 19 How. 206; *Reed v. Cutter*, 1 Story, 600; *Tuck v. Bramhill*, 6 Blatchf. 95; *Rumford Chemical Works v. Laner*, 10 Blatchf. 122; *Brooks v. Jenkins*, 4 McLean, 449; *Whitney v. Emmett*, 1 Bald. 313.

² Id., sec. 4918; *Foster v. Lindsay*, 3 Dill. 127.

§ 1681. Suits relating to Infringement — Treble Damages. — Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damage sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs.¹

§ 1682. Pleading and Proof in Actions for Infringement. — In any action for infringement the defendant may plead the general issue, and having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters: 1. That for the purpose of deceiving the public the description and specification filed by the patentee in the office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or 2. That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or 3. That it had been patented and described in some printed publication prior to his supposed invention or discovery thereof; or 4. That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or 5. That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. And in notices as to proof of previous invention, knowledge, or use

¹ Id., sec. 4919; *Dean v. Mason*, 20 How. 198; *Corporation of New York v. Rausom*, 23 How. 487; *Moore v. Marsh*, 7 Wall. 515; *Mowry v. Whitney*, 14 Wall. 620; *Mitchell v. Hawley*, 16 Wall. 544; *Philp v. Nock*, 17 Wall. 460; *Birdsall v. Coolidge*, 93 U. S. 64.

of the thing patented, the defendant must state the names of patentees and the dates of their patents and when granted, and the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged is found for the defendant, judgment must be rendered for him, with costs. And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect.¹

§ 1683. Infringement where Specification too Broad.—Whenever through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee has in his specification claimed to be the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, may maintain a suit at law or in equity for the infringement of any part thereof which was *bona fide* his own, if it is a material and substantial part of the thing patented and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree is rendered for the plaintiff, no costs are recoverable, unless the proper disclaimer has been entered at the office before the commencement of the suit; and no patentee is entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer.²

¹ Id., sec. 4920; *Blanchard v. Putnam*, 8 Wall. 420; *Wise v. Allis*, 9 Wall. 737; *Collender v. Griffith*, 11 Blatchf. 212; *Union Paper Bag Machine Co. v. Newell*, 11 Blatchf. 549; *Cohn v. U. S. Corset Co.*, 12 Blatchf. 225; *Andrews v. Carman*, 13 Blatchf. 307; *Webster Loom Co. v. Higgins*, 13 Blatchf. 349; *Johnson v. Farrman*, 1 Wood, 138; *Coolidge v. McCone*, 2 Saw. 571.

² Id., sec. 4922; *O'Reilly v. Morse*, 15 How. 62; *Seymour v. McCormick*, 19 How. 106; *Silsby v. Foote*, 20 How.

§ 1684. **Previous Use in Foreign Country.**— Whenever it appears that a patentee at the time of making his application for the patent believed himself to be the original and first inventor or discoverer of the thing patented, the patent is not void on account of the invention or discovery having been known or used in a foreign country before his invention or discovery thereof, if it had not been patented or described in a printed publication.¹

§ 1685. **Extension of Patents Granted Prior to March 2, 1861.**— Where the patentee of any invention or discovery the patent for which was granted prior to the 2d of March, 1861, desires an extension of such patent beyond the original term of its limitation, he may apply therefor in writing to the commissioner, setting forth the reasons why such extension should be granted; and he must furnish a written statement under oath of the ascertained value of the invention or discovery, and of his receipts and expenditures on account thereof, sufficiently in detail to exhibit a true and faithful account of the loss and profit in any manner accruing to him by reason of the invention or discovery. Such application must be filed not more than six months nor less than ninety days before the expiration of the original term of the patent, and no extension will be granted after the expiration of the original term;² and of this application notice by publication must be given by the commissioner.³

§ 1686. **Proceedings—Operation of Extension.**— Upon the publication of the notice, the commissioner must refer the case to the principal examiner having charge of the class of inventions to which it belongs,

378; *Vance v. Campbell*, 1 Black, 427; *Wyet v. Stone*, 1 Story, 273; *Reed v. Cutter*, 1 Story, 600; *Pitts v. Whitman*, 2 Story, 621; *Hall v. Wilds*, 2 Blatchf. 198; *Brooks v. Jenkins*, 3 McLean, 449.

¹ *Id.*, sec. 4923; *Judson v. Cope*, 1

Bond, 327; *Bartholomew v. Sawyer*, 1 Fish. Pat. Cas. 516; *How v. Morton*, 1 Fish. Pat. Cas. 586.

² *Id.*, sec. 4924; *Commissioner v. Whitely*, 4 Wall. 522. So are patents for designs: *Id.* sec. 4932.

³ *Id.*, sec. 4925.

who must make the commissioner a full report of the case, stating particularly whether the invention was new and patentable when the original patent was granted.' The commissioner must hear and decide upon the evidence produced, both for and against the extension; and if it appears to his satisfaction that the patentee, without neglect or fault on his part, has failed to obtain from the use and sale of his invention or discovery a reasonable remuneration for the time, ingenuity, and expense bestowed upon it, and the introduction of it into use, and that it is just and proper, having due regard to the public interest, that the term of the patent should be extended, the commissioner is to make a certificate thereon, renewing and extending the patent for the term of seven years from the expiration of the first term. Such certificate is to be recorded in the office; and thereupon the patent is to have the same effect in law as though it had been originally granted for twenty-one years.² The benefit of the extension of a patent extends to the assignees and grantees of the right to use the thing patented to the extent of their interest therein.³

§ 1687. Patents for Designs.—Any person who by his own industry, genius, efforts, and expense has invented and produced any new and original design for a manufacture, bust, statue, alto-relievo, or bas-relief; any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, patent, print, or picture to be printed, painted, cast, or otherwise placed on or worked into any article of

¹ Id., sec. 4926.

² Id., sec. 4927; *Woodworth v. Edwards*, 3 Wood. & M. 120; *Gibson v. Harris*, 1 Blatchf. 167; *Colt v. Young*, 2 Blatchf. 471.

³ Id., sec. 4928; *Wilson v. Rousseau*, 4 How. 646; *Bloomer v. McQuewan*, 14 How. 549; *Chaffee v. The Boston Belting Co.*, 22 How. 223;

Bloomer v. Millinger, 1 Wall. 340; *Nicholson Paving Co. v. Jenkins*, 14 Wall. 452; *Eanson v. Dodge*, 18 Wall. 414; *Gibson v. Cook*, 2 Blatchf. 146; *Blanchard v. Whitney*, 3 Blatchf. 307; *Day v. Rubber Co.*, 3 Blatchf. 488; *Phelps v. Comstock*, 4 McLean, 353; *Wooster v. Seidenberg*, 13 Blatchf. 88.

manufacture; or any new, useful, and original shape or configuration of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, — may, upon payment of the fee prescribed and other due proceedings had the same as in cases of inventions or discoveries, obtain a patent therefor.¹ Patents for designs may be granted for three years and six months, or for seven years, or for fourteen years, as the applicant may, in his application, elect.² The regulations of the statute as to patents apply to designs.³

§ 1688. Penalty for Using Patented Design without Authority. — During the term of a patent for a design, it is unlawful for any person other than, and without the license of, the owner to apply such design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or to sell, or expose for sale, any article of manufacture to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so applied. The penalty is two hundred and fifty dollars; and in case the total profit made by him from such manufacture or sale exceed the sum of two hundred and fifty dollars, he is liable also for the excess of such profit over and above such sum of two hundred and fifty dollars; and the full amount may be recovered by the owner of the patent, to his own use, in any United States circuit court having jurisdiction of the parties, either by action at law or upon a bill in equity to restrain such infringement.⁴

§ 1689. Jurisdiction — Of the Federal Courts. — The consolidation act of 1870 confirmed the jurisdiction in

¹ Id., sec. 4929; *Clark v. Bousfield*, 10 Wall. 133; *Gorham Co. v. White*, 14 Wall. 511; *Booth v. Garelly*, 1 Blatchf. 247; *Root v. Ball*, 4 McLean, 180.

² Id., sec. 4931.

³ Id., sec. 4933.

⁴ 24 U. S. Stats., c. 143, p. 387.

the circuit courts given by previous acts, and extended it to any district court having the powers and jurisdiction of a circuit court, and to the supreme court of the District of Columbia or of any territory. Under section 629 of the United States Revised Statutes, jurisdiction is conferred on the circuit courts of the United States in all suits at law or in equity arising under the patent laws of the United States. And power to award damages and grant injunctions in such suits is vested in those courts by sections 4919 and 4921,¹ and these are the statutes under which the circuit courts now exercise jurisdiction in patent cases. The district courts of the United States for the eastern district of Arkansas, at Helena, the western district of Arkansas, the northern district of Mississippi, the western district of South Carolina, and the district of West Virginia, have similar jurisdiction.² Controversies arising upon conflicting claims to or under patents issued under the laws of the United States are cases arising under those laws, and it is upon that theory that the circuit courts have from the foundation of the government entertained jurisdiction of patent cases.³ This jurisdiction is altogether distinct from that exercised by those courts sitting merely as courts of equity in many cases where the subject-matter of the dispute may consist of letters patent; for in such cases the grounds of the jurisdiction arise from some other statutory provision, or are inherent in the court, and the fact of the dispute relating to a patent is merely accidental, and has no bearing upon the question of jurisdiction.⁴

The question of whether the complainant's patent is good and valid is not one for the equity side of the court,

¹ U. S. Rev. Stats.

² U. S. Rev. Stats., sec. 571; 19 U. S. Stats., c. 41, p. 230.

³ Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co., 13 Blatchf. 375; Cohens v. Virginia, 6 Wheat. 378; Littlefield v. Perry, 21 Wall. 222.

⁴ Brooks v. Miller, 18 Fed. Rep. 615; Consolidated Middlings Purifier Co. v. Wolf, 28 Fed. Rep. 814; Gorrell v. Dickson, 26 Fed. Rep. 454; Pope Mfg. Co. v. Owsley, 27 Fed. Rep. 100.

but belongs to a court of law with the right of trial by jury;¹ but the mere fact that a contract pertains to a patent does not give a federal court jurisdiction,² though if an infringement is proved, jurisdiction is inferred, and having power to protect the rights of a party under a patent, the court will take cognizance of other matters as incidental to the infringement.³ If the court has jurisdiction of the parties, they may be restrained from committing acts of infringement, even though such acts may be committed outside the jurisdiction of the court,⁴ and an action for the infringement of a patent could formerly be maintained in any circuit court within and for any district where the defendant was found and served with process;⁵ but the act of March 3, 1887, has restricted such suits to the district in which the defendant is an inhabitant,⁶ and it has been construed as exempting corporations from such suits outside of the district or districts of the states in which they are respectively incorporated.⁷ A suit to recover royalties under a license, to determine the right of the licensee, to alienate his interests, and the like, is not such a suit on a patent as will give a federal court jurisdiction.⁸ The federal courts have jurisdiction to enjoin the use of a patented invention and for an account of profits by the infringer, notwithstanding an action at law may be maintained to recover damages for the infringement;⁹ but a claim for relief against setting up a false title to a patent does not confer such jurisdiction.¹⁰ Where a bill of complaint

¹ *Sullivan v. Redfield*, 1 Paine, 441.

² *Burr v. Gregory*, 2 Paine, 426; *Nesmith v. Calvert*, 1 Wood. & M. 34; *Wilson v. Sanford*, 10 How. 99; *Goodyear v. Day*, 1 Blatchf. 565; *Dean v. Mason*, 20 How. 198.

³ *Bloomer v. Gilpin*, 4 Fish. Pat. Cas. 50.

⁴ *Boyd v. Alpin*, 3 McLean, 427; *Wilson v. Sherman*, 1 Blatchf. 536; *Goodyear v. Chaffee*, 3 Blatchf. 268.

⁵ *Allen v. Blunt*, 1 Blatchf. 480.

⁶ 24 U. S. Stats., c. 373, p. 552;

Reinstadler v. Reeves, 33 Fed. Rep. 308.

⁷ *Halstead v. Manning*, 34 Fed. Rep. 565.

⁸ *Merserole v. Union Paper Collar Co.*, 6 Blatchf. 356; *Florence Sewing Mach. Co. v. Singer Mfg. Co.*, 8 Blatchf. 113; *Brooks v. Stolley*, 3 McLean, 523; *Willis v. McCullen*, 29 Fed. Rep. 641.

⁹ *McMillin v. Barclay*, 3 Pittsb. Rep. 377.

¹⁰ *Prime v. Brandon Mfg. Co.*, 16 Blatchf. 453.

alleges the infringement of a patent, and also alleges that the defendants seek to justify their infringement by reason of purchasing the patented articles from a party claiming the right to make the same, which right the complainant denies, a federal court sitting in equity has jurisdiction of the action.¹ When the patentee has infringed his license, and, while holding the legal title to the patent in trust for his licensee, has been faithless to his trust, courts of equity are always open to the redress of such a wrong. This wrong is an infringement. Its redress involves a suit, therefore, arising under the patent laws, and of that suit the circuit court has jurisdiction.² When a claim is made by the owner of a patent right against the government of the United States for compensation for implied or express licenses to the government to make and use a patented invention, the court of claims has jurisdiction in the matter, and the claimant is without redress in the circuit court.³ But the question whether that court has jurisdiction, where the government makes or uses specimens of a patented invention without the consent of the patentee, is one at present not definitely decided. The difficulty arises from the act being a tort, and the court of claims having no jurisdiction in tort;⁴ and the court of claims has no jurisdiction in a case where a government subordinate infringes upon a patent upon his own motion and authority.⁵

§ 1690. Of the State Courts. — Prior to the passage of the act of Congress approved March 3, 1875,⁶ it had been definitely settled that a state court had no jurisdiction of a suit for an infringement of a patent,⁷ or of interfering

¹ *Seibert Cylinder Oil Cup Co. v. Manning*, 32 Fed. Rep. 625.

² *Stanley R. & L. Co. v. Bailey*, 14 Blatchf. 510.

³ *McKeever v. U. S.*, 14 N. & H. 396; *Morse Mfg. Co. v. U. S.*, 16 N. & H. 296; *Burns v. U. S.*, 4 Nott & H. 113.

⁴ *James v. Campbell*, 104 U. S. 358.

⁵ *Pitcher v. U. S.*, 1 Nott & H. 7.

⁶ 18 U. S. Stats., pt. 3, ch. 137, p.

470.

⁷ *Parsons v. Barnard*, 7 Johns. 144; *Brooks v. Stalley*, 3 McLean, 523; *Merserole v. U. Paper Collar Co.*, 6 Blatchf. 356; *Smith v. McClelland*, 11 Bush, 523.

patents;¹ but under the language of section 1 of that act doubts have arisen as to whether the congressional prohibition theretofore existing has not been thereby removed, and that state courts may, by virtue of their inherent authority, exercise jurisdiction in cases of infringement, where the scope or validity of the patent does not come in question. The point has not yet been definitely settled, though the ruling in a recent case would seem to indicate that state courts do not possess such jurisdiction. The matter was not, however, expressly brought before the court, and is still left undecided.² There is no doubt that a state court has jurisdiction of questions of contract relating to patents, unless the question is one which concerns the scope of the patent or its validity; and even when such scope or validity is involved, a state court has jurisdiction, if the questions are simply collateral to the main issue in the case, notwithstanding such questions arise under the patent laws, and give jurisdiction to a federal court.³ Though complainant's right to a patent in question may rest in contract, yet if an injunction is sought against defendants from an infringement of such a patent, a federal court can take jurisdiction.⁴

State courts have no jurisdiction of causes wherein the validity and infringement of patents are directly in issue, and the direct assent of the parties cannot confer such jurisdiction.⁵ In a suit for an injunction based upon a contract relating to a patent, a federal court may have jurisdiction by reason of the citizenship of the parties, but it does not take jurisdiction because the subject of the contract is a patent.⁶ If a patentee parts with the whole

¹ *Gibson v. Woodworth*, 8 Paige, 132.

² *Continental Store Co. v. N. Y. Store Service Co.*, 31 O. G. 1561.

³ *Campbell v. James*, 2 Fed. Rep. 338; *Rice v. Hotchkiss*, 16 Conn. 409; *Nesmith v. Calvert*, 1 Wood. & M. 34; *Lindsay v. Roraback*, 4 Jones Eq. 124; *Slemmer's Appeal*, 58 Pa. St. 155; 98 Am. Dec. 248; *Sherman v.*

Champlain Transportation Co., 31 Vt. 162; *Read v. Miller*, 2 Biss. 12; *David v. Park*, 103 Mass. 501; *Middlebrook v. Broadbents*, 47 N. Y. 443; 7 Am. Rep. 457; *Blakeney v. Goode*, 30 Ohio St. 350.

⁴ *Nesmith v. Calvert*, 1 Wood. & M. 34.

⁵ *Dudley v. Mayhew*, 3 N. Y. 9.

⁶ *Goodyear v. Day*, 1 Blatchf. 565.

right secured by his patent, either for cash or upon the purchaser's entering into a covenant to pay him a certain sum of money or to do certain other things, the patentee has, after such a sale, no right vested in him secured by any act of Congress; and when a portion of the right is parted with, the rule is the same as respects such portion.¹ Where the question is one of the recovery of damages for fraudulent representations in the sale of a patent right, jurisdiction may be taken by the state court.²

A state court has jurisdiction to decree a license and agreement to be void and inoperative for fraud or any other adequate reason; and the fact that, in the investigation, the state court is obliged to inquire whether there was anything new in the patent which could operate as a consideration for the license and agreement, does not deprive the state court of jurisdiction, or confer it on the federal court.³ And a state court has jurisdiction of causes which involve the question of the novelty or utility of a patent as a consideration for a promise to pay money;⁴ and also of a suit to foreclose a mortgage of a patent;⁵ also where the question at issue is whether one party agreed to take a patent of another party.⁶ Where the controversy turns upon the effect of the contract, and not upon the letters patent, the case is within the jurisdiction of a state court;⁷ and an assignee can proceed in a state court for an injunction against an infringement of his rights by his assignor.⁸ A state court has jurisdiction of a case in which it is sought to set aside a patent on the ground of fraud;⁹ and in an action for the recovery of

¹ *Goodyear v. U. I. Rubber Co.*, 4 Blatchf. 63.

² *Hunt v. Hoover*, 24 Iowa, 231.

³ *Merserole v. U. Paper Collar Co.*, 6 Blatchf. 356; *Willis v. McCullen*, 29 Fed. Rep. 641.

⁴ *Page v. Dickerson*, 28 Wis. 694; 9 Am. Rep. 532.

⁵ *Boston and F. I. Works v. Montague*, 108 Mass. 248.

⁶ *Lockwood v. Lockwood*, 33 Iowa, 509; *Perry v. Littlefield*, 17 Blatchf. 272.

⁷ *Florence Sewing Mach. Co. v. G. & B. Sewing Mach. Co.*, 110 Mass. 70; 14 Am. Rep. 579; *Consolidated Fruit Jar Co. v. Whitney*, 2 B. & Ard. Pat. Cas. 30.

⁸ *Stone v. Edwards*, 35 Tex. 556.

⁹ *Leonard v. Barnum*, 34 Wis. 105.

money promised to be paid for an interest in a patent, it is open for the state court to go into the question of the validity of the patent.¹ Where the title and possession of a patent are vested in a receiver, a state court has jurisdiction to punish interference with him therein.² Where the suit was simply on a license on a certain contract between the parties, it was held that there was no question arising under the patent laws, and no jurisdiction in a United States court.³ Where a court is created and its objects are to be carried out within a certain state, the validity of a transfer of a patent involved in the creation of such trust is to be tested by the law of the state, though the matter may be in question in a suit in a federal court.⁴ Though a state court may enjoin the disposition of patents when the title thereto is in doubt, it may not enjoin the use of the patented mechanism; for the federal courts have exclusive jurisdiction of the prevention of the infringement of patentable inventions.⁵

§ 1691. Injunctions to Restrain Infringements.—The exercise of this equitable branch of jurisdiction is conferred by the same statutes and upon the same courts as are empowered to exercise common-law jurisdiction in patent cases. The statutory provision is, that the courts vested with jurisdiction under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable.⁶ Although the statute gives original cognizance of patent controversies equally to courts

¹ *Rice v. Garnhart*, 34 Wis. 453; 17 Am. Rep. 448.

² *In re Woven Tape Skirt Co.*, 12 Hun, 111.

³ *Kelly v. Porter*, 8 Saw. 482.

⁴ *Ladd v. Mills*, 22 Blatchf. 242.

⁵ *Continental Store Co. v. N. Y. Store Service Co.*, 31 O. G. 1561.

⁶ *Id.*, sec. 4921; *Woodworth v. Wilson*, 4 How. 712; *Hogg v. Emerson*, 11

How. 587; *Livingston v. Woodworth*, 15 How. 546; *Seymour v. McCormick*, 16 How. 489; *Dean v. Mason*, 20 How. 198; *Mitchell v. Hawley*, 16 Wall. 544; *Nesmith v. Calvert*, 1 Wood. & M. 34; *Goodyear v. Allyn*, 6 Blatchf. 33; *Ogle v. Ege*, 4 Wash. 584; *Cochrane v. Deener*, 94 U. S. 780; *Hockholzer v. Eager*, 2 Saw. 361; *Smith v. Pryor*, 2 Saw. 461.

of equity as to courts of law, and consequently the chancellor may decide a controversy as to infringement without requiring a previous verdict in a court of law, yet it does not follow that all distinction as to remedies granted by each tribunal is to be abolished. A court of law cannot issue an injunction, nor a court of equity take jurisdiction, to enforce a penalty or merely punitive damages. Each court will give the remedy peculiar to its own functions.¹

Injunctions to restrain infringements are either preliminary or perpetual. A preliminary injunction may be granted at any time between the filing of the bill and the hearing of the suit. In order to obtain an injunction before trial there must be not only proof of a patent, but also of some length of use under it, or some considerable sales under it, or some recovery establishing the validity of it beyond its mere issuance. A preliminary injunction is never granted as a matter of course.² An inventor's claim to inchoate right to his invention when acquiesced in by the public is sufficient to support an application for a preliminary injunction prior to the grant of the patent.³ A preliminary injunction will be granted to restrain infringement of a subsequent patent which has not been litigated, where the prior expired patent of the same patentee involved the broad principle and had been frequently sustained, and the infringement was willful.⁴ Whenever upon a motion for a preliminary injunction a fair and reasonable doubt exists upon the facts presented as to whether defendant has actually been guilty of an infringement, or when it does not satisfactorily appear that the complainant is the first and sole inventor of the

¹ *Livingston v. Jones*, 3 Wall. Jr. 330; *Sanders v. Logan*, 9 Am. Law Reg. 475.

² *Hovey v. Stevens*, 1 Wood. & M. 290; *Potter v. Whitney*, 1 Low. 87; *Doughty v. West*, 2 Fish. Pat. Cas. 553; *White v. Heath*, 10 Fed. Rep. 291; *American Nicholson Pavement*

Co. v. City of Elizabeth, 4 Fish. Pat. Cas. 189; *Putnam v. Wetherbee*, 1 Holmes, 497; *Ladd v. Cameron*, 25 Fed. Rep. 37.

³ *Sargent v. Seagrave*, 2 Curt. 553.

⁴ *Plimpton v. Winslow*, 3 Fed. Rep. 333.

improvements claimed, a preliminary injunction will be refused.¹ A court of equity will not grant a preliminary injunction where both an equitable defense and a legal defense are relied on by the alleged infringer, though the bill may be retained until after the trial of the action at law.² Where a reissue is obtained, not to correct a mistake, but to secure broad claims that will ostensibly cover more comprehensive rights than belong to the patentee, a preliminary injunction will not be granted to restrain infringement of a good claim, if the defendant has acted in the honest belief that the reissue was wholly void.³ Where the patent has recently been issued, has never been litigated, and its validity is seriously contested, a preliminary injunction will not be granted.⁴

A preliminary injunction will not be granted where it appears that the doing so would work irreparable injury to the defendant, without there being any corresponding necessity for it to protect the plaintiff's alleged rights. It is not a matter of course, upon the presentation of a patent, which *prima facie* establishes the right of the patentee to the thing patented, accompanied by an allegation that the defendant is violating it, that a preliminary injunction will issue; but it must appear likewise that if the injunction is not presently granted, the complainants will be irreparably injured, and that no subsequent decree of the court can sufficiently ascertain and make good their damages.⁵ An application for a preliminary in-

¹ Cross v. Livermore, 9 Fed. Rep. 607; Cooper v. Matthews, 8 Law Rep. 413; Dodge v. Card, 1 Bond, 398; Hardy v. Marble, 10 Fed. Rep. 752; Marks v. Corn, 11 Fed. Rep. 900; Dorlan v. Guie, 25 Fed. Rep. 816.

² City of Concord v. Norton, 16 Fed. Rep. 477.

³ Western Union Tel. Co. v. Baltimore and Ohio Tel. Co., 25 Fed. Rep. 30.

⁴ White v. Harris & Sons Mfg. Co., 3 Fed. Rep. 161; Onderdonk v. Fanning, 5 B. & Ard. Pat. Cas. 562; Fish

v. Domestic Sewing Mach. Co., 12 Fed. Rep. 495; McGuire v. Eames, 15 Blatchf. 312; Gunn v. Savage, 25 Fed. Rep. 101; New York Belting and Packing Co. v. Magowan, 23 Fed. Rep. 596; Illingsworth v. Spaulding, 9 Fed. Rep. 154.

⁵ Pullman v. R. R. Co., 4 Hughes, 236; Morris v. Shelbourne, 8 Blatchf. 266; Burleigh Rock-drill Co. v. Lobdell, 1 Holmes, 450; Morris v. Lowell Mfg. Co., 3 Fish. Pat. Cas. 67; Batten v. Silliman, 3 Wall. Jr. 124; N. Y. Grape Sugar Co. v. American Grape

junction should be made promptly, and where the complainant has been guilty of laches, and the granting of the injunction would seriously injure the defendant, the order will not be made.¹ Where the plaintiff's right has never been established at law, and is disputed by others besides the defendant, and has never been acquiesced in by the public, a preliminary injunction will not be granted.² The application is addressed to the discretion of the court, except where the validity of the patent and its infringement are clear, and the court will not decide doubtful questions of law or fact upon a motion for a preliminary injunction.³ Where the complainant is successful on the hearing and the preliminary injunction has been granted, it is made perpetual by the decree, unless some special reason exists for its being refused or being postponed till after the master's report, or being suspended pending an appeal.⁴ A perpetual injunction is defined to be a part of the decree made at the hearing on the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or restrained from the commission of an act which would be contrary to equity and good conscience.⁵

A perpetual injunction will generally be refused where the patent has expired at the date of the interlocutory

Sugar Co., 10 Fed. Rep. 835; *Hoe v. Boston Daily Advertiser Corp.*, 14 Fed. Rep. 914; *Zinsser v. Cooledge*, 17 Fed. Rep. 538.

¹ *Hockholzer v. Eager*, 2 Saw. 361; *Andrews v. Spear*, 3 B. & Ard. Pat. Cas. 82; *Jones v. Merrill*, 8 O. G. 401; *Whitney v. Rollstone Mach. Works*, 2 B. & Ard. Pat. Cas. 170.

² *Serrell v. Collins*, 4 Blatchf. 62; *North v. Kershaw*, 4 Blatchf. 70; *Smith v. Cummings*, 1 Fish. Pat. Cas. 152; *Wooster v. Howe Machine Co.*, 16 O. G. 314; *American Carpet Lining Co. v. Beale*, 5 B. & Ard. Pat. Cas. 529; *Gold and Stock Telegraph Co. v. Commercial Telegraph Co.*, 22 Fed. Rep. 838; *Continental Store Service Co. v.*

N. Y. Store Service Co., 31 O. G. 1561.

³ *Earth Closet Co. v. Fenner*, 5 Fish. Pat. Cas. 15; *Irwin v. Dane*, 2 Biss. 442; *Batten v. Silliman*, 3 Wall. Jr. 124; *Bailey Wringing Mach. Co. v. Adams*, 3 B. & Ard. Pat. Cas. 96; *Green v. French*, 16 O. G. 215; *Parker v. Sears*, 1 Fish. Pat. Cas. 93; *Union Paper Bag Co. v. Binney*, 5 Fish. Pat. Cas. 166; *Cary v. Lowell Mfg. Co.*, 32 O. G. 1009; *Colgate v. Gold and Stock Tel. Co.*, 16 Blatchf. 503; *Winans v. Eaton*, 1 Fish. Pat. Cas. 181.

⁴ *Potter v. Mack*, 3 Fish. Pat. Cas. 430; *Rumford Chemical Works v. Hecker*, 2 B. & Ard. Pat. Cas. 388.

⁵ *Motte v. Bennett*, 2 Fish. Pat. Cas. 642.

decree, except that the defendant will be enjoined from using or selling after the expiration of the patent those specimens of the patented thing which he unlawfully made before that expiration.¹ Where the defendant admits the infringement, but alleges that after notice he refrained from further infringing, and undertakes not to infringe in future, there is no reason why the injunction should not be made perpetual.² But the court will refuse to grant a perpetual injunction where it is shown that the complainant has assigned, prior to decree, all his interest in the future duration of the patent right infringed by the defendant.³ There is no inflexible rule requiring a court of equity to refuse a permanent injunction upon a final hearing, on the ground that validity and infringement have not been established by the verdict of a jury.⁴

A perpetual injunction will be postponed until final decree, when such postponement is necessary to save the defendant from special hardship, and is not injurious to the just rights of the complainant; but where such a postponement is allowed, the defendant will be required to give a bond for the security of the complainant.⁵ Where the allowance of an injunction would cause much greater injury to the respondent than benefit to the complainant, the decree will be for an account only.⁶ A perpetual injunction may be suspended, pending an appeal from a final decree to the supreme court, at the discretion of the judge who tried the case and allowed the appeal, upon

¹ *Jordan v. Dobson*, 2 Abb. 415; *Big-
nal v. Harvey*, 18 Blatchf. 356; *Parker
v. Sears*, 1 Fish. Pat. Cas. 102; *Am.
Diamond Rock etc. Co. v. Sheldon*, 1
Fed. Rep. 870; *Am. Diamond Rock
etc. Co. v. Marble Co.*, 2 Fed. Rep. 353;
Root v. R. R. Co., 105 U. S. 210; *To-
ledo Reaper Co. v. Harvester Co.*, 24
Fed. Rep. 739; *N. Y. Packing Co. v.
Magowan*, 27 Fed. Rep. 111.

² *Jenkins v. Greenwald*, 1 Bond,
126; *Bullock Printing Press Co. v.
v. Jones*, 3 B. & Ard. Pat. Cas.

³ *Wheeler v. McCormick*, 11 Blatchf.

345; *Boomer v. Powder Press Co.*, 13
Blatchf. 107.

⁴ *Buchanan v. Howland*, 5 Blatchf.
151.

⁵ *Barnard v. Gibson*, 7 How. 657;
Yale etc. Mfg. Co. v. North, 5 Blatchf.
462; *Dorsey Harvester Rake Co. v.
Marsh*, 6 Fish. Pat. Cas. 401; *Am.
Mid. Pur. Co. v. Christian, B. & Ard.
Pat. Cas.* 53; *Brown v. Deere*, 2 Mc-
Crory, 422.

⁶ *McCrary v. Pa. Canal Co.*, 5 Fed.
Rep. 367.

such terms as to bond or otherwise as he may think proper.¹

Where in an equity suit for infringement the defendants own and set up an interfering patent, the complainant's patent may be declared void, and he enjoined from bringing further suits under it.² Where the infringement complained of was not willful, only a single infringing device had been made, and the infringement was stopped as soon as proceedings were begun, an injunction will not be granted.³ But where a defendant company had not sold any infringing instruments, but had such in its office, and had advertised them for sale, an injunction was granted against all its officers concerned in the matter.⁴

¹ Equity Rule, 93.

² *Sawyer v. Massey*, 25 Fed. Rep. 144. ⁴ *American Bell Telephone Co. v.*

³ *North Am. I. Works v. Fiske*, 30 Fed. Rep. 622. *Globe Telephone Co.*, 31 Fed. Rep. 729.

TITLE XXI.

BAILMENTS.

- PART I.—BAILMENTS IN GENERAL, §§ 1692-1750.
PART II.—PAWNS AND PLEDGES, §§ 1751-1777.
PART III.—INNKEEPERS, §§ 1778-1788.
PART IV.—COMMON CARRIERS, §§ 1789-1954.
PART V.—TELEGRAPH COMPANIES, §§ 1955-1973.
- .

TITLE XXI.

BAILMENTS.

PART I. — BAILMENTS IN GENERAL.

CHAPTER LXXXVI.

GENERAL PRINCIPLES OF THE LAW.

- § 1692. Bailment defined.
- § 1693. Illustrations of bailment.
- § 1694. Mutual assent and knowledge essential.
- § 1695. But may be created without contract.
- § 1696. Identical thing must be returned.
- § 1697. Bailments by public officers.
- § 1698. The different kinds of bailments.
- § 1699. The degrees of negligence as affecting bailments.
- § 1700. Tortious bailee liable without regard to negligence — So where there is misuser.
- § 1701. Bailee cannot dispute owner's title.
- § 1702. Liability may be limited by contract — Negligence.
- § 1703. Liability may be enlarged by contract.
- § 1704. Contributory negligence of owner.
- § 1705. Burden of proof.

§ 1692. **Bailment Defined.** — A bailment is a delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished.¹ The party first delivering the thing is

¹ *Bouvier's Law Dict.*; *Schouler on Bailments*, 2; *2 Stephen's Com.*, c. 5, p. 80; *Jones on Bailments*, l. Mr. Justice Story, in his commentaries on *Bailments*, section 2, extends the definition to include consignments made to a factor. This was criticised by *Chancellor Kent* (2 *Kent's Com.* 558),

the bailor; the recipient upon whom rests the duty of a final return or delivery over is the bailee.¹ Mr. Schouler speaks of bailment as a "division of the law whose main artery ramifies into the closest transactions of our daily life." One can hardly take another's chattels, he says, except as a purchaser or as a donee, without making himself to some extent a bailee.² All bailments, whether with or without compensation to the bailee, are contracts founded on a sufficient consideration.³

§ 1693. **Illustrations of Bailment.**—Receiving goods from another under an agreement to try them, and return if not suitable or to the person's liking, is a bailment.⁴ A contract by which a yoke of oxen was delivered to a hirer, "to keep and use in a farmer-like manner for one year," and then to be returned, with the privilege of purchasing at a fixed price, is a bailment, and not a conditional sale; and the bailee cannot by a sale thereof pass the title as against the owner.⁵ So, also, where goods are received upon an agreement to sell them and account to the owner, or to return them as good as when taken.⁶ One's taking a horse on trial, with option to purchase it if he likes it, constitutes a bailment, and not a sale, and imposes on him only the obligation of ordinary care in keeping and returning the horse.⁷ Where the owner of personal property delivers it to another under an agreement that the latter is to keep and carefully use it, and not remove it from the county, and that he is to return it at the end of three months, provided that if he pays the first party an agreed

and apparently with reason. As said by Mr. Schouler: "To make bailment synonymous with any delivery of personal property on special trust would be leading into an unfenced field": Schouler on Bailments, 3, note.

¹ Schouler on Bailments, 3.

² Schouler on Bailments, 3.

³ McCauley v. Davidson, 10 Minn. 418.

⁴ "An option to purchase if he liked is essentially different from an option

to return a purchase if he should not like. In one case, the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return": Hunt v. Wyman, 100 Mass. 198.

⁵ Chamberlain v. Smith, 44 Pa. St. 431.

⁶ Morss v. Stone, 5 Barb. 516.

⁷ Colton v. Wise, 7 Ill. App. 395.

price therefor within that time he may become the owner of the property, this is not a sale, but a bailment, the title remaining in the first party; and he may maintain replevin to recover his property.¹ Where goods are delivered to another, but to remain the property of the seller until paid for, the buyer is a bailee of them until so paid for.² Where one receives goods upon a contract by which he is to keep them a certain period, and if in that time he pays for them he is to become the owner, but otherwise he is to pay for the use of them, he receives them as bailee, and the property of the goods is not changed until the price is paid.³ A vendor who, after the payment of the purchase money, agrees to store and protect the property sold, and when called upon to deliver it at a specified place, is a bailee.⁴ A contract acknowledging the receipt of grain for storage, "loss by fire and the elements at the owner's risk," with the option to the party receipting for it to return grain of equal test and value, constitutes a contract of bailment, which is converted into a sale whenever the bailee disposes of the grain.⁵ A refusal by the bailee to deliver goods on demand of the owner, unless on payment of certain claims of the bailor or bailee inconsistent with the plaintiff's title, is equivalent to an absolute refusal, and amounts to conversion. A bailee cannot relieve himself from responsibility to the owner by redelivery to his bailor after demand and notification by the owner.⁶ An agreement by which one places his personal property in the hands of another without any obligation of sale on part of the one, or the right of purchase at any time in the other, is not a conditional sale, but a bailment.⁷

¹ *Dunlap v. Gleason*, 16 Mich. 158; 93 Am. Dec. 231.

² *Harrington v. King*, 121 Mass. 267; *Dunlap v. Gleason*, 16 Mich. 158; 93 Am. Dec. 231; *Kohler v. Hayes*, 41 Cal. 455; *King v. Bates*, 57 N. H. 446; *Wheeler etc. Co. v. Heil*, 115 Pa. St. 487; 2 Am. St. Rep. 575.

³ *Sargent v. Gile*, 8 N. H. 325.

⁴ *Oakley v. State*, 40 Ala. 372.

⁵ *Nelson v. Brown*, 44 Iowa, 455.

⁶ *Roberts v. Yarbboro*, 41 Tex. 449.

⁷ *Kaut v. Kessler*, 114 Pa. St. 603.

But where property is delivered for a consideration, and no option is given the purchaser to return it, or to the seller to reclaim it, upon any contingency, except upon the purchaser's failure to make payment or to retain possession, it is a conditional sale, and not a bailment.¹ When one delivers logs at a custom saw-mill to be sawed at an agreed price, the owner of the mill becomes a bailee, bound to exercise ordinary care in keeping and manufacturing the logs.²

ILLUSTRATIONS.—A delivered to B a cooking-stove and furniture, and took his receipt, reciting that he was to pay a certain sum per month or return the stove, etc., if he did not make payments. He made one payment, and the plaintiffs made an entry in their books charging him with the stove and crediting him with the payment. B failed to pay anything more, and A agreed to take the stove back, after which it was attached by C on a writ against B. *Held*, that the property did not pass to B by the contract, but remained in A until payment should be made: *Porter v. Pettengill*, 12 N. H. 299. A contract provided that the recipient of certain property might purchase it within a specified time, and that the owner might have a return on demand. *Held*, not a bailment, although it spoke of the property as "let"; because, among other facts, no hire was provided for: *Heryford v. Davis*, 102 U. S. 235. W., having ascertained the price asked by H. for a horse, proposed that H. should allow him to take the horse and try it, promising that if he did not like it, he would return it in as good condition as he got it. H. assented, and delivered the horse to W.'s servant; but on the way to W.'s house, and without the fault of the servant, the horse escaped, was injured, not tried by W., and never returned to H. *Held*, that this was a bailment, and not a sale: *Hunt v. Wyman*, 100 Mass. 198. An executor delivered to a legatee certain goods bequeathed to him by the testatrix, with an agreement that the legatee should take charge of them, and be responsible for their return in case the executor should need them in the settlement of the estate; and at the time of such delivery, the executor believed he had sufficient funds remaining in his hands to pay all debts and charges against the estate, his object being to save the estate the expense of the care of the goods; and the legatee afterwards, on demand by the executor, refused to return the goods. In an action for

¹ *Bryant v. Crosby*, 36 Me. 562; 58 Am. Dec. 767.

² *Gleason v. Beers*, 59 Vt. 581; 59 Am. Rep. 757.

goods sold and delivered by the executor against the legatee, *held*, that the contract was one of bailment, and not of sale, and that the action could not be maintained: *Bulkley v. Andrews*, 39 Conn. 71. A receipt for "2,345 bushels first-quality wheat, subject to order any day when called for after first day of January next, without charge for storage," *held*, not to import a sale, but a bailment: *Wadsworth v. Allcott*, 6 N. Y. 64. The plaintiff delivered a piano to another, with a written agreement that the latter should pay a specified sum per month as rent, and that it should be sold for a specified price, and that the rent was to be paid until it amounted to the price asked, when the plaintiff would give a bill of sale. *Held*, that no title to the piano vested in the person renting it before the full amount asked for it was paid: *Kohler v. Hayes*, 41 Cal. 455. The terms of a contract were as follows: "Received of G. one sewing-machine, which I agree to safely keep and carefully use, and not remove from W. county, and at" the end of three months "return the same to him free of charge and unencumbered; provided always, and it is expressly understood that if on or before the expiration of the above time I shall pay to the said G. the sum of sixty dollars, then this receipt shall be null and void, and the said G. shall execute to me a bill of sale of said machine." The receiptor sold the machine soon after. *Held*, that G. could maintain an action of replevin, it being a bailment importing a personal trust not transferable: *Dunlap v. Gleason*, 16 Mich. 158; 93 Am. Dec. 231. A sold a cow to B. B received permission to let the cow remain for a while in A's pasture. The fence was secure, but the cow unaccountably disappeared. *Held*, that B, and not A, must bear the loss: *Race v. Hansen*, 12 Ill. App. 605. Plaintiff delivered cotton to a warehouseman ordering him to ship the same to the order of the defendant, and notified S., an interior merchant, of the shipment through the defendant, and requested S. to sell the cotton to the best advantage, and pay the proceeds to the defendant or order. *Held*, a bailment, and not a sale, by the plaintiff to the defendant: *Furlow v. Gillian*, 19 Tex. 250. A, being indebted to B, deposits in his hands merchandise to be sold and the proceeds to be applied to the extinguishment of the debt. This constitutes a contract of mandate between A and B, which obliges the former to reimburse the latter whatever necessary and useful expenses have been incurred in fulfilling the object of the mandate: *Devalcourt v. Dillon*, 12 La. Ann. 672. The owner of machinery agreed to sell it to another upon his paying by installments a certain sum, and leased him a mill in which it was. *Held*, to be a mere bailment, and to pass no title. And that such bailee having paid several installments, and the sheriff having levied

on his "right, title, and interest" in the machinery, the sale thereunder (the property still remaining in the mill) was valid, if duly advertised, notorious and fair: *Henry v. Patterson*, 57 Pa. St. 346. A delivered to B two colts, under a contract that B should safely keep and sell them, if possible, before a certain date, for A, he fixing a minimum price; and if not, to return them in good condition. *Held*, that this was not a sale, but a bailment: *Middleton v. Stone*, 111 Pa. St. 589. A sold a horse to B, who was an infant, and B gave his note for the price. After a short time B injured the horse; it was subsequently taken back, and the note given up; and A sued B for said injury. *Held*, that the bargain was binding on A; that B held the horse as owner, and that A could not recover against B as bailee: *Poe v. Horne*, Busb. 398. A delivered wheat to B. On the question of whether the delivery was a bailment or a sale, the unsigned receipts and papers favored the theory of a bailment, as did the testimony of two witnesses and the circumstances surrounding the case. *Held*, a bailment, and not a sale: *Dean v. Lammers*, 63 Wis. 331.

§ 1694. **Mutual Assent and Knowledge Essential.** —

A gratuitous bailment even cannot be made where goods are put in a person's possession without his knowledge and assent.¹ There must be a contract, either express or implied, and the mere taking by an overseer of cotton-seed left by the former occupant on the plantation of the employer of the overseer, and the use of it by his direction, will not support a declaration by the owner of the cotton-seed against the overseer for the value of it as upon a bailment to him.² Bailees without hire of baggage cannot be held liable for its loss, unless a delivery to and

¹ *Michigan Cent. R. R. Co. v. Carrow*, 73 Ill. 348; 24 Am. Rep. 248; *Fay v. The New World*, 1 Cal. 348; *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168; *Green v. Birchard*, 27 Ind. 483. In *Lloyd v. West Branch Bank*, 15 Pa. St. 172, 53 Am. Dec. 581, it is said: "No person, corporation, or individual can be made the bailee of another man's goods without his own consent, express or implied. If the servant, of his own head, and without authority of his master, takes goods on deposit unknown to his master, although they be deposited in his master's house, he

is not answerable, but the servant only. There must, in order to induce a legal liability on any one, be a contract, express or implied." See *Dela-ware etc. R. R. Co. v. Central Stock Yard Co.*, N. J., 1889. But a count averring that property was delivered to defendants, and that they promised to take care of it and return it to plaintiffs, sufficiently shows an acceptance of a bailment by defendants: *Hetherington v. Richter*, W. Va., 1889.

² *Bohannon v. Springfield*, 9 Ala. 789.

acceptance by them of the property, such as imposes a legal obligation to answer for its safety, is shown. Evidence which merely establishes that, according to certain rules and regulations, the property should have come into their possession is not sufficient.¹

§ 1695. Bailment may be Created without Contract. —

But one may become a bailee without any express contract; as, for example, by knowingly receiving an article and holding possession of it.² Thus a finder of goods, or one wrongfully intermeddling with another's property, or one into whose possession property has come by mistake, will be held to the duty of a bailee.³ A finder of goods is bound

¹ *Samuels v. McDonald*, 11 Abb. Pr., N. S., 344; 42 How. Pr. 360.

² In *Phelps v. People*, 72 N. Y. 357, the court say: "A bailee of property is one to whom the thing has been delivered to be held according to the purpose or object of the delivery, and to be returned to the bailor or delivered over to some other when that object has been accomplished, or for the purpose of accomplishing it; and the obligation of the bailee may arise by implied contract as well as express agreement. Thus a finder of a lost chattel or chose in action may become a bailee of it by the act of finding and keeping it in custody. And so, too, is the recipient of a chattel or chose in action, either directly from the hands of the absolute owner or through the intervention of a private agency, such as a manager or a public agency, such as a common carrier or the government mails. Hence this character of bailee with this special property in the thing may arise without any express agreement to receive and to hold for a particular purpose. It may arise from the bare fact of the thing coming into the actual possession and control of a person fortuitously, or by mistake as to the duty or ability of the recipient to effect the purpose contemplated by the absolute owner."

³ In *Newhall v. Paige*, 10 Gray, 366, it was held that the liability of a person who negligently receives goods not

directed to him is the same as that of a bailee for hire. In *Smith v. R. R. Co.*, 27 N. H. 86, 59 Am. Dec. 364, a leading case, the subject is reviewed, and the liabilities of bailees without express contract stated by the court at length, and very ably. The court say: "The ordinary case of a deposit is where the owner of goods delivers them to another to be kept for him, without any agreement, expressed or reasonably to be implied, that the person to whom they are delivered shall receive any compensation for his services or care. But there is a large class of deposits where there is no actual delivery to keep and no actual agreement to accept the goods, or to keep or take care of them, and where the contract of a depositary is implied from the nature of the transaction or occurrence by which the property comes into the hands of one not the owner, and from the principles of equity and justice which ought to govern the conduct of men towards each other. Generally no person can be compelled to become a depositary without his own consent; but there are cases where a person may be subjected to the duties and liabilities of a depositary simply, or of a depositary for hire, without an intention on his part to enter into any contract, or to assume any liability, in regard to the property in question. The finder of the property of a person unknown is not bound to interfere with it. He may pass by,

to the same care of them as an involuntary depositary by contract.¹ One who takes charge of an article uninten-

it if he pleases, and has then no responsibility in relation to it. But if he takes it into his possession, he becomes at once bound, without any actual contract, and perhaps without any actual intention to bind himself to the owner of the property, for its safe-keeping and return. And by the better opinion, we think the duties of a finder of property are, in law, precisely the same, except so far as they may be varied by the provisions of our statutes, as those of a person who has voluntarily received a deposit of goods to be kept for the owner without charge: 1 Bouv. Inst. 428; Story on Bailments, 61; *Isaack v. Clark*, 2 Bulst. 306; 1 Parsons on Contracts, 579; Story on Contracts, 257; 6 Bac. Abr. 681. If, however, it is provided by statute that the finder shall be entitled to a compensation for the keeping, or if an agreement to that effect may under the circumstances be reasonably inferred, the presumed contract of the finder and his liabilities will be those of a depositary for hire, which differ essentially from those of a simple, that is, gratuitous, depositary: Story on Bailments, 289; Jones on Bailments, 97; 1 Bouv. Inst. 406. A much more numerous and frequent class of cases, where the law imposes the duty of a depositary without any actual contract for that purpose, is where the property of one person is voluntarily received by another by delivery of the owner for some different purpose from that of keeping it, and upon an express or implied agreement of a different kind, which has been answered or performed, and the property remains in the hands of such party without further agreement. In such cases, the law, having regard to the requirements of justice between men, implies a contract for the keeping of the property until it shall be restored to the proprietor or his agent; and the contract thus implied is ordinarily that of a depositary. The holder is bound to take care of, keep, and preserve the property, not for the sake of any benefit to himself, nor upon any expectation of compensation for

his services, but solely for the convenience and accommodation of the owner: Story on Bailments, 292, 347; *Ostrander v. Brown*, 15 Johns. 35; 8 Am. Dec. 211; *In re Webb*, 8 Taunt. 443; *Hyde v. Trent and Mersey Nav. Co.*, 5 Term Rep. 389; *Garside v. Trent and Mersey Nav. Co.*, 4 Term Rep. 581; *Fisk v. Newton*, 1 Denio, 45; 43 Am. Dec. 649; 1 Parsons on Contracts, 459; *Thomas v. R. R. Co.*, 10 Met. 472; 43 Am. Dec. 444. The slightest degree of care known to the law is that of a depositary, such slight care as is taken by every man of common sense of his own property under like circumstances, as it was well laid down by the court below. This, presumptively, is the extent of the responsibility of one upon whom is thrown the care and custody of property where he has not voluntarily assumed any liability directly for these purposes: 1 Bouv. Inst. 431; Story on Bailments, 41; 2 Kent's Com. 560; *Angell on Carriers*, 293. Where a right to receive a compensation for his services may be reasonably inferred from the circumstances of the case, the duty of the bailee becomes that of a depositary for hire, and his liability is increased to a responsibility for ordinary neglect, which is the want of such reasonable care as men in general take of their own property under similar circumstances: 1 Bouv. Inst. 406; Jones on Bailments, 49, 96, 97; Story on Bailments, 289; *Cailiff v. Danvers, Peake*, 114; *Finucane v. Small*, 1 Esp. 315; 2 Kent's Com. 586. There is this distinction between the case of the finder of goods and that of the person in whose possession such property has remained at the close of a previous bailment: the person who finds an article may leave it untouched; he in whose house or premises the property of another is casually left may treat it as damage-feasant. He may suffer it to remain undisturbed, or he may take it and remove it to a near and convenient distance, and there leave it in a suitable place for the use of the owner, doing it no unnecessary damage while he is removing

¹ Story on Bailments, sec. 87.

tionally left in his shop becomes a bailee, and a demand and refusal constitutes *prima facie* a conversion.¹ A lessee of chattels who does not deliver up possession at the end of the term is liable as bailee.²

ILLUSTRATIONS. — C. sold R. a mill. At the time of the sale, P. was in C.'s employ as miller, and continued after the sale to discharge the same duties. C. left in the mill certain wheat to be manufactured into flour. P. knew this fact. *Held*, that R. was thus constituted bailee for reward of the wheat; that it made no difference whether he knew that C. had left the wheat there; and that *assumpsit* without previous demand would lie against R. for the value of the wheat, if the same was disposed of by him or his servants: *Cox v. Reynolds*, 7 Ind. 257.

§ 1696. **Identical Thing must be Returned.** — To constitute a bailment, the contract, express or implied, must be that the same thing delivered is to be returned.³ But it may be in an altered form; as, for example, grain delivered to a miller to be ground into flour;⁴ or logs deliv-

it, and he will thereby incur no responsibility, speaking without reference to the statute provisions: 2 Saund. Pl. & Ev. 388; 2 Ch. Pl. 548; *Peaslee v. Wadleigh*, 5 N. H. 317. But the party into whose hands the property of another has come by virtue of a contract for some other purpose cannot, when that purpose is accomplished, either leave it where it happens to be, or lay it by and neglect it, unless that may be fairly inferred from the nature of the contract to be the intention and understanding of the parties; but he still continues to owe a duty to the owner, still remains liable for the care and custody of the property, until he has delivered it to the owner or his agent, or has placed it in such a situation as may be fairly regarded as equivalent to a delivery to him: *Ostrander v. Brown*, 15 Johns. 39; 8 Am. Dec. 211; *Fisk v. Newton*, 1 Denio, 45; 43 Am. Dec. 649; 1 Parsons on Contracts, 659; Story on Bailments, 347; Angell on Carriers, 289."

¹ *Osgoodby v. Liemberner*, 22 Alb. L. J. 114.

² *Zule v. Zule*, 24 Wend. 76.

³ *Buffum v. Merry*, 3 Mason, 478; *Ewing v. French*, 1 Blackf. 353; *Baker v. Woodruff*, 2 Barb. 520; *Norton v.*

Woodruff, 2 N. Y. 154; *Seymour v. Wyckoff*, 10 N. Y. 216; *Reed v. Abbe*, 2 Thomp. & C. 380; *Hurd v. West*, 7 Cow. 752; *Inglebright v. Hammond*, 19 Ohio, 337; 53 Am. Dec. 430; *Chase v. Washburn*, 1 Ohio St. 224; 59 Am. Dec. 623; *Butterfield v. Lathrop*, 71 Pa. St. 225; *Johnson v. Baker*, 37 Iowa, 200; *Moore v. Holland*, 39 Me. 307; *Slaughter v. Green*, 1 Rand. 3; 10 Am. Dec. 488; *Marsh v. Titus*, 6 Thomp. & C. 29; 3 Hun, 550. "The distinction is this: when the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed. But when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed, it is a sale": *Bronson, C. J.*, in *Mallory v. Willis*, 4 N. Y. 85; *Bretz v. Diehl*, 117 Pa. St. 589; 2 Am. St. Rep. 706.

⁴ *Mallory v. Willis*, 4 N. Y. 76; *Foster v. Pettibone*, 7 N. Y. 433; 57 Am. Dec. 530; *Smith v. Clark*, 21 Wend. 83; 34 Am. Dec. 213; *Bretz v. Diehl*, 117 Pa. St. 589; 2 Am. St. Rep. 706.

ered to be manufactured into boards.¹ It does not alter the case from that of a bailment that the thing returned is to come from a common lot delivered by several. "The character of the transaction is not lost when for general convenience the wheat delivered at a mill by many customers is agreed by a common usage or otherwise to be put into a common stock, and when it is further agreed that the return is to be made out of the common mass of flour."² Whether the manufacturer must return the identical things delivered, or may make use of other similar materials in the manufacture, determines the question of bailment.³ Where one receives chattels for a specified time, agreeing to pay for their use, and to purchase them before or at the expiration of the time, the contract is one of bailment, not of sale.⁴ Where merchandise, such as grain stored in warehouse, is delivered to a person on the agreement that he may use or dispose of the identical thing, and is bound only to restore an equal quantity of the same kind of property, or to pay for it in money, the transaction is a sale rather than a bailment.⁵ Where one receives jeweler's sweepings for refining, having the option to return the refined product or to account for the value thereof, there is no bailment.⁶ Where a bailee of goods has converted them to his own use, having similar goods with which he intends to replace them, the principal has no title to such similar goods as against attaching creditors of the bailee.⁷ The ordinary case of deposits of money in bank is not a bailment. The banker is not to return the same coin,

¹ *Baker v. Roberts*, 8 Greenl. 101; *Mallory v. Willis*, 4 N. Y. 77; and see *Westcott v. Tilton*, 1 Duer, 55.

² *Slaughter v. Green*, 1 Rand. 3; 10 Am. Dec. 488; *Mallory v. Willis*, 4 N. Y. 77; *Chase v. Washburn*, 1 Ohio St. 251; 59 Am. Dec. 623; *Inglebright v. Hammond*, 19 Ohio, 337; 53 Am. Dec. 430; *Bretz v. Diehl*, 117 Pa. St. 589; 2 Am. St. Rep. 706.

³ *Powder Company v. Burkhardt*, 97 U. S. 110.

⁴ *Danda v. Foulds*, 105 Pa. St. 74; *Edwards's Appeal*, 105 Pa. St. 103.

⁵ *Rahilly v. Wilson*, 3 Dill. 420.

⁶ *Austin v. Selizman*, 18 Fed. Rep. 519; 21 Blatchf. 506.

⁷ *Wood v. Fales*, 24 Pa. St. 246; 64 Am. Dec. 655.

and therefore he becomes a debtor, not a bailee;¹ but a special deposit is a bailment.²

Thus the *mutuum* of the civil law spoken of by the early writers, and by both Lord Holt and Sir William Jones, as a species of bailment is not regarded by modern writers as being a bailment at all.³ A *mutuum* was where the bailee was bound to deliver, not the specific article lent to him, but, at his opportunity, something of the same kind. It was usually a loan for consumption where the thing received, such as corn, wine, oil, or money, was to be returned in kind. Notwithstanding this refusal of the best authorities on our common law to consider this as a species of bailment, we find in a late case in Ohio, where a number of shares of stock were transferred to a person who agreed to return them on demand, the transaction spoken of as a *mutuum*, and it was held that the bailee might return the same number of other shares in the same corporation.⁴ It is not believed that any other American court has incorporated this civil-law relation into its jurisprudence.⁵

¹ Story on Bailments, sec. 88.

² Where bonds deposited with a banker for safe-keeping were by him disposed of, and the proceeds went to increase the assets, and the banker soon afterwards made an assignment for the benefit of creditors, it was held that the owner of the bonds had a paramount right to be first paid in full: *Bowers v. Evans*, 71 Wis. 133.

³ Schouler on Bailments, 5, 75; Story on Bailments, sec. 228.

⁴ *Fosdick v. Greene*, 27 Ohio St. 484; 22 Am. Rep. 328.

⁵ In *Caldwell v. Hall*, 60 Miss. 330, 45 Am. Rep. 410, A had deposited with a merchant a sum of money for safe-keeping without reward, but with permission to the merchant to use it. He did not do so; but his book-keeper, with the acquiescence of both parties, occasionally took some of it to make change. Being stolen without negligence of the bailee, it was agreed by the plaintiff's counsel that it was a case of *mutuum*, but the

court refused to acquiesce in this view.

"This irregular and anomalous character of bailment," said the court, "well defined and recognized in the Roman or continental law, is alluded to rather than distinctly announced by the common-law writers. In our system of jurisprudence it is treated as a sale rather than a bailment, and this seems to be its proper aspect, since its practical effect must always be to operate a transfer of title where chattels are deposited, and to create the relation of lender and borrower where money is involved. In the one case, it is a sale, with the right in the purchaser to return the thing delivered, or its equivalent in kind, though not in specie. In the other, it is a deposit of money, with the understanding that it is to be surrendered on demand, but with the right in the receiver to use and replace it if he desires. If A delivers to B a quantity of flour, or wine, or cotton, with the agreement that the latter

ILLUSTRATIONS.—A agreed to take B's logs, at a stated method of computing the quantity, to saw them into boards, and to deliver the boards to B, who agreed to sell them free of charge, and allow A all they would sell for beyond the stipulated price per thousand, the property to remain all this time at A's risk. *Held*, not to be a sale, but a bailment for hire: *Barker v. Roberts*, 8 Me. 101. A delivered cotton-yarn to B, on a contract to manufacture it into cloth, B to find the filling, and to weave so many yards of cloth at an agreed price per yard as was equal to the value of the yarn at sixty-five cents a pound. *Held*, that this was a sale of yarn to B, and that he was answerable for the delivery of the cloth, though the yarn was destroyed by an accidental fire: *Buffum v. Merry*, 3 Mass. 478. A delivered six sheep to B, upon an agreement that at the end of the year B would deliver to A an equal number of sheep of equal value, and also one pound of wool per head for each sheep. *Held*, a sale: *Wilson v. Finney*, 13 Johns. 358. The purchaser of ale whose barrels were branded with the vendor's name agreed to return the barrels as soon as the ale was drawn out, with a provision that if for any cause it became impossible to return any of them, then such barrels should be paid for at a stipulated rate. *Held*, a bailment, and not a sale of them: *Westcott v. Tilton*, 1 Duer, 53; 10 N. Y. Leg. Obs. 278; *Westcott v. Thompson*, 18 N. Y. 363. By a written contract, O. agreed to tan a quantity of hides to be furnished by H. and E., and return the leather to them. H. and E. were to furnish the hides on a commission for buying and commission and guaranty for selling the leather, and the hides were to be insured and charged to O., and when the leather was sold the net proceeds, after deducting costs, expenses, commissions, insurance, interest, etc., was to be the profit and loss to accrue to O. for tanning. *Held*, that this was not a sale to O., but a bailment: *Hyde v. Cookson*, 21 Barb. 92. B. agreed with L. that L. should have the use of certain personal property belonging to B., and might sell them on commission, depositing the proceeds with a banker, and when these deposits reached a certain sum, L. was to become the owner of the property remaining; if the sales

may use it at his pleasure and return its equivalent in the same species of goods, this is nothing more nor less than a purchase, with the right in the buyer to pay in a particular manner; and if the goods are neither returned in specie nor paid for in the manner contracted for, an action of *assumpsit* may be maintained for their money value. The result is the same where the thing delivered is money. — It fol-

lows, therefore, that in the common law the idea of bailment in this class of cases is lost in that of a purchase, where the thing deposited is a chattel, and in that of debtor and creditor where it is money: Schouler on Bailments, 5, 7, 73, 75; Edwards on Bailments, 136–186; Story on Bailments, sec. 283." See *Carlisle v. Wallace*, 12 Ind. 252; 74 Am. Dec. 207.

did not amount to the sum, L. was to make up the deficiency. *Held*, a bailment of the property, and not a sale on condition: *Becker v. Smith*, 59 Pa. St. 469. After the complainant had paid a note, the money was paid back to him, that he might keep it safely for the owner. He gave a due bill, promising to pay the amount in currency on demand, and did not keep the money separate from his own funds. *Held*, that the transaction was a loan, and not a deposit: *Rankin v. Craft*, 1 Heisk. 711. Calicoes were delivered by the owners to calico-printers to be printed and returned to them. *Held*, a bailment, and not a sale: *Wood v. Orser*, 25 N. Y. 350. Money of A is left by him for sake-keeping with B, with the understanding, not that the identical money shall be kept for and returned to him, but only that a like sum shall be repaid him by B. *Held*, not a bailment or special deposit, but a general deposit in the nature of a loan, and B is absolutely liable to A in *assumpsit* for an equal sum, although the money may have been lost without his fault: *Shoemaker v. Hinze*, 53 Wis. 116. A town that issued thirty thousand dollars in bonds at two per cent interest contracted with a broker to give him the use of bonds of the nominal value of seven thousand five hundred dollars, if he would keep seven thousand five hundred dollars more at par as a circulating medium, and redeem then when presented; and when the town by taxation should redeem seven thousand five hundred dollars, the other seven thousand five hundred dollars were to be delivered up to be canceled. He became bankrupt with four thousand nine hundred dollars of the bonds on his hands, and his assignee claimed them as assets. *Held*, 1. That the trust was in the nature of a bailment, as defined by the Georgia Code, sections 2058 and 2085, and the town could recover them; and this, though these were not the identical ones delivered to him by the town; 2. That his rights and duties under the contract were not affected by his knowledge that more than the amount agreed upon had been issued: *Cabaniss v. Ponder*, 65 Ga. 134. A. delivered wheat to a miller, taking a receipt agreeing to return wheat or the price. The wheat was mixed with other wheat, from which the miller took as he wanted for grinding. After all the wheat in the bin had been destroyed by an accidental fire, A. demanded the price. *Held*, that whether the transaction was a bailment or a sale, his demand was tenable: *Andrews v. Richmond*, 34 Hun, 20. A firm of merchant millers received in their elevator wheat from farmers, charging nothing for storage, and using the wheat for their milling purposes as required, the farmers having the option of demanding at any time an equal quantity of wheat or the current market price. *Held*, that this was a contract of bailment, not a sale: *Ledyard v. Hibbard*, 48 Mich. 421; 42 Am. Rep. 474.

A transfers to B certain movable property on condition that B sell it, pay himself what A owes him, and distribute the residue to C and D. *Held*, not a sale, but a bailment; and the property is liable to seizure on *fi. fa.* by E, a judgment creditor of A: *Bourg v. Lopez*, 36 La. Ann. 439. A company agreed to furnish A certain plows, and not to sell to any one else in that county during a year; that A should have a commission on every plow sold; that he should remit all cash received for plows every month; and that the plows remaining unsold at the end of the year A might pay for, or store subject to the company's order. *Held*, to constitute a bailment, not a sale: *Weir Plow Co. v. Porter*, 82 Mo. 23. Grain was delivered by its several owners to a miller to grind and return in flour. It was all mixed together by him. *Held*, a bailment, and as against his attaching creditor, that the owners could each reclaim a part equivalent in quantity to that contributed: *Bretz v. Diehl*, 117 Pa. St. 589; 2 Am. St. Rep. 706. Furniture was delivered by A to B under an agreement to "hire" the same, and calling the installments payable "rent," and providing that within the term B might purchase for a price identical in amount with the sum of the installments. *Held*, not a conditional sale, but a bailment: *Foreman v. Drake*, 98 N. C. 311.

§ 1697. **Bailments by Public Officers.**—A public officer may be held as bailee of articles which come into his possession, even though there was no legal duty on him to receive them.¹ The liability of an officer who attaches a boat for articles contained therein, but not forming part thereof at the time of the attachment, is that of a bailee without hire.²

§ 1698. **The Different Kinds of Bailments.**—The different kinds of bailments are (according to the classification made by Lord Holt in *Coggs v. Bernard*,³ and followed by the text-writers):—

1. *Depositum*, a delivery of personal property to be kept by the bailee for the bailor without recompense, and to be returned to him at his request.

¹ *Phelps v. People*, 72 N. Y. 334; *Moore v. State*, 47 Md. 467; 28 Am. Mott v. Pettit, 1 N. J. L. 298; *Cross Rep.* 483.
² *Briggs v. Dearborn*, 99 Mass. 50.
³ 2 Ld. Raym. 909.

2. *Mandatum*, a delivery of personal property to the bailee to have something done to them by him without reward.

3. *Commodatum*, a loan for use without reward.

4. *Pignus*, a delivery of personal property to a creditor as security for some debt or engagement, i. e., a pledge or pawn.

5. *Locatio-conductio*, a hiring for reward; which has these four divisions, viz.: (a) *Locatio rei*, the hiring of a thing for use; (b) *Locatio operis faciendi*, the hiring of work and labor upon a thing;¹ (c) *Locatio custodiæ*, the hiring of care and services to be given to or upon the thing delivered; (d) *Locatio operis mercium vehendarum*, the hiring of the carriage of goods from place to place.

Modern writers, however, wishing to discard the terms of the civil law, have, without disturbing the distinctions made, adopted a classification more simple. They divide bailments as follows:—

1. Bailments for the bailor's sole benefit. This includes the *depositum* and *mandatum* of the old classification.

2. Bailments for the bailee's sole benefit. This includes the *commodatum* of the old classification.

3. Bailments for the mutual benefit of bailor and bailee: This includes *pignus*, and the *locatio-conductio* with its four divisions, of the old classification.

4. Exceptional bailments. This includes the cases of innkeepers and common carriers, upon whom, for reasons of public policy, the law has placed an unusual liability.

§ 1699. **The Degree of Negligence as Affecting Bailments.**—The divisions just made are important in considering the question as to the negligence of a bailee in a particular case. The law seems to have settled down to this: that a different degree of diligence is required of a bailee in each of these cases:—

¹ As grain to be ground by a miller: *Wallace v. Canady*, 4 Sneed, 364; 70 Am. Dec. 250.

1. Only slight diligence is required of the bailee.
2. Extraordinary diligence is required of the bailee.
3. Ordinary diligence is required of the bailee.
4. The bailee, for reasons of public policy, is held to nearly, if not quite, the liability of an insurer.

Starting out thus with a standard of diligence, the courts have considered that the bailee (1) is liable only for gross negligence; that the bailee (2) is liable for slight negligence; that the bailee (3) is liable for ordinary negligence. Gross negligence is defined as the "want of slight diligence";¹ "the omission of that care which even the most inattentive and thoughtless men never fail to take of their own concerns."² It is also said to come very close to fraud.³ Ordinary negligence is defined as the omission of that care which "the generality of mankind use in their own concerns."⁴ Slight negligence is the want of great diligence.⁵

¹ Story on Bailments, sec. 17.

² *Tompkins v. Saltmarsh*, 14 Serg. & R. 275. The employment of the term "gross" in this connection has been much criticised. Lord Denman, in one case, said that he doubted very much whether any intelligible distinction could exist between "negligence" and "gross negligence": *Hinton v. Dibbin*, 2 Q. B. 661; and Baron Rolfe maintained that the latter was the same thing as the former, *plus* a vituperative epithet: *Wilson v. Brett*, 11 Mees. & W. 113. Other English judges have made similar remarks: See *Lord v. R. R. Co.*, L. R. 2 Com. P. 344; *Austin v. R. R. Co.*, 10 Com. B. 475; *Beal v. R. R. Co.*, 5 Hurl. & C. 337; *Cashill v. Wright*, 6 El. & B. 897; *Grill v. General Iron Screw Co.*, L. R. 1 Com. P. 612. And the same objections have been raised in our own courts: *Steamboat New World v. King*, 16 How. 474; *Storer v. Gowen*, 18 Me. 177; *Briggs v. Taylor*, 28 Vt. 185. "But," as said by Lord Chelmsford in a late case, "as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully

retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord Holt and Sir William Jones": *Giblin v. McMullin*, L. R. 2 P. C. 336. "The term itself," says Allen, J., in *First Nat. Bank v. Ocean Bank*, 60 N. Y. 278, 19 Am. Rep. 181, "has been quarreled with, but it still has a place in the law, and must have so long as the measure of liability implied by the law is recognized, and until some better term can be invented to give expression to it. It is incapable of precise definition, and its application and use may lead, in some cases, to results unsatisfactory, but that comes as directly from the nature and extent of the duty in the particular case as from the phrase by which a breach of the duty is expressed." And see *R. R. Co. v. Lockwood*, 17 Wall. 382.

³ Story on Bailments, secs. 19 et seq.; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275.

⁴ *Tompkins v. Saltmarsh*, 14 Serg. & R. 275.

⁵ Story on Bailments, sec. 17.

§ 1700. **Tortious Bailee Liable without Regard to Negligence—**So where there is Misuser.—Where the bailment is tortious on the part of the bailee, he is liable as an insurer.¹ So where the property is used by the bailee for a purpose different from that for which it was bailed, the bailee is liable for a loss or injury thereto, even though guilty of no negligence.² If the owner of property gives another person authority to deal with it in a particular way, and such person chooses to deal with it in another way, he must take the risk of the consequences, and is liable for its loss or injury, unless such loss or injury would have occurred in whichever way the property had been dealt with.³

ILLUSTRATIONS.—A steals B's boat, and while riding in it, it is lost by *vis major*. Held, A is liable to B for its value: See Schouler on Bailments, 20.

§ 1701. **Bailee cannot Dispute Owner's Title.**—If a bailee takes the goods with knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against the bailor.⁴ As we afterwards shall see,⁵ a bailee cannot dispute the title of his bailor.⁶ A bailee cannot, in an action brought against him by his bailor for a conversion, set up the title of a third person, except by the author-

¹ Lucas v. Trumbull, 15 Gray, 306; Fisher v. Kyle, 27 Mich. 454; Cullen v. Lord, 39 Iowa, 302; Wentworth v. McDuffee, 48 N. H. 402; Kennedy v. Ashcroft, 4 Bush, 530; Collins v. Bennett, 46 N. Y. 490. A demand of goods bailed is not always necessary to support an action by the bailor against the bailee, as in case of their tortious conversion or destruction: Cothran v. Moore, 1 Ala. 423; Warner v. Dunnavan, 23 Ill. 380; Spencer v. Morgan, 5 Ind. 146; Smith v. Stewart, 5 Ind. 220; Alden v. Pearson, 3 Gray, 342.

² De Tollenez v. Fuller, 1 Mill Const. 117; 12 Am. Dec. 616; Duncan v. R. R. Co., 2 Rich. 213; Ulmer v. Ulmer, 2 Nott & McC. 489; Lane v. Cameron,

38 Wis. 603; Spencer v. Pilcher, 8 Leigh, 565; Hooks v. Smith, 18 Ala. 338; Mills v. Ashe, 16 Tex. 295; Harrington v. Snyder, 3 Barb. 380; Mayor v. Howard, 6 Ga. 213; Horsely v. Branch, 1 Humph. 199; Stewart v. Davis, 31 Ark. 518; 25 Am. Rep. 576; Green v. Hollingsworth, 5 Dana, 173; 30 Am. Dec. 688.

³ Lilley v. Doubleday, L. R. 7 Q. B. D. 510; 51 L. J. Q. B. D. 310; 44 L. T., N. S., 814.

⁴ Ex parte Davies, L. R. 19 Ch. Div. 86.

⁵ Post, Chapters LXXXVII. and LXXXVIII.; Simpson v. Wrenn, 50 Ill. 222; 99 Am. Dec. 511.

⁶ Maxwell v. Houston, 67 N. C. 305; Barnard v. Kobbe, 3 Daly, 35.

ization of that person.¹ But a bailee is liable in trover who refuses to deliver the property to one whom he knows to be the owner, and from whom the bailor obtained it wrongfully.² In an action by a bailor against his bailee, it is no defense to the latter that the bailor purchased the property while acting as agent or attorney for a third person who may have the right to claim the benefit of the purchase.³ For although in ordinary cases a bailee cannot dispute his bailor's title, yet where it can be shown that the bailor fraudulently obtained possession of the goods, or that they have been recovered from the bailee by suit or paramount title, or that he has been notified by the true owner not to deliver them to the bailor, the rule does not apply.⁴

§ 1702. **Liability may be Limited by Contract — Negligence.**—The liability of the bailee may be varied by contract between the parties.⁵ But no contract of this kind will be recognized by the court which is contrary to public policy.⁶ Thus a bailee could not by contract with the bailor exempt himself from a loss caused by his own fraud.⁷

§ 1703. **Liability may be Enlarged by Contract.**—In Story on Bailments it is said:⁸ “As the legal responsibility of a bailee may be narrowed by any special contract, either express or implied, so it may in like manner be enlarged.⁹ Thus if a depositary should specially contract to keep the deposit safely, he might be liable for ordinary negligence, although the law would otherwise hold him liable only for gross negligence.” A bailee, who, having

¹ Dodge v. Meyer, 61 Cal. 405.

² Doty v. Hawkins, 6 N. H. 247; 25 Am. Dec. 459.

³ Estes v. Boothe, 20 Ark. 583.

⁴ Kelly v. Patchell, 5 W. Va. 585.

⁵ Story on Bailments, sec. 31.

⁶ Story on Bailments, sec. 32. A common carrier cannot, for example,

stipulate that he shall not be liable for negligence: See *post*, Common Carriers.

⁷ Story on Bailments, sec. 32; Lancaster Co. Bank v. Smith, 62 Pa. St. 47.

⁸ Sec. 33.

⁹ Ames v. Belden, 17 Barb. 515.

failed to return the property, agrees to pay for it, is liable to an action for the price or value as in case of any other sale of goods.¹ An agreement by a bailee not to remove the chattel from the premises without the bailor's consent is not broken by its removal by an officer attaching it on mesne process against the bailee; and such removal does not give the bailor a right of possession sufficient to enable him to maintain replevin against the officer.²

ILLUSTRATIONS.—A safe-deposit company contracts with a depositor who has rented a safe to keep an adequate guard over it. A number of bonds placed there are missing. The burden is on the company to explain their absence: *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391; 27 Am. Rep. 660. An agricultural society inviting persons to lend articles for exhibition advertised that it "would keep an efficient police force on the grounds day and night to take care of articles on exhibition." B sent a gun to exhibit. It was stolen from a building about which there were no police on guard. *Held*, that the association was liable: *Vigo Agricultural Society v. Brumfiel*, 102 Ind. 146; 52 Am. Rep. 657. A sheriff delivered goods attached to a person who gave him a written contract to return them on demand. *Held*, that the value of the goods as stated in the contract was conclusive upon both parties: *Remick v. Atkinson*, 11 N. H. 256; 35 Am. Dec. 493. Plaintiffs (who were not common carriers) contracted to take all the staves of defendant at a certain point, and raft and run them to a certain other point and land and pile them for eight dollars per thousand, and to keep a strict account of the expenses, and if it should be found to exceed eight dollars, reckoning fair prices for labor, defendant was to pay the extra expense, but the entire price not to exceed ten dollars. *Held*, that as there was nothing in the contract to show that plaintiffs were to be compensated for any risks in running the staves, and as they did not expressly assume all risks, they were only bound to ordinary care and diligence, and could not be held to have bound themselves to deliver the whole quantity of staves at all events, and to receive no compensation if any were lost without their fault: *Shaw v. Davis*, 7 Mich. 318.

§ 1704. **Contributory Negligence of Owner.**—In a Maine case it is said: "When the bailor or depositor not

¹ *Parker v. Tiffany*, 52 Ill. 286.

² *Wade v. Mason*, 12 Gray, 335; 74 Am. Dec. 597.

only knows the general character and habits of the bailee or depositary, but the place where and the manner in which the goods deposited are to be kept by him, he must be presumed to assent in advance that his goods shall be thus treated; and if under such circumstances they are damaged or lost, it is by reason of his own fault or folly. He should not have intrusted them with such a depositary to be kept in such a manner and place."¹ But a bailee for hire cannot excuse himself for the want of reasonable care in the custody of property intrusted to him simply by showing that the owner knew and acquiesced in the kind and degree of care which he exercised. And if the owner did not know all the circumstances affecting the risk to which the property was exposed, and especially if he had informed the bailee that the manner of keeping it was unsafe, it cannot be said, as matter of law, that the owner waived due care on the part of the bailee.² The hirer of a horse at a livery-stable is liable for a want of reasonable care and skill in driving him; and unless he is manifestly incapable of using such care and skill, it is immaterial whether the keeper of the stable expected, or had reason to expect, that he would or would not be careless or unskillful.³ Under a contract of bailment for mutual benefit, the bailee may show that the bailor approved of the place of storage, and that the goods were damp when delivered, and liable to mildew; and the bailor, that the goods were in the ordinary trade condition, and that the bailee knew they should have been aired and dried.⁴ Where horses are hired for a journey and the owner sends his driver, the hirer is not liable if they are driven immoderately and injured.⁵ The hirer of a horse, who, by improperly feeding and watering him, has made him

¹ Knowles v. R. R. Co., 38 Me. 55; 61 Am. Dec. 234; Hayes v. Wells, 23 Cal. 185; 83 Am. Dec. 89.

² Conway Bank v. American Express Co., 8 Allen, 512.

³ Mooers v. Larry, 15 Gray, 451.

⁴ Brown v. Hitchcock, 28 Vt. 452.

⁵ Hughes v. Boyer, 9 Watts, 556.

sick and returned him in this condition to the owner, is liable for his full value, if the owner, by the use of reasonable care and the employment of a suitable veterinary surgeon, who treated him according to his best judgment, was unable to cure him, although such treatment was, in fact, improper, and contributed to the horse's death.¹

ILLUSTRATIONS.—Plaintiff knew that defendant had provided a place for the safe-keeping of his customer's garments and an attendant to receive and return them; but instead of giving his overcoat to the attendant, hung it upon a peg near the door, from which it was stolen. *Held*, that the loss was the result of his own negligence, and he could not recover: *Trowbridge v. Schriever*, 5 Daly, 11. A person sent a check by a carrier in a sealed envelope. The check was indorsed in blank. *Held*, negligence on the part of the sender: *Hayes v. Wells*, 23 Cal. 185; 83 Am. Dec. 89.

§ 1705. **Burden of Proof.**—As to the burden of proof in ordinary bailments, the English rule, followed in some of the states, is, that the burden of proof is upon the plaintiff to show that the bailee has been guilty of negligence.² In other states a more reasonable and just rule is in force, viz., that when a bailee is sued for goods intrusted to his care, the fact that such goods were placed in his hands in good condition and are returned damaged, or not returned at all, raises a presumption of negligence which the defendant must explain.³ Where property while in the

¹ *Eastman v. Sanborn*, 3 Allen, 594; 81 Am. Dec. 677.

² *Gilbart v. Dale*, 5 Ad. & E. 543; *Midland R. R. Co. v. Bromley*, 17 Com. B. 372; *Butt v. R. R. Co.*, 11 Com. B. 140; *Finucane v. Small*, 1 Esp. 315; *Runyan v. Caldwell*, 7 Humph. 134; *Brown v. Johnson*, 29 Tex. 40; *Cross v. Brown*, 41 N. H. 283; *Lamb v. R. R. Co.*, 7 Allen, 98; *Smith v. First Nat. Bank*, 99 Mass. 605; 97 Am. Dec. 59.

³ *Boies v. R. R. Co.*, 37 Conn. 272; *McDaniels v. Robinson*, 26 Vt. 316; 62 Am. Dec. 574; *Funkhouser v. Wagner*, 62 Ill. 59; *Goodfellow v. Meegan*, 32 Mo. 280; *Bennett v. O'Brien*, 37 Ill.

250; *Ford v. Simmons*, 13 La. Ann. 397; *Wiser v. Chesley*, 53 Mo. 547; *Collins v. Bennett*, 46 N. Y. 490; *Cumins v. Wood*, 44 Ill. 416; 92 Am. Dec. 189; *Cass v. R. R. Co.*, 14 Allen, 448; distinguishing *Lamb v. R. R. Co.*, 7 Allen, 98. A hires a horse and buggy from B. When he returns them they are in a damaged state, and he gives no explanation. The burden is on A to show that the damage was not done through his negligence: *Logan v. Matthews*, 6 Pa. St. 417, the court saying: "The books are extremely meager of authority on this subject of the *onus probandi* in cases of bailment. But reason and analogy would seem to

exclusive possession of a bailee for hire receives an injury which could not ordinarily occur without negligence on the part of the custodian, the burden of proof is upon him to show that the injury was not caused by his negligence.¹ Where an action is brought against a defendant as warehouseman, to recover for the loss of property left with him as such warehouseman, on

establish the correctness of the position of the court below. All persons who stand in fiduciary relation to others are bound to the observance of good faith and candor. The bailor commits his property to the bailee for reward in the case of hiring, it is true, but upon the implied undertaking that he will observe due care in its use. The property is in the possession and under the oversight of the bailee, whilst the bailor is at a distance. Under these circumstances, good faith requires that if the property is returned in a damaged condition, some account should be given of the time, place, and manner of the occurrence of the injury, so that the bailor may be enabled to test the accuracy of the bailee's report by suitable inquiries in the neighborhood and locality of the injury. If the bailee returns the buggy (which was the property hired in this case), and merely says, 'Here is your property, broken to pieces,' what would be the legal and just presumption? If stolen property is found in the possession of an individual, and he will give no manner of account as to the means by which he became possessed of it, the presumption is that he stole it himself. This is a much harsher presumption than the one indicated by the court in this case. The bearing of the law is always against him who remains silent when justice and honesty requires him to speak. It has been ruled that negligence is not to be inferred unless the state of facts cannot otherwise be explained: 9 English Jurist, 907. But how can they be explained if he in whose knowledge they rest will not disclose them? and does not the refusal to disclose them justify the inference of negligence? Judge Story, in his treatise on bailments, section 410, says

that it would seem that the burden of proof of negligence is on the bailor, and that proof merely of the loss is not sufficient to put the bailee on his defense. The position that we are now discussing, however, includes an ingredient not mentioned by Judge Story, and on which it turns; that is, the refusal or omission of the bailee to give any account of the manner of the loss, so as to enable the bailor to shape and direct his inquiries and test its accuracy. Judge Story says there are discrepancies in the authorities. In the French law, as stated by him (section 411), the rule is different; and the hirer is bound to prove the loss was without negligence on his part. And he cites the Scottish law, to the effect that if any specific injury has occurred, not manifestly the result of accident, the *onus probandi* lies on the hirer to justify himself by proving the accident. That would be near the case in hand, because the injury here was not manifestly the result of accident, and the hirer did not even explain or state how the accident occurred." On trial of an action by a bailor against a bailee, the bailor having proved a bailment, — either for hire or gratuitous, — and that the goods were returned damaged, or not at all, the presumption of negligence and burden of showing due care is on the bailee. So held in a case of storage of household goods in good condition, although the presumption of negligence was rebutted as to some of the articles, by proof of a fire on the bailee's premises, but where there was nothing to show but that certain furniture had been broken and carpets lost or stolen by the bailee's employees": *Cumins v. Wood*, 44 Ill. 416; 92 Am. Dec. 189.

¹ *Collins v. Bennett*, 46 N. Y. 490.

the ground of negligence on the part of the defendant, the burden of proof rest upon the defendant to explain and account for the loss. But where the testimony given on the part of the defense fully and satisfactorily explains the manner of the loss, and indicates that the defendant did not in any way contribute by any neglect or want of precaution on his part to such loss, and there is no proof on plaintiff's side from which negligence could be inferred, the defendant is entitled to a nonsuit.¹ In an action for the rusting of the plaintiff's iron in the defendant's warehouse by its neighborhood to salt, also stored there, the declaration alleged that the defendant received the iron for storage on the ordinary contract of a warehouseman. It was held that an answer admitting the fact of the injury, but alleging that the iron was received on a contract by which the plaintiff assumed all risk of the injury, did not shift the burden of proof. The plaintiff must establish the contract on which he relied, and not alone the facts whence he sought to deduce it.²

¹ *Coleman v. Livingston*, 45 How. Pr. 483. ² *Gay v. Bates*, 99 Mass. 263.

CHAPTER LXXXVII.

GRATUITOUS BAILMENTS.

(a) Bailments for Sole Benefit of Bailor.

- § 1706. These are the depositum and mandatum of the civil law.
- § 1707. Test of gratuitous bailment.
- § 1708. Liability of gratuitous bailee (depositum and mandatum).
- § 1709. Not liable on promise to perform gratuitous bailment.
- § 1710. Bailee of closed receptacle.
- § 1711. Bailee or bailor may sue for chattel.
- § 1712. Termination of bailment — By act of parties.
- § 1713. By redelivery.
- § 1714. By death.
- § 1715. Excuses for not delivering.
- § 1716. At what place bailee bound to redeliver.
- § 1717. After refusal or breach of contract — Bailee an insurer.
- § 1718. Bailee not entitled to use article bailed.
- § 1719. Bailee entitled to reimbursement for expenses.
- § 1720. Joint bailors and joint bailees.

(b) Bailments for Sole Benefit of Bailee.

- § 1721. This bailment is the gratuitous loan.
- § 1722. Borrower liable for slight neglect.
- § 1723. For what borrower not liable.
- § 1724. Rights, duties, and liabilities of lender.
- § 1725. Rights and duties of borrower.
- § 1726. Termination of bailment.

(a) Bailments for Sole Benefit of Bailor.

§ 1706. **These Bailments are the Depositum and Mandatum of the Civil Law.** — The bailments for the bailor's sole benefit are the *depositum* and the *mandatum*¹ of the old writers. Much of the learning in the books on the subject is taken from the civil law. The adjudicated cases in our reports are not very many, both for the reason given by Sir William Jones, that it is an uncommon thing to undertake an office of trouble without

¹ See *Connor v. Winton*, 8 Ind. 315; 116 Pa. St. 129; 2 Am. St. Rep. 65 Am. Dec. 761; *Rozelle v. Rhodes*, 591.

compensation,¹ and for those of Judge Story, that the facilities of modern times to obtain all kinds of service render it unnecessary to burden friends with the execution of such trusts, and that persons are unwilling to make their friends responsible for a meritorious though negligent kindness.² "There is another class of deposits," says Story,³ "which might indeed fall under the head of necessary deposits,⁴ but which we have ventured to call involuntary deposits. Such is the case where lumber floating in a river is, by a sudden flood or freshet, lodged on the land of a stranger, and left there by the subsidence of the stream. Such, also, is the case of trees blown by a tempest upon the land of a stranger, and also of goods lodged in the like manner by a whirlwind or tornado in a distant field of a stranger. . . . In respect to the duty of the owner of the land to preserve the property thus by accident thrown upon his land, it would probably be held that it was of the same nature and extent as that of an ordinary finder of goods."⁵ Where property is not put in the bailee's charge by the owner, but comes into his possession through the owner's neglect, and where he may not know to whom it belongs, or by whom it was left, he should not be held responsible for delivering it to the wrong person, if he has exercised all the care and vigilance that could reasonably be expected of him under the circumstances.⁶

ILLUSTRATIONS. — A undertakes, without pay, to carry a thing for B from C to D. This is a mandate: *Gulledge v. Howard*, 23 Ark. 61; *Ferguson v. Porter*, 3 Fla. 27. A purchases

¹ Jones on Bailments, 57.

² Story on Bailments, sec. 218.

³ Bailments, sec. 83 a.

⁴ Necessary deposits are such as are suddenly and almost involuntarily made by the depositor in cases of extraordinary peril and difficulty, such as in cases of fire, shipwreck, inundations, insurrections, attacks by mobs, and other casualties and pressing emergencies. The common law treats such bailees as to liability the same as

other gratuitous bailees: Story on Bailments, sec. 83.

⁵ A, who had rented rooms of B, at the expiration of the lease went away, leaving there some trunks and a stove. Held, that this was an involuntary deposit: *Preston v. Neale*, 12 Gray, 223. The clerk of a court is an involuntary depository as to money paid into court which he is obliged to take charge of: *Aurentz v. Porter*, 56 Pa. St. 118.

⁶ *Morris v. R. R. Co.*, 1 Daly, 202.

for B a draft to transmit for him to another place. A is not to be paid for his pains. This is a mandate: *Eddy v. Livingston*, 35 Mo. 487; 88 Am. Dec. 122. A customer of a bank deposits bonds and other securities and valuables in the bank safe, the bank receiving no pay for the service. The bank is a gratuitous bailee: *De Haven v. Kensington National Bank*, 81 Pa. St. 95; *First National Bank v. Graham*, 79 Pa. St. 106; 21 Am. Rep. 49.¹

§ 1707. **Test of Gratuitous Bailment.**—Whether a certain bailment is for the bailor's sole benefit is often a difficult question to decide.² If the bailee had a right and it was the usage of his business to charge compensation, then the fact that in the particular case nothing was said about compensation will not make it gratuitous.³ But "where one undertakes for a near relative or personal friend, or out of mere charity or favor, and more especially if accomplishing the trust puts him to little outlay of time, trouble, and skill, and the bailment lies outside his remunerated field of labor, we may well presume the undertaking to have been gratuitous."⁴ Where a passenger on a railroad train, after arriving at the end of his route, takes his baggage into his own exclusive possession and control, but afterwards, for his own convenience, redelivers

¹ "The bank cannot use the deposit in its business, and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind": *Scott v. National Bank*, 72 Pa. St. 478; 13 Am. Rep. 711; *Lancaster Co. Bank v. Smith*, 62 Pa. St. 47.

² In *Vigo Agricultural Society v. Brumfiel*, 102 Ind. 146, 52 Am. Rep. 657, A, in response to an invitation, sent his gun to an agricultural fair to exhibit. It was held that there was a consideration for the deposit. "The case made by the complaint is one of bailment. The bailment was not a gratuitous one, for the reason that the exhibition of the gun, in response to the invitation contained in the advertisement of the appellant, constituted a consideration for the undertaking. It may be true that both parties de-

rived a benefit, but this did not strip the contract of its character, — that of a bailment for reward. The reward was not, it is true, in money, but it was nevertheless a reward in the form of an act performed at the request of the bailee. An association which invites persons to supply articles to enable it to conduct an exhibition receives some consideration from the person who responds to its invitation by placing articles in its care for exhibition."

³ *Pattison v. Syracuse Nat. Bank*, 4 Thomp. & C. 96; *Mariner v. Smith*, 5 Heisk. 203; *Kirtland v. Montgomery*, 1 Swan, 452; *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. 362.

⁴ *Schouler on Bailments*, 35; citing *Dart v. Lowe*, 5 Ind. 131; *Lafourche Navigation Co. v. Collins*, 12 La. Ann. 117.

it to the baggage-master at the depot to be kept until sent for, the railroad company is not liable for the baggage as a common carrier: It is a gratuitous bailment, and the company is liable only for gross negligence.¹ To render it a bailment for hire or recompense, the compensation need not be direct and certain, or an ascertained sum in money or a given value in anything else. A mere contingent, uncertain, and indirect benefit will be sufficient.² Where the mandatary has made no agreement for a compensation for his services, and it cannot be inferred, either from the nature of the employment or the relation of the parties, that it was in contemplation of both parties that the mandatary should receive compensation for his services, it is a case of a gratuitous procuration, and the mandatary is not entitled to compensation.³ Where one person uses another's carriage at the request of the owner, and neither derives any benefit from such use, other than the amusement and recreation arising

¹ *Minor v. R. R. Co.*, 19 Wis. 40; 88 Am. Dec. 670.

² *Newhall v. Paige*, 10 Gray, 366; A box was left at A's liquor store by an expressman. A received no compensation for the use of his store by expressmen except the advantage in their bringing him business. Held, that A was a bailee for hire of the box, and liable as such: *Newhall v. Paige*, 10 Gray, 366. The court said: "The only error in this case was in the instructions given to the jury, and consisted in telling them that the defendant could not be considered a bailee for hire, unless his compensation was for some certain benefit to himself, and that a mere contingent, uncertain, and indirect benefit would not constitute such a consideration as was necessary to establish a contract of bailment for hire or reward. This was stating the proposition more broadly than the rules of law will warrant. A person becomes a bailee for hire when he takes property into his care and custody for a compensation. The nature and amount of the compensation are immaterial. The law will

not inquire into its sufficiency or the certainty of its being realized by the bailee. The real question is, Was the contract made for a consideration? If so, then it was a *locatum*, and not a *depositum*, and the defendants were liable for a want of ordinary care. The general rule as to the consideration of a contract is well understood, and is the same in case of bailments as in all other contracts. The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may inure to the benefit of the party making the promise: *Haigh v. Brooks*, 10 Ad. & E. 320; 2 Perry & D. 484; *Lawrence v. McCalmont*, 2 How. 452; *Hubbard v. Coolidge*, 1 Met. 92. Where such a consideration exists, a contract cannot be said to be a *nudum pactum*, nor a bailment a gratuitous undertaking."

³ *Lafourche Navigation Co. v. Collins*, 12 La. Ann. 119.

therefrom to both, the person using the carriage is liable for any injury that may happen to it through his want of ordinary care and prudence.¹ On a trial before a jury, where one of the questions to be tried is whether the defendant was a gratuitous bailee of the plaintiff or not, courts will not allow the plaintiff to introduce evidence to show that the defendant, in a different transaction with a person other than the plaintiff, and concerning a different bailment, was a bailee for compensation.²

ILLUSTRATIONS. — A carrier, being also a wharfinger, received into his warehouse goods of the plaintiff on the terms that they should be conveyed by his barges to London, when the plaintiff should direct, at the usual freight, and that in the mean time they should be kept by him without change for warehousing. *Held*, in an action for not keeping the goods safely, that he was not a gratuitous bailee: *White v. Humphrey*, 11 Q. B. 43; 12 Jur. 417. A bank was in the habit of taking bonds for safe-keeping, and of detaching the coupons and collecting the interest for the depositors of the bonds. It sent these coupons to city banks, and the proceeds were there placed to its credit, and upon the funds thus accumulated it would draw drafts and charge a small commission therefor. The interest paid by the city banks was inconsiderable, and the amount realized therefrom and the commissions on drafts did not compensate for the trouble of forwarding the coupons and paying out the interest. *Held*, that these facts did not constitute the bank a bailee for hire: *Comp v. Carlisle Deposit Bank*, 94 Pa. St. 409.

§ 1708. **Liability of Gratuitous Bailee.** — Of the bailee without reward only the lowest degree of care is required. He is required to exercise towards the chattel bailed to him only the same degree of care which he, under the same circumstances, exercises or would exercise towards his own.³ He is not liable for a loss or injury, unless it

¹ *Carpenter v. Branch*, 13 Vt. 161; 37 Am. Dec. 587.

² *Lobenstein v. Pritchett*, 8 Kan. 213.

³ Story on Bailments, secs. 63, 64, 183; Schouler on Bailments, 44-48; First Nat. Bank v. Graham, 79 Pa. St. 106; 21 Am. Rep. 49; Knowles v. R. R. Co., 38 Me. 55; 61 Am. Dec.

234; *Rozelle v. Rhodes*, 116 Pa. St. 129; 2 Am. St. Rep. 591. But see *Doorman v. Jenkins*, 2 Ad. & E. 256. In *Foster v. Essex Bank*, 17 Mass. 499, 9 Am. Dec. 168, Parker, C. J., said: "It will not be disputed that if it amounts only to a naked bailment without reward, and without any special undertaking, which in

is the result of gross negligence on his part.¹ This rule is laid down in many cases against a bailee of goods gratuitously deposited with him² (i. e., *depositum*), and against a bailee of goods who without recompense is to do something with them³ (i. e., *mandatum*).

the civil and common law is called *depositum*, the bailee will be answerable only for gross negligence which is considered equivalent to a breach of faith, as every one who receives the goods of another in deposit impliedly stipulates that he will take some degree of care of it. The degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the depositary uses towards his own property of a similar kind. For although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest; and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns."

¹ *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Whitney v. Lee*, 8 Met. 91; *McKay v. Hamblin*, 40 Miss. 472; *Spooner v. Mattoon*, 40 Vt. 300; 94 Am. Dec. 395; *First Nat. Bank v. Ocean Bank*, 60 N. Y. 278; 19 Am. Rep. 181; *Griffith v. Zipperwick*, 28 Ohio St. 388; *Tracy v. Wood*, 3 Mason, 132; *Haynie v. Waring*, 29 Ala. 265; *Bissell v. R. R. Co.*, 29 Barb. 615; *Grant v. Ludlow*, 8 Ohio St. 48; *Needles v. Howard*, 1 E. D. Smith, 62; *Green v. Hollingsworth*, 5 Dana, 173; 30 Am. Dec. 680; *Conwell v. Smith*, 8 Ind. 530; *Gulledge v. Howard*, 23 Ark. 61; *Dart v. Low*, 5 Ind. 131; *Johnson v. Reynolds*, 3 Kan. 257; *Bakewell v. Talbot*, 4 Dana, 216; *Tudor v. Lewis*, 3 Met. (Ky.) 378; *Fulton v. Alexander*, 21 Tex. 148; *Maury v. Coyle*, 34 Md. 235; *Wiser v. Chesley*, 53 Mo. 547; *Patterson v. McIver*, 90 N. C. 493; *Lloyd v. West Branch Bank*, 15 Pa. St. 172; 53 Am. Dec. 581; *De Haven v. Kensington Bank*, 81 Pa. St. 95; *Connor v. Winton*, 8 Ind. 315; 65 Am. Dec. 761; *Minor v. R. R. Co.*, 19 Wis. 40; 88 Am. Dec. 670; *Eddy v. Livingston*, 35 Mo. 487; 88 Am. Dec. 122.

² *Wiser v. Chesley*, 53 Miss. 547; *Mariner v. Smith*, 5 Heisk. 203; *Dunn v. Branner*, 13 La. Ann. 452; *Maury v. Coyle*, 34 Md. 235; *Knowles v. R. R. Co.*, 38 Me. 55; 61 Am. Dec. 234; *Green v. Buchard*, 27 Ind. 483; *Dart v. Low*, 5 Ind. 131; *Giblin v. McMullen*, L. R. 2 P. C. 317; *Edson v. Weston*, 7 Cow. 278; *Smith v. First Nat. Bank*, 99 Mass. 605; 97 Am. Dec. 59; *De Haven v. Kensington Bank*, 81 Pa. St. 95; *First Nat. Bank v. Graham*, 79 Pa. St. 106; 21 Am. Rep. 49; *Scott v. Nat. Bank*, 72 Pa. St. 478; 13 Am. Rep. 711; *Lancaster Co. Bank v. Smith*, 62 Pa. St. 47; *Chase v. Maberry*, 3 Harr. (Del.) 266; *Dougherty v. Posegate*, 3 Iowa, 88; *Mechanics' Bank v. Gordon*, 5 La. Ann. 607; *Green v. Hollingsworth*, 5 Dana, 173; 30 Am. Dec. 680; *Hills v. Daniels*, 15 La. Ann. 280; *Sodowsky v. McFarland*, 3 Dana, 205; *Spooner v. Mattoon*, 40 Vt. 300; 94 Am. Dec. 395; *Monteath v. Bissell*, Wright, 411; *McKay v. Hamblin*, 40 Miss. 472; *Carrington v. Ficklin*, 32 Gratt. 670; *Danville Bank v. Waddill*, 31 Gratt. 469.

³ *Skelley v. Kahn*, 17 Ill. 170; *Eddy v. Livingston*, 35 Mo. 487; 88 Am. Dec. 122; *Lamley v. Scott*, 24 Miss. 528; *Kemp v. Farlow*, 5 Ind. 462; *Lobenstein v. Pritchett*, 8 Kan. 213; *McCauley v. Davidson*, 10 Minn. 418; *Mariner v. Smith*, 5 Heisk. 203; *Gulledge v. Howard*, 23 Ark. 61; *Ferguson v. Porter*, 3 Fla. 27; *Colyar v. Taylor*, 1 Cold. 372; *Fulton v. Alexander*, 21 Tex. 148; *McNabb v. Lockhart*, 18 Ga. 495; *Persch v. Quiggle*, 57 Pa. St. 248; *Percy v. Millaudon*, 20 Mart. 75; *Jourdan v. Reed*, 1 Iowa, 135; *Hyland v. Paul*, 33 Barb. 241; *Stanton v. Bell*, 2 Hawks, 145; 11 Am. Dec. 744; *Beardslee v. Richardson*, 11 Wend. 25; 25 Am. Dec. 596; *Lloyd v. West Branch Bank*, 15 Pa. St. 172; 53 Am. Dec. 581; *Jenkins v. Motlow*, 1 Sneed, 248; 60 Am. Dec. 154; *Connor v. Winton*, 8 Ind.

The duty and liability of a bailee without reward are well summed up by Mr. Schouler, the latest American writer on the subject of bailments, thus: "On the whole, it may be concluded that wherever a bailee undertakes without recompense to accomplish towards a chattel the bailment purpose, and has actually entered upon the per-

• 315; 65 Am. Dec. 761; *Storer v. Gowan*, 18 Me. 174; *Tracy v. Wood*, 3 Mason, 132; *Blaine v. Wominck*, 2 Murph. 373. C.'s horse having a swelling on its neck, W., as a matter of friendship and without reward, undertook to lance it. The horse died, and C. sued W. The court instructed the jury that if W. pretended to no skill as a farrier, but as a matter of friendship did the lancing, W. was not liable. This was held on appeal too broad, amounting to a declaration that W.'s position screened him from all liability: *Connor v. Winton*, 8 Ind. 315; 65 Am. Dec. 761. Said the court: "The general rule in relation to bailment is, that where the contract is of mutual benefit, as where the work is done for hire, there ordinary diligence only is required. Here there is no special contract to that effect set up, so that none of the received doctrines in relation to care, skill, etc., combined, are applicable. The instruction assumes that the lancing was done without hire, 'as a matter of friendship or otherwise,' and hence its correctness must be tested by the rules applicable to that species of bailment. When an act is thus done *gratis*, it is called in the books a mandate: *Story on Bailments*, 159; *Coggs v. Bernard*, 1 Smith's Lead. Cas. 82; 2 Kent's Com. 568. It was therefore a bailment of the horse in regard to which Winton undertook, as assumed in the instruction, to do an act without reward. What, then, were the obligations of Dr. Winton as such mandatary? That a mandatary is liable for misfeasance or malfeasance is settled by the highest authority: *Story on Bailments*, 180, *infra*; 2 Kent's Com. 569. The degree of diligence required of the mandatary is equally well settled. He is bound only to slight diligence, and responsible only for gross neglect: 2 Kent's Com. 571, 572; *Story on*

Bailments, 194; *Whitney v. Lee*, 8 Met. 91. In *Tracy v. Wood*, 3 Mason, 132, it is held that a mandatary is liable if he omit that care which persons of common prudence are accustomed to take of their own property. In *Moore v. Mourgue*, Cowp. 479, Lord Mansfield held that to maintain such an action the defendant must be guilty either of a breach of orders, gross negligence, or fraud. So also *Dartnall v. Howard*, 4 Barn. & C. 345. The authorities are also abundant to show that in proportion to the value of the article to be kept, or the delicacy of the operation to be performed, will the act assume character. What would be simply negligence as to one thing would be gross negligence as to another. What would be ordinary care in relation to a pound of nails would be gross negligence in relation to a like weight of gold coin. So what might be proper care in mending a plow might be the grossest negligence as applied to the repair of a watch: *Story on Bailments, supra*. So that what on the part of Winton might have been due diligence in thrusting his lance into a vein of the horse's neck might have been very gross negligence in lancing the complicated and delicate machinery of the hock-joint. It is therefore very clear that though Winton acted as a 'friend or otherwise,' that is, without compensation, as the instruction implies, he might still be liable for consequences. Hence the instruction is erroneous. It makes his mandatary position screen him from all liability. The assumption in relation to his not being a professional farrier is equally erroneous. If he assumed to perform so delicate an operation, his not being a professional farrier would not screen him from liability in case he performed it in gross ignorance or with gross negligence."

formance of such undertaking, he is bound to bestow a degree of diligence less than what the average of mankind under the same conditions are wont to exert with reference to their own property, and yet enough to be deemed slight diligence; that he renders himself liable correspondingly for the ill consequences of what the law terms gross negligence, or negligence of a deeper dye than the ordinary, in executing his undertaking; and that for fraud and bad faith in the performance he becomes, as a matter of course, liable. As to what constitutes slight diligence or gross negligence, this depends in each case upon a variety of circumstances, such as the occupation, means, and method of performance, habits, skill, and general character of the bailee, as fairly brought home to the bailor, local custom and business usage, and the nature, quality, and value of the chattel bailed; so much so, in fact, that often a bailment of the present class might almost seem a personal trust, to be graded by the bailee's usual diligence towards his own under similar circumstances. Whether the gratuitous bailment be by way of 'deposit' or 'mandate' (as some have classified), the general rule is the same, only that some undertakings contemplate more activity and some less. And since our standard is to be adjusted in each case by the special circumstances presented, so as to get at the full import of the bailment, a modifying element lurks in the express agreement of the parties."¹

A gratuitous bailee is not liable for a loss by robbery² or larceny, even by a servant, if there has been no negligence in selecting or keeping him.³ So a bailee is not liable for the loss of goods in his possession caused

¹ Schouler on Bailments, sec. 49.

² *De Haven v. Kensington Bank*, 81 Pa. St. 95; *Jenkins v. Motlow*, 1 Sneed, 248; 60 Am. Dec. 154; *Tancil v. Seaton*, 28 Gratt. 601; 26 Am. Rep. 380; *Schermer v. Neurath*, 54 Md. 491; 39

Am. Rep. 397; *Levy v. Bergeron*, 20 La. Ann. 290.

³ *Scott v. Bank*, 72 Pa. St. 471; 13 Am. Rep. 711; *Foster v. Bank*, 17 Mass. 479; 9 Am. Dec. 168; *Smith v. Bank*, 99 Mass. 605; 97 Am. Dec. 59.

by a storm, without his fault or negligence.¹ One intrusted with money for a specific purpose is not ordinarily liable if it is stolen from him without his fault.² Where a party collects rents for another without any reward, he is liable only for gross negligence in the care of the money so collected.³ A bank taking a gratuitous special deposit is not bound to take extraordinary measures to protect the property of the depositor.⁴ But private bankers who receive a special deposit of a locked tin box, known to contain government bonds, etc., for safe-keeping, although without reward, are bound to keep the property with such care as is appropriate to its value and the manner in which it is put up. In deciding whether they are liable for its loss by theft, because not put into the strongest compartment of their safe, the jury may take the character of the locked box into consideration.⁵ Where one with whom money is left, to be paid over to another on his leaving certain instruments for the benefit of the bailor, exercises the care and prudence that would be exercised ordinarily by a careful business man before paying over the money, he fulfills his legal obligations to the bailor.⁶ If one who wishes to buy a horse takes it on trial, and it dies in his possession, he is liable only for gross negligence.⁷ A party who rides a horse at the request of the owner for the purpose of exhibiting and offering him for sale, without any benefit to himself, is bound to use such skill as he possesses; and if proved to be conversant with and skilled in horses, is equally liable with a borrower for an injury done to the horse.⁸ An agricultural society which invites persons to leave their

¹ *Mein v. West*, T. U. P. Charlt. 170.

² *Furber v. Barnes*, 32 Minn. 105.

³ *Bronnenburg v. Charman*, 80 Ind. 475.

⁴ *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; 19 Am. Rep. 181.

⁵ *Griffith v. Zipperwick*, 28 Ohio St. 388.

⁶ *Cannon River Mfg. Ass'n v. Fari-bault Bank*, 37 Minn. 394.

⁷ *La Borde v. Ingraham*, 1 Nott & McC. 419.

⁸ *Wilson v. Brett*, 11 Mees. & W. 113; 12 L. J. Ex. 264.

property with it for exhibition at its fair, and promises to take care of it, is liable if it is stolen by its negligence.¹ Where the language of a mandate is fairly susceptible of different interpretations, and the bailee, acting in good faith, is misled and adopts one when the bailor intended another, the latter will be bound and the former exonerated.² When the profession of the bailee implies skill, the want of skill is imputable as gross neglect.³ On a deposit or bailment of money to be kept without recompense, if the bailees without authority attempt to transmit the money to the bailor at a distant point by mail or private conveyance, and the money is lost, they are responsible.⁴ It is regarded as suspicious for a bailee to claim to have lost the bailed chattels and to have saved his own when both were together.⁵

ILLUSTRATIONS. — A person who had received another's money to keep for him without recompense, put it in a cash-box and kept it in a bar-room on Sunday. It was stolen. *Held*, that he was liable: *Doorman v. Jenkins*, 2 Ad. & E. 256. One not a common carrier undertook gratuitously to move several hogsheads of brandy from one cellar to another. He did the work so badly that he broke one of them and lost the contents. *Held*, that he was liable: *Coggs v. Bernard*, 2 Ld. Raym. 909. A bank accepted the care of bonds from S., a stranger, he taking a list of them and the bank inclosing them in an envelope, marking his name on them and putting them in its vault. Some time afterward, a stranger, representing himself as S., demanded the bonds from the teller, giving S.'s address and the description of the bonds correctly. The teller, without further evidence of identity, delivered him the bonds. The person was a man personating S. *Held*, that a verdict in favor of S. on the ground of the bank's negligence would be affirmed: *Lancaster Co. Bank v. Smith*, 62 Pa. St. 47. A soldier in camp was in the habit of leaving his pocket-book at night with a comrade, receiving it again in the morning. Failing to call for it one morning, the comrade started, before going on duty, to find him, and, having no pocket, secreted it between his shirt and vest, holding on to it by pressing outside.

¹ *Vigo Agricultural Society v. Brumfiel*, 102 Ind. 146; 52 Am. Rep. 657.

² *Dunbar v. Hughes*, 6 La. Ann. 466.

³ *Stanton v. Bell*, 2 Hawks, 145; 11 Am. Dec. 744.

⁴ *Stewart v. Frazier*, 5 Ala. 114.

⁵ *Bland v. Womack*, 2 Murph. 373.

On his way his attention was diverted, and when he reached his comrade's tent the pocket-book was missing. *Held*, he was not liable for the loss: *Spooner v. Mattoon*, 40 Vt. 300; 94 Am. Dec. 395. Defendant, not an innkeeper, but the proprietor of a tenement-house, permitted plaintiff, a tenant, to store trunks and boxes in a storeroom where a janitor slept, and where defendant said that he thought the trunks and boxes would be safe. They were broken into and the contents stolen. *Held*, that an auditor's finding for defendant was sustained by evidence: *Davis v. Gay*, 141 Mass. 531. A horse being for sale, A asked the agent of the vendor to let him have the horse for the purpose of trying it, and the agent did so. *Held*, that A was entitled to put a competent person on the horse for the purpose of trying it, and was not limited to merely trying it himself: *Camoy's v. Scurr*, 9 Car. & P. 383. A box containing debentures and other securities was deposited at a bank, the depositor keeping the key. The bank received no payment for their care of the box, which was kept in a strong-room with similar boxes of other customers, and with property belonging to the bank. The debentures were stolen by the cashier of the bank. In an action by the depositor against the bank, *held*, that the bank was not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary care which men of common prudence generally exercise about their own affairs: *Giblin v. McMullin*, 21 L. J., N. S., 214; 17 Week. Rep. 445; L. R. 2 P. C. 317; 38 L. J. P. C. 25. A lent a picture to B, who wished to show it to C; B, without any previous communication, and unknown to C, sent the picture to his house, where it was accidentally injured. *Held*, that C was not responsible for not keeping the picture safely: *Lethbridge v. Phillips*, 2 Stark. 544. A, a general merchant, undertakes voluntarily and without reward to enter a parcel of goods, the property of B, together with a parcel of his own of the same sort, at the custom-house for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized. A, having taken the same care of the goods of B as of his own, and not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken, was not liable to an action for the loss occasioned to B: *Shiells v. Blackburne*, 1 H. Black. 158. A bailee without reward, who receives money to transmit to a third person, is bound to perform his undertaking in good faith, and with due diligence and attention adequate to the trust reposed in him. Where money was given to A to transmit to B, without reward, and there being no bankers where he resided in Utah, he purchased a draft of the United States marshal upon the treasury

department at Washington, with B's money and some of his own, and of others uniting with him, in accordance with the usual method of transmitting money from that place; and the draft was refused payment. *Held*, that he was not liable: *Eddy v. Livingston*, 35 Mo. 487; 88 Am. Dec. 122. Money was intrusted to the owner of a steamboat by a passenger who paid no more than the regular fare. There was a great crowd; two boats lying near had just been robbed. The money was stolen from the safe, and the extra watchman employed about the boat was not produced as a witness. *Held*, that the owner was liable as a mandatary, and that there was evidence of a want of the ordinary care called for under the circumstances to sustain a verdict for the plaintiff: *Jenkins v. Motlow*, 1 Sneed, 248; 60 Am. Dec. 154. A ticket agent in the employ of a railroad company, as a matter of convenience to passengers, and without compensation, receives and stores baggage. *Held*, not liable for its loss, without proof of ordinary negligence, and in the absence of special contract, evidence is admissible to show what his custom was in relation to the storage of passengers' baggage: *Green v. Birchard*, 27 Ind. 483. A ring was deposited with defendant to be illegally raffled for, and lost by his gross carelessness. *Held*, that he was liable for it: *Woolf v. Bernero*, 14 Mo. App. 518. A went to the clothing-house of the defendants, and, while trying on a suit of clothes, left his own clothing in a closet to which he had been directed by a salesman in the store. During the time he was away from the closet his pocket-book and other property was taken from his clothing. No negligence was shown on the part of the defendants, and there was evidence of experienced tailors that it was customary for tailors to provide dressing-rooms for customers in which to hang up their clothes while trying on suits they had ordered. *Held*, that the defendants were not liable to the plaintiff for the loss of his property: *Rea v. Simmons*, 141 Mass. 561. Forty-four record-books, some deeds, mortgages, and other papers of a county having been stolen, the county officers deposited three thousand five hundred dollars in the hands of A, upon condition that it should upon the return of the stolen property be paid to the person causing the return. It was also stipulated that the failure to "deliver some small paper or papers" should not invalidate the agreement. Within the time limited, A received a paper, signed by the deputy sheriff of the county, acknowledging the receipt of the record-books, "also papers and small index-books." He thereupon paid the money to the person presenting the receipt. The county then brought suit against A to recover the money, alleging that some of the books were, upon their return, in such a damaged condition as to be rendered comparatively worthless, and that he had therefore not performed his contract. *Held*, that

A, being a simple bailee of the money deposited in his hands without compensation, was not, in the absence of bad faith on his part, responsible for the condition of the property at the time of its return: *Eldridge v. Hill*, 97 U. S. 92. A deposited with D, a merchant, two hundred dollars, and took an acknowledgment reciting that there was due this amount "left on deposit." The money was placed in the merchant's safe. The deposit was for A's accommodation, and intended to be for a day or two only. *Held*, that the question whether defendant used ordinary care in keeping the money safely was one of fact for the jury, and that it was error to charge that defendant was liable if the money was stolen from the safe by one of his clerks: *Glover v. Burbidge*, 27 S. C. 305. P. lived in L., where one J. L. L. owned a lot of land. A person signing himself "J. L. L." wrote to P. from F. and proposed to sell him the lot. A contract was made between them by correspondence. P. then telegraphed through his agent to a bank at F., saying, "Is J. L. L. an honorable man, and good for his contracts?" The bank replied, "Don't know J. L. L." The next day a man giving his name as J. L. L. called at the bank and inquired if a deed for him to sign had come from P. The bank then telephoned to P.'s agent, "A man is in the bank who says his name is J. L. L., and that he has an arrangement with you by which you are to send a deed for him to sign." P. at once sent the deed to the bank, with instructions that it was "for Mr. and Mrs. L. to sign," and requesting it to pay J. L. L., when it should be executed, the purchase price. The bank handed the deed to the person who had represented himself as J. L. L., received it back executed in that name, returned it to P., and upon being advised that the deed was all right, paid the purchase price to the same person. He was an imposter, and the deed a forgery, but the bank had no knowledge thereof, and acted in good faith, and without any consideration for its services. *Held*, that the bank was not liable for the loss: *Metzger v. Franklin Bank*, 119 Ind. 359.

§ 1709. Not Liable on Promise to Perform Gratuitous Bailment.—Although the gratuitous bailee may be held liable for negligently performing the trust which he has undertaken, he cannot be sued for refusing to carry out his promise to accept the thing and perform the trust.¹

¹ 2 Kent's Com., 4th ed., 569-573; 415; *Ferguson v. Porter*, 3 Fla. 88; *Elsee v. Gatward*, 5 Term Rep. 143; *Jenkins v. Bacon*, 111 Mass. 373; 15 *Balfe v. West*, 13 Com. B. 466; *Samuels v. McDonald*, 11 Abb. Pr., N. S., 344; *McGee v. Bast*, 6 J. J. Marsh. 455; *Fellowes v. Gordon*, 8 B. Mon. Johns. 84, is the leading American

But if anything has been done in part execution of the agreement, then he must carry it out.¹ One who is made custodian of money or securities under an agreement entered into by several parties, under which the several parties are to place in the hands of the custodian an equal sum of money, or securities amounting in value to the sum to be deposited, to be held by the custodian for the purposes of the agreement, and under which agreement the custodian is required to deposit the money and securities received by them in certain companies, and to keep them so deposited until the happening of certain events, is bound to comply with those requirements as to the deposit. If he fail to deposit and keep deposited the money or securities received from any one of the parties, such party, after a demand on the custodian for and a refusal by him to deliver such money or securities, may bring an action against him to recover damages for a conversion of the property, or at his election, if the property consist of securities, an action of claim and delivery.²

ILLUSTRATIONS. — A agrees to carry B's valise for him to the next town without reward. A takes it and negligently loses it.

case. Kent, C. J., there said: "A review of the cases will show that by the common law a mandatary, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss. In other words, he is responsible for a misfeasance, but not for a non-feasance, even though special damages are averred. Those who are conversant with the doctrine of *mandatum* in the civil law, and have perceived the equity which supports it and the good faith which it enforces, may perhaps feel a portion of regret that Sir William Jones was not successful in his attempt to ingraft this doctrine all its extent into the English law. I have no doubt of the perfect justice of the Roman rule on the ground that good faith ought to be observed, because the employer placing reliance upon that good faith

in the mandatary was thereby prevented from doing the act himself or employing another to do it. This is the reason which is given in the institutes for the rule. . . . But there are many rights of moral obligation which civil laws do not enforce, and are therefore left to the conscience of the individual as rights of imperfect obligation; and the promise before us seems to have been so left by the common law which we cannot alter, and which we are bound to pronounce."

¹ *Whitney v. Lee*, 8 Met. 91; *Smedes v. Bank of Utica*, 20 Johns. 377; 3 Cow. 362; *Kellogg v. Sweeney*, 1 Lans. 402; *Graves v. Ticknor*, 6 N. H. 537; *Roulston v. McClelland*, 2 E. D. Smith, 60; *Kirtland v. Montgomery*, 1 Swan, 452; *Jenkins v. Motlow*, 1 Sneed, 248; 60 Am. Dec. 154; *Eddy v. Livingston*, 35 Mo. 487; 88 Am. Dec. 122.

² *McCullough's Lead Co. v. Strong*, 8 Jones & S. 21.

A is liable. A refused to carry it as he promised. A is not liable: Schouler on Bailments, 41. L. received of R. a bill of exchange, which he promised to return to R. on demand, or pay the amount thereof. Though the bill was received by L. as a matter of courtesy, and was to be used for the benefit of R., yet as he did not return the bill on demand, nor in due season, *held*, that he was liable to R. for the amount: *Rutgers v. Lucet*, 2 Johns. Cas. 92.

§ 1710. **Bailee of Closed Receptacle.**—The liability of a bailee of a closed receptacle depends upon his knowledge, or means of knowledge, of the contents. The bailor should notify the bailee of its contents, or give him power to do so, as by leaving him the key of a box or trunk. In such case, the bailee will be liable for the contents according to the rule requiring care in proportion to the value. And though, without authority, the bailee would not be justified in opening a closed receptacle, yet circumstances of emergency might afford an excuse.¹

§ 1711. **Bailee or Bailor may Sue for Chattel.**—A bailee without reward by virtue of his possession of the property has title against a stranger,² and may maintain trespass,³ trover, or replevin against one wrongfully interfering with his possession.⁴ Even a finder may maintain trover

¹ Schouler on Bailments, 57. It is a gross breach of trust for a bailee to break open a closed receptacle, as a locked chest or a sealed package: Story on Bailments, sec. 92; *Heiman v. Drinkwater*, 1 Greenl. 27.

² *Armory v. Delamirie*, 1 Strange, 505.

³ *Shaw v. Kaler*, 106 Mass. 448, the court saying: "It has been settled by a long course of decisions, that possession is a sufficient title to support an action of trespass or trover against a party having no right. A mere wrongdoer is not permitted to question the title of a person in the actual possession and custody of the goods, whose possession he has disturbed: *Armory v. Delamirie*, 1 Strange, 505; *Rogers v. Arnold*, 12 Wend. 30, 37; *Winship v. Neale*, 10 Gray, 382; *Burke v.*

Savage, 13 Allen, 408. In the action of trespass, as possession is *prima facie* evidence of right, so a mere stranger cannot deprive the party of that possession without showing some authority or right from the true owner to justify the taking. This sound and incontrovertible principle has been extended to trover, and it equally applies to replevin."

⁴ *Harrington v. King*, 121 Mass. 269; *Thayer v. Hutchinson*, 13 Vt. 504; 37 Am. Dec. 607; *Poole v. Symonds*, 1 N. H. 290; 8 Am. Dec. 71; *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508; *Miller v. Adsit*, 16 Wend. 335; *Giles v. Grover*, 6 Bligh, 277, 452; *Carson v. Prater*, 6 Cold. 565; *Jones v. McNeil*, 2 Bail. 466; *Neff v. Thompson*, 8 Barb. 213. See *Ludden v. Leavitt*, 9 Mass. 104; 6 Am. Dec. 45; *Oucalt v.*

against a stranger.¹ The bailor also may sue;² but a recovery by one bars a similar action by the other.³

§ 1712. **Termination of Bailment—By Act of Parties.**—The bailment may be terminated by the act of the bailor.⁴ But he must first demand the thing, unless the demand is rendered unnecessary by the bailee's misappropriation, or other violation of duty.⁵ One who deposits money with another, to be appropriated for the benefit of a third person, being under no legal obligation so to appropriate it, has a right to countermand the appropriation and recall the money at any time before it has been actually appropriated, or before such an arrangement has been entered into between the depositary and the person for whose benefit it was deposited as creates a privity between them and amounts to an appropriation of it. Anything short of this is irrelevant on the depositor's right to recall and recover back his money.⁶

The bailment may be terminated by the act of the bailee. He may refuse to continue the relation longer, when, after notifying the bailor to that effect, and giving him an opportunity of getting the thing back, he will

Dinling, 25 N. J. L. 443; *Hare v. Fuller*, 7 Ala. 717; *Cox v. Easley*, 11 Ala. 362; *McGille v. Monette*, 37 Ala. 49; *Little v. Fossett*, 34 Me. 545; 56 Am. Dec. 671; *Shaw v. Kaler*, 106 Mass. 448.

¹ *Brandon v. Huntsville Bank*, 1 Stew. 320; 18 Am. Dec. 48; *Armory v. Delamirie*, 1 Strange, 505; 1 Smith's Lead. Cas. 636; *McLaughlin v. Waite*, 9 Cow. 670; 5 Wend. 404; 21 Am. Dec. 232; *Pinkham v. Gear*, 3 N. H. 484; *Poole v. Symonds*, 1 N. H. 290; 8 Am. Dec. 71; *Clark v. Maloney*, 3 Harr. (Del.) 63; *Magee v. Scott*, 9 Cush. 148; 55 Am. Dec. 49; *Tatum v. Sharpless*, 6 Phila. 18; *Bridges v. Hawkesworth*, 15 Jur. 1027. A finder may sue a gratuitous bailee with whom he has deposited the article for a negligent loss: *Tancil v. Seaton*, 28 Gratt. 601; 26 Am. Rep. 380.

² *Howard v. Farr*, 18 N. H. 457. The possession of the bailee is the possession of the bailor: *Sallee v. Arnold*, 32 Mo. 532; 82 Am. Dec. 144.

³ *Harrington v. King*, 121 Mass. 269; *Johnson v. Holyoke*, 105 Mass. 80; *Chesley v. St. Clair*, 1 N. H. 189; *Bissell v. Huntingdon*, 2 N. H. 143.

⁴ *Howard v. Roeben*, 33 Cal. 399.

⁵ *Brown v. Cook*, 9 Johns. 361; *Beardslee v. Richardson*, 11 Wend. 25; *West v. Murphy*, 3 Hill (S. C.), 284; *McLain v. Hoffman*, 30 Ark. 428; *Phelps v. Bostwick*, 22 Barb. 314; *Montgomery v. Evans*, 8 Ga. 178; *Stewart v. Frazier*, 5 Ala. 114; *Jackman v. Partridge*, 21 Vt. 558; *Hosmer v. Clark*, 2 Greenl. 308; *Derrick v. Baker*, 9 Port. 362; *Magee v. Scott*, 9 Cush. 148; 55 Am. Dec. 49.

⁶ *Winkley v. Foye*, 33 N. H. 171; 66 Am. Dec. 715.

stand released;¹ but if the bailment is one to do a certain work on or with the chattel, or to hold it for a certain time, the bailee cannot terminate the relation without the consent of the bailor till that is done, otherwise he will be liable in damages for a breach of his contract.² A gratuitous bailee who desires to terminate the bailment should notify the bailor to take the property away, and if he neglects to do so within a reasonable time, or cannot be found by due inquiry, the bailee should store it at bailor's risk, subject to the right of the store-keeper to sell it for payment of his charges when they approach near its value.³ So the bailment is terminated by the bailee's wrongful transfer of the thing bailed.⁴

ILLUSTRATIONS.—A made a special deposit with the defendant of gold coin. It was afterwards agreed that the defendant should pay interest on such deposit. *Held*, after such agreement the special deposit was turned into an open account: *Howard v. Roeben*, 33 Cal. 399; *Hathaway v. Brady*, 26 Cal. 581. A delivered to B a certain sum of money to keep, which B accepted. A afterwards requested B to take it to one S, to keep over night, and B agreed so to do. *Held*, that this new contract was not inconsistent with the former one, and only provided a new mode of discharging it, and had no effect unless or until performed: *McDaniels v. Robinson*, 26 Vt. 316; 62 Am. Dec. 574. Money was deposited by plaintiff with defendants as a special deposit, and the parties subsequently agreed that the plaintiff should lend and the defendants borrow the money. *Held*, that the loan was complete, if nothing remained to be done at any future time, and the defendants were liable, although subsequently robbed of the money: *Chiles v. Garrison*, 32 Mo. 475. A conditional vendee of personal property, having it in his possession, sold it unconditionally before the time limited in the contract of purchase. *Held*, that this terminated the bailment, and the vendor might reclaim the property at any time after such sale and delivery: *King v. Bates*, 57 N. H. 446.

§ 1713. **By Redelivery.**—The redelivery of the thing bailed terminates the bailment. This delivery may be

¹ *Roulston v. McClelland*, 2 E. D. Smith, 60.

² *Schouler on Bailments*, 66.

³ *Dale v. Brinckerhoff*, 7 Daly, 45.

⁴ *King v. Bates*, 57 N. H. 446; *Crump v. Mitchell*, 34 Miss. 449; *Wilkinson v. Verity*, L. R. 6 Com. P. 206; *Mott v. Pettit*, 1 N. J. L. 298.

to the bailor himself, or to a third person or transferee.¹ Delivery over to one authorized will discharge the bailee, though the latter did not know of the authority.² A bailment on trust implies that there is reserved to the bailor the right to claim a redelivery of the property deposited in bailment.³ A bailee cannot refuse to deliver it to its real and true owner, even if he be not the bailor.⁴ Where the parties to a contract of bailment reside in the same city, the property should be returned to the bailor at his residence, unless otherwise agreed; and a delivery of the property elsewhere to a third person, amounting to a conversion, trover lies against the bailee, without proof of a previous demand and refusal.⁵ If the time is not fixed by agreement or by the nature of the object to be accomplished, a bailee must return the property of the bailor whenever called upon, after a reasonable time; and if a written contract does not in its terms specify the time of its continuance, parol evidence is admissible in order to enable the jury to determine what length of time is reasonable under the circumstances.⁶ A mere depositary is not liable to an action until refusal to deliver up on demand.⁷ A bailee of goods for a particular purpose cannot transfer them in contravention of that purpose, even to a *bona fide* vendee without notice.⁸ The depositary must restore not only the thing, but any increase or profits which may have accrued from it.⁹

ILLUSTRATIONS. — A, as the agent of B, deposits a sum of money with C, with a request that he will keep it until B returns home (he being absent at the time), and then pay it to

¹ Story on Bailments, sec. 103; Bates v. Stanton, 1 Duer, 79.

² Chattahoochee Bank v. Schley, 58 Ga. 369.

³ South Australian Insurance Company v. Randell, L. R. 3 P. C. 101; 22 L. T., N. S., 843.

⁴ Story on Bailments, sec. 102; Bates v. Stanton, 1 Duer, 79; Hurd v. West, 7 Cow. 752.

⁵ Esmay v. Fanning, 9 Barb. 176.

⁶ Cobb v. Wallace, 5 Cold. 539; 98 Am. Dec. 435.

⁷ West v. Murphy, 3 Hill (S. C.), 284; Hill v. Wiggins, 31 N. H. 292; Brown v. Cook, 9 Johns. 361; Phelps v. Bostwick, 22 Barb. 314; Duncan v. Magette, 25 Tex. 245; Nelson v. King, 25 Tex. 655; Jackman v. Partridge, 21 Vt. 558.

⁸ Story on Bailments, sec. 102.

⁹ Story on Bailments, sec. 99.

him, which C agrees to do. *Held*, that C is a depositary, and not liable to be sued for the money by B until after a request to pay it: *Montgomery v. Evans*, 8 Ga. 178.

§ 1714. **By Death.**—The death of the gratuitous bailee gives the bailor the right to immediately reclaim his property.¹ It does not, on the other hand, terminate the bailment in all cases *ipso facto*; for where it has been partially executed, the bailor may require his representatives to complete it.² The death of the bailor, however, even without notice, terminates the bailment.³

§ 1715. **Excuses for not Redelivering.**—It is a sufficient excuse for the non-delivery that the property has been attached by a third person, or has been recovered from him by process of law by one having a paramount title;⁴ or if an animal, that it has died.⁵ A bailee who merely points out the chattels when one claiming adversely to the bailor comes for them is to be deemed as only passively assenting to their being taken, and is not liable as for wrongful delivery.⁶ An officer's bailee of personal property has no authority to surrender it to any other person, even though such claimant's right of possession has been established in a trial thereof.⁷ To charge a mandatary, or bailee without hire, with an article lost, it is not necessary in every case that the delivery should have been made to him individually, or to one expressly or specifically authorized to receive for him; but an agency to receive may be implied in the same manner as such agency may be implied in relation to articles which are to be carried for hire.⁸

¹ *Smiley v. Allen*, 13 Allen, 465.

² Story on Bailments, sec. 202; 2 Kent's Com. 643, 644; Schouler on Bailments, 71.

³ Story on Bailments, sec. 205; 2 Kent's Com. 646.

⁴ *Edson v. Weston*, 7 Cow. 278; *Cook v. Holt*, 48 N. Y. 275.

⁵ *Bobo v. Patton*, 6 Heisk. 172; 19 Am. Rep. 593.

⁶ *Decker v. Shelton*, 1 Thomp. & C. 224.

⁷ *Foltz v. Stevens*, 54 Ill. 180.

⁸ *Lloyd v. Barden*, 3 Strob. 343.

ILLUSTRATIONS.—A deposits money with B, to be paid C when A shall have satisfied himself of a certain fact. C cannot sue without first showing that A had satisfied himself, and so notified B: *Carle v. Bearce*, 33 Me. 337.

§ 1716. **At What Place Bailee Bound to Redeliver.**—Though the demand may be made on a bailee at any place where he may be at the time, he is only obliged to deliver them at the place where the property is, or at his place of business or dwelling.¹

§ 1717. **After Refusal to Deliver or Breach of Contract, Bailee an Insurer.**—After a demand of the property by the bailor and a refusal, the bailee holds it at his peril, and will be answerable if it is afterwards lost or damaged even by accident.² And he will also be held to this extreme liability if he deals with the thing in a way not contemplated by the contract.³

¹ 2 Kent's Com., 4th ed., 508; *Masson v. Briggs*, 16 Mass. 453.

² Story on Bailments, sec. 122; *Winkley v. Foye*, 33 N. H. 171; 66 Am. Dec. 715; *Roulston v. McClelland*, 2 E. D. Smith, 60. Non-delivery on demand is a conversion of a thing bailed: *Vaughan v. Webster*, 5 Harr. (Del.) 256.

³ *Kowing v. Manley*, 49 N. Y. 192; 10 Am. Rep. 346; *Stewart v. Frazier*, 5 Ala. 114. In *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33, the plaintiff, on going abroad, requested the defendant to buy a government bond and keep it for him. He did so, though he was to receive nothing for his services. After keeping it a year, without being requested, he sent it by mail to the plaintiff's wife, and it was lost. It was held that he was liable, without regard to the question of negligence. Said the court: "The substance of the defendant's contract and duty was to keep the deposit with reasonable care and to restore it when properly called upon. We do not interpret this contract as restricting him to one place or uniform mode of keeping. All that could reasonably be expected of him was that he should

keep it with his own papers, and in the same manner and with the same degree of care as a man of ordinary prudence would exercise in the custody of papers of his own of like character. Circumstances might occur which would render it reasonable and proper that he should change the place of deposit. If his own place of business should be destroyed by fire, or if, from change of residence or temporary absence from the country, or for other sufficient reason, it should become inconvenient or unsafe that he should retain the manual possession of the bond, he would undoubtedly be at liberty to deposit it in any other place or mode in which he with reasonable prudence might deposit his own property of the like description. But, as between the original depositor and himself, he would continue to be the lawful and responsible custodian, and bound to practice that degree of care which the law required of gratuitous bailees. The complaint against him is, not that he kept it negligently or lost it by gross carelessness, but that he intentionally disposed of it in a manner not authorized by the terms of the trust. For the purposes of

ILLUSTRATIONS.—T. gratuitously undertook to receive fifteen hundred dollars for C. at N., and to deliver it to him at W. where they both resided. After drawing the money T. went to a public fair, where he met E., a townsman, who was going home before he was. T., stepping a little aside from the crowd, gave E. the money to carry to C. On his way home, while in a crowded car, E. had his pocket picked of the money. *Held*, that T. was liable for the loss, as he had violated his trust, was guilty of a conversion of the property, and of gross negligence: *Colyar v. Taylor*, 1 Cold. 372.

§ 1718. **Bailee not Entitled to Use Article Bailed.**—The bailee is not entitled to use the thing deposited with him, unless with the consent, express or implied, of the bailor.¹ A bailee without reward cannot lend the thing for his benefit without being guilty of a breach of trust.²

§ 1719. **Bailee Entitled to Reimbursement for Expenses.**—A depositary is entitled to be reimbursed for his necessary expenses in preserving the deposit;³ though by the

this case, it is wholly immaterial whether the post-office furnishes a reasonably safe mode of transmission in the case of valuable papers of such a description or not. The question of due diligence or gross neglect, in our opinion, is not raised by the bill of exceptions. . . . As we have already remarked, if the defendant had delivered the bond by mistake to a person not entitled to receive it, he would make himself responsible, without regard to the question of due care or degree of negligence. His duty was to keep the deposit; he could not dispose of it without the express or implied authority of the depositor. It will not be contended that the case shows any express authority for sending it by mail to the plaintiff's wife, and certainly none can be implied from the circumstances. In so doing, he subjected the plaintiff to a risk which he had not contemplated, and did an act not authorized by the terms of his trust. It was left to the jury to say whether, in the words of the presiding judge, it was 'a disposition of the bond contrary to the original understanding,' whereby the defendant lost it."

¹ Story on Bailments, sec. 98; *Persch v. Quiggle*, 57 Pa. St. 247.

² *Persch v. Quiggle*, 57 Pa. St. 248.

³ *Preston v. Neale*, 12 Gray, 222; *Reeder v. Anderson*, 4 Dana, 193. In *Preston v. Neale*, 12 Gray, 222, a lodger, on leaving the plaintiff's premises, left several trunks and a stove there, which the plaintiff was obliged to move from one place to another. In a suit for compensation it was held that the plaintiff was entitled to recover her expenses in taking care of the property up to the time of a demand on her for them, but nothing after that, as she had no lien on the property for the charges. "The exception to the ruling," said the court, "that the plaintiff had a lien on the trunks and stove left in her house by the defendant is sustained. It is not shown nor alleged that these things were left in her house with her consent. She therefore became an involuntary depositary of them. And we are of opinion that the law which is applied to cases of deposits by the finding of goods lost on land, and deposits of property made by the force of winds or floods (which Judge Story terms involuntary deposits), is to be applied

common law a finder of property is not entitled to anything.¹ A mere volunteer who is under no legal obligation to receive and keep, but accepts temporary custody of goods, without any agreement for a lien, has no lien for their storage.² A naked bailee without compensation has authority to contract for and appoint a bailor for services necessary, in any exigency, for the protection of the property.³ If the owner of property put into the hands of a gratuitous bailee neglects to take it away after notice, the bailee cannot sell the property, but may place

to this case. In those cases the law gives no lien to the depositary for his care and expense in the keeping and preservation of the property: Story on Bailments, secs. 44 a, 83 a, 121 a; 3 Stephens on Nisi Prius Evidence, 2690; *Amory v. Flynn*, 10 Johns. 102; 6 Am. Dec. 316. Yet if the loser offer a certain sum as a reward to him who will restore the property, a lien thereon is thereby created to the extent of the reward so offered: *Wentworth v. Day*, 3 Met. 352; 37 Am. Dec. 145; *Wilson v. Guyton*, 8 Gill, 213. Although, in cases of the deposits above mentioned, the depositaries have no lien on the property, yet we are of opinion that they are legally entitled to compensation for the care and expense of keeping and preserving it. Mr. Dane doubted this: 2 Dane Abr. 270. But in the section last above cited from Story on Bailments it is said of these deposits that 'the question may arise as to the right of the depositary to be paid his necessary and reasonable expenses for preserving and keeping the property.' It is certain that at the common law he has no lien therefor; but the just doctrine seems to be, although perhaps there is no direct and positive adjudication, that the depositary may rightfully claim and recover such expenses in an action.' In *Nicholson v. Chapman*, 2 H. Black. 258, Chief Justice Eyre said: 'A court of justice would go as far as it could go towards enforcing payment.' See also Addison on Contracts, 2d ed., 444; 2 Kent's Com., 6th ed., 636; *Reeder v. Anderson*, 4 Dana, 193; *Baker v. Hoag*, 3

Barb. 208. There is also an ancient authority on this point, to wit, Doctor and Student, c. 51, where is this passage: 'Though a man waive the possession of his goods and saith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seize them after when he will. And if any man in the mean time put the goods in safeguard to the use of the owner, I think he doth lawfully, and that he shall be allowed for his reasonable expenses in that behalf, as he shall be of goods found; but he shall have no property in them, no more than in goods found.' In the present case, which we hold to be, in its legal incidents, like deposits by finding, or made by winds or floods, we think the plaintiff is entitled to recover for storage of the trunks and stove from the time when they were left in her house until the time when the defendant made a demand on her for them. But as she, having no lien on them, wrongfully withheld them from the defendant on his demand, she is not entitled to compensation for subsequent storage during such unlawful detention. And as the jury were instructed that the plaintiff was entitled to recover compensation for storage after the demand made of the goods by the defendant, we grant a new trial."

¹ Story on Bailments, sec. 121 a; *Nicholson v. Chapman*, 2 H. Black. 254.

² *Rivara v. Ghio*, 3 E. D. Smith, 264.

³ *Harter v. Blanchard*, 64 Barb. 617.

it on storage at the bailor's charge, subject to the risk of being sold by the store-keeper for his charges at the proper time.¹

§ 1720. **Joint Bailors and Joint Bailees.**—Where there has been a joint bailment to him, the bailee is not bound to deliver to one without the consent of all.² Where there are two or more joint depositaries, each is liable for the delivery of the whole deposit.³ If personal property is made the subject of a bailment by all of the owners of it, the bailee may refuse to deliver it up to only some of them acting without the consent of the other owner or owners.⁴ If a thing is deposited by one with the authority of another, and received by the bailee to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it.⁵ Where two persons have deposited money and papers with a bank upon the agreement that the same shall be drawn out only upon their joint order, an action by one against the bank for the recovery of the deposits, to which the other was not made a party, is not maintainable.⁶ Where persons jointly hire a carriage, horses, and driver, and it is a part of the agreement that the horses should be driven by the driver alone, and one of the persons contracting causes an injury to the horses and carriage, either of the hirers is liable for the damage.⁷

ILLUSTRATIONS.—Goods had been bailed by several upon the terms that the bailee was not to part with the possession, except upon the joint order or request of the bailors, and the bailee afterwards delivered the goods to one of the bailors upon his sole request. *Held*, that the bailors jointly could not maintain an action for the delivery up of the goods without the joint order or request of the bailors: *Brandon v. Scott*, 7 El. & B. 234; 3 Jur., N. S., 362; 26 L. J. Q. B. 163.

¹ *Dale v. Brinkerhoff*, 7 Daly, 45.

² Story on Bailments, sec. 114.

³ Story on Bailments, sec. 116.

⁴ *Harper v. Godsell*, 18 Week. R. 954; 39 L. J. Q. B. 185.

⁵ *May v. Harvey*, 13 East, 197.

⁶ *Rand v. State Nat. Bank*, 77 N. C. 152.

⁷ *O'Brien v. Bound*, 2 Speers, 495; 42 Am. Dec. 384.

(b) *Bailment for Sole Benefit of Bailee.*

§ 1721. **This Bailment is the Gratuitous Loan.**—The only bailment for the bailee's sole benefit is the temporary loan of a chattel to a person to be afterwards returned by the borrower to the lender. An ordinary loan of money does not come within this; as there, the intention being that the money shall be used and other money returned, it is a debt, and not a bailment, which is created.¹ That the borrower of an animal bears the expense of its food and care does not change the case from one of gratuitous bailment.² But to constitute a gratuitous bailment no benefit to the bailor must be able to be shown,—the benefit must be all on the bailee's side.³

¹ See *Fosdick v. Greene*, 27 Ohio St. 484; 22 Am. Rep. 328. A *commodatum* cannot be created without the consent of the owner: *State v. Bryant*, 74 N. C. 124.

² *Bennett v. O'Brien*, 37 Ill. 250. But *aliter*, it seems, where a horse is taken in consideration of his keep: *Chamberlain v. Cobb*, 32 Iowa, 161.

³ In *Carpenter v. Branch*, 13 Vt. 161, 37 Am. Dec. 587, the plaintiff and defendant were engaged in "swapping" horses, when the former, whose horse was attached to his sulky, told defendant to get in and drive him a little. Defendant did so, and in turning too fast, broke the sulky. The court charged that if defendant did not use common prudence, he was liable. On appeal this was affirmed. "The only question of importance," said the court, "is, to which species of bailment the present case properly belongs. If it is ranked with those where the expected profit or advantage of the bailment is limited to the bailor, the defendant should be answerable only for gross neglect; if with those which are exclusively beneficial to the bailee, he would be holden to the exercise of extraordinary care; and if with those which are mutually beneficial to both parties, then he would be bound to the use of common or ordinary care, and would consequently be liable for ordinary neglect.

The case states that at the time of the injury complained of the parties had already agreed upon the exchange of horses, and, for anything appearing in the case, that agreement was sufficient to pass the property before delivery. It may, therefore, be assumed that the defendant was driving his own horse in the plaintiff's sulky. The inquiry then arises, For whose use or benefit was he thus employed? And the answer must be that the case discloses no inducement or motive on either side beyond the mutual gratification and pleasure of the parties. Nor could the plaintiff's request, as detailed with the other circumstances, have the effect to control or vary the consequences resulting from this view of the subject. The act requested had no tendency to promote his interest, nor had it any connection with his business; and, as a means of recreation and amusement, would seem to have been as fully and readily approved by one party as the other. Regarding the transaction in this light, we think the measure of care and prudence required of the defendant was correctly given in charge to the jury. If there was no just ground for holding him to a degree of circumspection above the common standard, none is discovered for fixing his responsibility at any point below it." The rule obligating the borrower of a chattel without com-

ILLUSTRATIONS.—A delivers cattle to B, which B promises to redeliver within one year, with the natural increase, and to pay for such as should be lost or destroyed and not redelivered. *Held*, a letting of the cattle for a year for a valuable consideration, and not a mere naked bailment: *Putnam v. Wyley*, 8 Johns. 432. The plaintiff having a horse for which he had no use, to avoid the expense of keeping, requested the defendant to take it and do his work with it in consideration of its feed and keeping. *Held*, that this was not a mere gratuitous loan, under which the defendant would be required to exercise extraordinary care, but a contract for the mutual benefit of both parties, under which the defendant was required to exercise only ordinary care in the keeping and care of the animal: *Chamberlain v. Cobb*, 32 Iowa, 161.

§ 1722. **Borrower Liable for Slight Neglect.**—In this bailment—it being beneficial to him alone—the bailor is bound to exercise the highest diligence, and is responsible for any loss or damage to the article caused by even slight negligence.¹ Especially is he held to a rigid responsibility where he deviates from the terms on which he has obtained the use of the property and a loss or damage ensues.²

ILLUSTRATIONS.—A loaned B a negress. B sent her to attend a friend where small-pox was raging, and the negress was stricken

and required extraordinary care does not apply to the delivery of a horse to be broken to service; the trainer is only bound to ordinary care: *Francis v. Shrader*, 67 Ill. 272.

¹ *Fortune v. Harris*, 6 Jones, 532; *Scranton v. Baxter*, 4 Sand. 5; *Hagebush v. Ragland*, 78 Ill. 40; *Green v. Hollingsworth*, 5 Dana, 173; 30 Am. Dec. 680; *Wood v. McClure*, 7 Ind. 155; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Rooth v. Wilson*, 1 Barn. & Ald. 59; *Howard v. Babcock*, 21 Ill. 259; *Bennett v. O'Brien*, 37 Ill. 250; *Phillips v. Cardon*, 14 Ill. 84; *Carpenter v. Branch*, 13 Vt. 161; 37 Am. Dec. 587; *De Tollenere v. Fuller*, 1 Mill Const. 117; 12 Am. Dec. 616. In *Todd v. Figley*, 7 Watts, 542, the court say: "The case before us falls within the third species of bailment, which is a loan for use, that is, a bailment or loan by the plaintiff below of his mare to the defendant, to be used by the latter, who

thereby became the bailee for the time without reward: *Jones on Bailments*, 36, 117. The bailee or defendant below being the only person, as it would seem, who was to be benefited by the loan of the mare, was therefore bound by the obligation from his implied contract to take extraordinary care of her; and he became liable to make good to the plaintiff below any loss which he might sustain by reason of an injury happening to the mare, even from slight neglect on the part of him, the defendant."

² *Martin v. Cuthbertson*, 64 N. C. 328; *Buchanan v. Smith*, 10 Hun, 474; *Lane v. Cameron*, 38 Wis. 603; *Cullen v. Lord*, 39 Iowa, 302; *Stewart v. Davis*, 31 Ark. 518; 25 Am. Rep. 576; *Kennedy v. Ashcroft*, 4 Bush, 530; *Cramp v. Mitchell*, 34 Miss. 449; *De Tollenere v. Fuller*, 1 Mill Const. 117; 12 Am. Dec. 616.

with the disease and died. B was held liable for her value: *De Tollenere v. Fuller*, 1 Mill Const. 117; 12 Am. Dec. 616. A horse loaned by plaintiff to defendant was carried to defendant's house and placed in the common horse-lot, so used for many years, though it was somewhat slanting, and the horse, being nearly blind and the weather being wet, slipped and fell upon a stump, breaking its thigh. *Held*, that these facts did not import such negligence as to render defendant liable for the loss of the property: *Fortune v. Harris*, 6 Jones, 532.

§ 1723. **For What Borrower not Liable.** — If not to blame in other respects, the borrower will not be liable for a loss or damage to the thing caused by inevitable accident, or *vis major*, or by fire, or the public enemy, or robbers and thieves.¹ Nor is he liable for the ordinary wear and tear of the article, or its destruction by natural causes.² But he may enlarge his liability by special contract.³

ILLUSTRATIONS. — The owner of a flag lent it to another person, helping him to hoist it, and left it there flying. Subsequently it was injured by a hail-storm. *Held*, that this did not show negligence in the borrower, and he was not liable: *Beller v. Schultz*, 44 Mich. 529; 38 Am. Rep. 280. A lent a mare to B, who agreed to return her in good condition, or if, by reason of accident or otherwise, he should fail to do so, to pay her value. The mare died while in B's possession. There was no evidence tending to show neglect or fault on B's part. *Held*, that he was not liable for the value of the mare: *Whitehead v. Vanderbilt*, 10 Daly, 214.

§ 1724. **Rights, Duties, and Liabilities of Lender.** — The lender must allow the borrower the free enjoyment of the thing loaned while the bailment lasts. He must reimburse him for extraordinary expenses occasioned in preserving the chattel, and he must not have lent a defective thing without so notifying the borrower; "for even a gratuitous lending should be to confer a benefit, not

¹ Story on Bailments, secs. 239, 240; *Watkins v. Roberts*, 28 Ind. 167.

² Schouler on Bailments, 81.

³ A borrowed government bonds from B to use as collateral security for loans, promising to "return or account for the bonds." *Held*, that A was liable to B, notwithstanding the bonds were stolen without his fault: *Archer v. Walker*, 38 Ind. 472.

to do a mischief.”¹ But to charge the lender, he must have been aware of the defect at the time.² The owner of a horse and carriage is not liable for an injury to a third person, caused by the negligent driving of a borrower, if they were not being used at the time in the owner’s business.³ Either the lender or the borrower may sue for invasions of the property, may bring trespass, trover, or the like, for such aggression.⁴ The lender need not be the absolute owner: it is enough if he have a special property therein, or simply a lawful possession.⁵

§ 1725. Rights and Duties of Borrower.—The borrower must not use it beyond the time or in excess of the manner of the loan;⁶ or permit it to be used by others than himself.⁷ A disregard of instructions as to the manner of use of a horse or other chattel loaned will render a bailee for hire liable for a loss occasioned thereby,—a gratuitous bailee, absolutely.⁸ The borrower must return the thing (and its increase, if any) at the time, place, and in the manner contemplated by the contract.⁹

¹ Schouler on Bailments, 86; *Blake-more v. R. R. Co.*, 8 El. & B. 1035.

² *McCarthy v. Young*, 6 Hurl. & N. 329; 9 Week. Rep. 439.

³ *Herlihy v. Smith*, 116 Mass. 265.

⁴ *Orser v. Storms*, 9 Cow. 687; 18 Am. Dec. 543; *Nicholls v. Bastard*, 2 Crompt. M. & R. 859.

⁵ Story on Bailments, sec. 230.

⁶ Story on Bailments, sec. 232.

⁷ Story on Bailments, sec. 234; *Bringlee v. Morrice*, 1 Mod. 210.

⁸ *Cullen v. Lord*, 39 Iowa, 302.

⁹ Story on Bailments, sec. 257. The lender may, without making demand, maintain an action for the recovery of the thing loaned where the time has expired: *Clapp v. Nelson*, 12 Tex. 370; 62 Am. Dec. 530. In *Green v. Hollingsworth*, 5 Dana, 173, 30 Am. Dec. 680, which was a case of the loan of a watch, the court say: “If there was a simple loan, more than ordinary care was required by law, and if the watch was in fact lost, as alleged, it was the province of the court to decide as to

what was gross, ordinary, and slight neglect, and that of the jury to determine whether the facts established the one or the other, or any degree of negligence. If the watch was loaned to Green, when it was to be returned was a fact to be ascertained by the jury from the circumstances proved; and if those circumstances conduced to establish no special time, and, from the nature of the transaction as proved, the jury could have inferred that the parties actually intended a beneficial loan, the law made it the duty of Green to return the watch in a reasonable time. But in such a state of case, of indefinite loan for use, a court could not decide that Green was guilty of a breach of his implied obligation in not returning the watch within three weeks, or the time that elapsed before the alleged loss of it. Nor could it be decided, as a matter of law, upon the facts proved, that there was gross or even slight neglect in carrying the watch in his pocket when

His refusal to redeliver is sufficient to sustain an action against him, though the demand was not made at the place of delivery.¹ He cannot dispute the bailor's title, or set up title in himself.² The fact that the owner of a

he was hunting. The use of it may have been, and probably was, especially important on such an occasion; and therefore, if there was culpable negligence in thus using it, the consequence might be that he could not have used it at all, without being responsible for an accidental loss of it in consequence of using it. But there may, *prima facie*, have been at least slight neglect in losing the watch out of his pocket. If the watch was loaned without any express agreement, and if Green failed, upon a demand of restitution, to return it while he had it, or converted it in judgment of law, by seriously claiming it as his own, he would be liable for it, whatever may have happened to it."

¹ Dunlap v. Hunting, 2 Denio, 643; 43 Am. Dec. 763, the court saying: "The proof leaves it somewhat uncertain where and when the books were to be delivered. But assuming that they were to be delivered at the defendant's office in Farmerville on demand, it was not indispensable to a right of action that the demand should be made at that place. Property may be demanded of a bailee wherever he may be at the time, and although he is not bound to deliver it at that place. And then if the bailee answers that he is ready to deliver at the proper place, there will be no breach of his duty; but if he deny the right of the bailor, and refuse to deliver the property at all, there could be no use in making another demand, and the bailee will be answerable in the proper action: Scott v. Crane, 1 Conn. 255; Higgins v. Emmons, 5 Conn. 76; 13 Am. Dec. 41; Slingerland v. Morse, 8 Johns. 474; Mason v. Briggs, 16 Mass. 453; 2 Kent's Com. 508. Now, here, although the demand was made at Ovid, if the defendant's answer was that he would not give up the books, that was a full denial of the plaintiff's right, and no further demand could be necessary. If the answer was, that he had not got the books, that would make a

more doubtful case; but as the defendant did not intimate that he had lost the books, or that anything had happened to discharge his obligation as a bailee, the answer involved a denial of the bailment and amounted to refusal to deliver the property. At least the answer may have been so understood by the jury. A bailee is not at liberty to be silent when a reasonable demand is made, though not at the place for delivery: Higgins v. Emmons, 5 Conn. 76; 13 Am. Dec. 41. Here there was nothing like a satisfactory answer, and I think the evidence was sufficient to carry the cause to the jury": Cobb v. Wallace, 5 Cold. 539; 98 Am. Dec. 435.

² Edwards on Bailments, sec. 73. See Pulliam v. Burlingame, 81 Mo. 111, 51 Am. Rep. 229, where the borrower of property was held to have no right to set up a claim to it on behalf of his wife: Simpson v. Wrenn, 50 Ill. 222; 99 Am. Dec. 511. In Nudd v. Montanye, 38 Wis. 511, 20 Am. Rep. 25, the bailee set up title in himself by purchase from the bailor's assignee in bankruptcy. "In this case," said the court, "the defendant's have acquired an adverse title, and seek to set it up to defeat the rights of their principal, against their own manifest obligations to him. It is as though a tenant in possession of land should acquire an adverse title and set it up to defeat the title of his landlord. The cases are strictly analogous; and if the law will not allow the tenant to commit such an act of bad faith toward his landlord, it ought not to permit the defendants to avail themselves of an adverse title acquired while holding the property as agents and bailees of the plaintiffs. The defendants had agreed to make restitution of the property to the plaintiffs. To relieve themselves from that duty they purchase an adverse title and seek to hold the property under it. If agents and bailees were permitted thus to deal with property intrusted to their

chattel has gone into bankruptcy since lending it will not justify the borrower's refusal to return or pay for the same, although the right of possession be in the assignee.¹ A mere executory contract for bailment does not give to the person named in the contract as bailee a right of possession of the property.² Unlike the other kinds of gratuitous bailments, in this one the bailee is entitled to use the thing bailed.³

ILLUSTRATIONS.—The plaintiff loaned his carriage in June to the defendant, it being then stored at a stable in the city in which both parties resided, and in November following, the defendant returned it to the same stable, after the stable-keeper had ceased to be plaintiff's agent. *Held*, a conversion; it should have been returned to plaintiff at his residence: *Esmay v. Fanning*, 9 Barb. 176; 5 How. Pr. 228; and see *Rutgers v. Lucet*, 2 Johns. Cas. 92. K. borrowed a mare to ride some three miles in the country, and instead of doing so, put the mare in a buggy and drove her twelve or fourteen miles. The mare died while in the possession of K. In an action by the owner, the court instructed the jury that "if K. borrowed the mare to ride two or three miles, and he drove her in a carriage some twelve or fourteen miles, and the mare died there, the defendant was liable for her value." There was no evidence that the death was caused by natural causes. *Held*, not to be erroneous: *Kennedy v. Ashcraft*, 4 Bush, 530. Defendant borrowed, "until his furnace should be in blast," certain articles to be returned in kind. *Held*, that plaintiff must make demand after the furnace was in operation, before suit brought: *Gilbert v. Manchester Iron Manufacturing Co.*, 11 Wend. 625.

§ 1726. **Termination of Bailment.** — Mr. Schouler says: "A gratuitous loan for use may be variously terminated; as, by lapse of time or full accomplishment of the bailment purpose; loss or destruction of the chattel; operation of law, as in case the bailee should become full owner; or rescission of the contract by mutual consent or the act of either party."⁴ A gratuitous bailment is usually termi-

care, — were allowed to buy in adverse claims against it, and set them up as against their principals or bailors, — it would indeed 'be difficult to transact commercial business.'"

¹ *Lain v. Gaither*, 72 N. C. 234.

² *Crosby v. German*, 4 Wis. 373.

³ Schouler on Bailments, 85.

⁴ Schouler on Bailments, 87; Story on Bailments, secs. 257, 777.

nable at the pleasure of the bailor.¹ But if the loan was to be for a fixed time, the lender cannot arbitrarily terminate it to the injury of the borrower.² When a chattel is loaned for a definite time, the borrower should return it then, and the lender may sue for its recovery without making a demand.³

¹ Schouler on Bailments, 87.

² Id.

³ Where property is loaned for a definite period, or for a day or two, and is not returned within the longer time, an action may be sustained to recover it or its value without a demand: *Clapp v. Nelson*, 12 Tex. 370; 62 Am. Dec. 530, the court saying: "The plaintiff's allegations about the loan or the time for which it was made are not very definite and precise, but they are sufficiently definite to authorize proof of the facts. He alleges property in himself about ten days before the commencement of suit, and that he had made a loan for a day or two, the term for which had expired. The phrase 'a day or two' is rather indefinite; but I presume a jury, with the facts before them, would have but little difficulty in determining whether the property had been detained longer than a day or two or not. Whether a demand should be made, in cases of

bailment, previous to suit, depends upon the stipulations as to time for the return of the property. The return must be made at the time contemplated in the contract. If the property be detained beyond that period, no demand would be necessary in order to sustain an action for its recovery. It is not one of the obligations of the lender that he shall at the expiration of the loan go after and bring back his property, but it is the duty of the borrower to restore it according to his stipulations. If no time is fixed for the return, then a demand might be necessary as a prerequisite to the action. In this case it is averred that the time for the loan had expired. If such were the fact, and the demurrer admits its truth, it was the duty of the defendant to have restored the property, and he cannot justify its detention on the ground that no demand was made for its restoration."

CHAPTER LXXXVIII.

MUTUAL-BENEFIT BAILMENTS.

(a) Hire of Labor and Services on Property.

- § 1727. Different classes of these bailees.
- § 1728. Requisites of these bailments — Chattels — Recompense — Mutual assent.
- § 1729. Bailees liable for ordinary negligence.
- § 1730. Not responsible when.
- § 1731. Exception — Negligence contributing to accidental loss.
- § 1732. Liability of warehouseman and wharfinger.
- § 1733. Rights of bailee — To bring action.
- § 1734. To compensation.
- § 1735. Completion of bailment interrupted.
- § 1736. Other rights and duties of bailee.
- § 1737. Duty of bailee to deliver property.

(b) Hire of Chattels.

- § 1738. This bailment how created.
- § 1739. Hirer liable for ordinary negligence.
- § 1740. Hirer may enlarge liability by contract.
- § 1741. Use by hirer beyond terms of hiring.
- § 1742. Hirer has no right to transfer thing.
- § 1743. Liable for injury to thing by servant or others.
- § 1744. Bailor liable for letting defective thing.
- § 1745. Bailment may be terminated how.
- § 1746. Hirer may sue for injury to thing.
- § 1747. Other rights of hirer.
- § 1748. Duty of hirer to restore thing.
- § 1749. To make compensation.
- § 1750. Bailor must pay for expenses when.

(a) Hire of Labor and Services on Property.

§ 1727. **Different Classes of These Bailees.**— Bailments for the mutual benefit of bailor and bailee are either for the hire of labor and services upon property or for the hire of property. A bailment is *in re*, and therefore the ordinary hire of labor or services alone is not a bailment.¹ The different classes of bailees who perform

¹ Schouler on Bailments, 92.

work, labor, and services in and about a chattel for a reward are: Agisters, those who take care of domestic animals; forwarders and private carriers, those who, not following the carriage of goods as a calling, undertake on a particular occasion to transport goods; safe depositaries, those who receive money and valuables on deposit; warehousemen, those who take goods and merchandise to keep on storage;¹ wharfingers, those who take charge of goods and merchandise on wharves; workmen, those who do work upon a chattel, including in this term mechanics, artificers, and artisans of all sorts and conditions. To these are to be added common carriers and innkeepers. Their liabilities, however, are exceptional, and will be considered in another place.²

It matters not that the bailee's labor and materials put upon the article far exceed the original value of the article.³

¹ The business of a stock-yard corporation, except in the character of the property which is the subject of bailment, corresponds with the business of warehousemen: Delaware etc. R. R. Co. v. Central Stock-yard etc. Co., 43 N. J. Eq. 71.

² As to innkeepers, see *post*; as to carriers, see Common Carriers, *post*.

³ In *Gregory v. Stryker*, 2 Denio, 628, A sent an old wagon of his to B to repair. When it was completed it was worth \$90, but the cost of repairing had been \$78.50. Held, that this was a bailment of the wagon. "Where a manufacturer or mechanic," said the court, "agrees to construct a particular article out of his own materials, or out of materials the principal part of which are his own, the property of the article, until its completion and delivery, is in him, and not in the person for whom it was intended to be made: 1 Cowen (Tracy), 2d ed., 289; 2 Kent's Com. 361; *Merritt v. Johnson*, 7 Johns. 473; 5 Am. Dec. 289; 1 Chit. Pl., 7th Am. ed., 381; *Atkinson v. Bell*, 8 Barn. & C. 277; 2 Chit. Com. L. 270. But it is equally clear, as a

general proposition, that where the owner of a damaged or worn-out article delivers it to another person, to be repaired and renovated by the labor and materials of the latter, the property in the article as thus repaired and improved is all along in the original owner for whom the repairs were made, and not in the person making them. The agreement in such case is but an every-day contract of bailment, — *locatio operis faciendi*: Story on Bailments, 3d ed., secs. 421, 422 a; 2 Kent's Com. 588. And the original owner, so far from losing his general property in the thing thus placed in the hands of another person to be repaired, acquires that right to whatever accessorial additions are made in bringing it to its new and improved condition. Nor am I aware that in this class of cases it is at all important what the value of the repairs, actual or comparative, may be. No case is referred to which proceeds on that distinction, nor any writer by whom it is adverted to as material. If we adopt this distinction, what shall be its limit? The general property must be in one party,

§ 1728. **Requisites to These Bailments — Chattels — Recompense — Mutual Assent.** — The subject-matter of the bailment must be a chattel or chattels.¹ The letting

to the exclusion of the other; for surely they are not tenants in common in the thing repaired. Shall we, then, say that where the value of the repairs falls below that of the dilapidated article on which they were made, the original owner has title to the article in its improved condition, and *vice versa*, where they exceed it in value, title to the article as repaired and improved passes over to the person by whom the repairs were made? Such a rule would certainly be plain enough, and probably might be applied without great difficulty to any particular case. But it would be found to give rise to a variety of questions never heard of in actions growing out of the reparation of decayed or injured articles; and the rule itself, I am persuaded, has not so much as the shadow of authority for its support. There are a multitude of instances in which the expense of proper repairs greatly exceeds the value of the article on which they are made. It is so in the lowly operation of footing an old pair of boots, and not unfrequently in repairing a broken-down carriage. The principle contended for by the defendant is not necessary for the security of the mechanic by whom the repairs are made. He has a lien for his labor and materials, and may retain possession until his just demands are satisfied: Story on Bailments, sec. 440; Cross on Law of Lien, 331, Chitty on Contracts, 5th Am. ed., 544, 545; 1 Cowen (Tracy), 295; Moore v. Hitchcock, 4 Wend. 292; Grinnell v. Cook, 3 Hill, 491; 38 Am. Dec. 663. This affords ample protection to the mechanic. And who, let me ask, ever heard that his lien was limited to repairs which, in value, fall below that of the original article on which they are made? Yet this limitation must necessarily exist, if the ground assumed by the counsel for the defendant is well taken. Various cases have arisen, in which property in a raw state was delivered by one person to another,

upon an agreement that it should be wrought upon and improved by the labor and skill of the bailee, and when thus improved in value, should be divided in certain proportions between the respective parties; and in which it was held that the original owner retained his exclusive title to the property until the contract had been completely executed; and this, notwithstanding the labor to be performed by the bailee might be equal, or even greater, in value than that of the property when received by him. Thus in *Pierce v. Schenck*, 3 Hill, 28, where logs were delivered at a saw-mill, under a contract with the miller that he should saw them into boards and each party should have one half, it was held to be a bailment, and not a sale of the logs, and that the bailor retained his general property until the contract was fully executed. The cases of *Barker v. Roberts*, 8 Greenl. 101, and *Rightmyer v. Raymond*, 12 Wend. 51, as well as many others, are to the same effect. To be sure, these are not cases in which old articles were to be improved by repairs put upon them; yet the bailment in each is of the same nature and class, — *locatio operis faciendi*; and as to this question the same principle should apply to both. If I employ a mechanic to make a new article for me, the right of property while the work is going on may essentially depend upon the original ownership of the materials used in its construction. If they are his, or chiefly his, we have seen that the property remains in him. If, on the other hand, the materials used were mine, the general property is in me, although he may add some small proportion of his own materials: Story on Bailments, sec. 423; 1 Cowen (Tracy), 289. The distinction between these cases is, that the first is a contract for the sale of the article *in futuro*, the latter a pure bailment."

¹ Story on Bailments, sec. 383.

of a house or lodgings, therefore, is not a bailment.¹ And the property must be at the time in existence.²

¹ Schouler on Bailments, 92. A owned a building in New York used and occupied as a storehouse. B desiring to store her household furniture, a space was allotted to her by A, who assured her that the goods would be safe there. The allotted space was inclosed by wooden partitions with a door upon which were two locks, the key of one of which was kept by B. When money was paid by B it was accepted for generally as for "storage," though sometimes called rent. Held, that A was a bailee,—a warehouseman: *Jones v. Morgan*, 90 N. Y. 4; 43 Am. Rep. 131. "The plaintiff," said Earl, J., "claims that her contract with the defendant was one for the storage of her goods in his storehouse, and that his responsibility to her was that of one who takes goods to be stored in a storehouse for hire. The claim of the defendant is, that the plaintiff hired the room in which she placed her goods, and that the relation between him and her, if any existed, was that of landlord and tenant, with the responsibility on his part which such a relation implied. The trial judge charged the jury that the contract of the plaintiff with the defendant, if they should find that it was made with him, was one of bailment, and that the defendant, if liable at all, was liable as a warehouseman, and bound to exercise ordinary care and diligence in keeping the goods; and to this portion of the charge the defendant excepted. It is not absolutely essential to determine whether the contract between the plaintiff and the defendant was one of bailment of the goods or of hiring the room in which they were stored; because, whichever it was, the defendant was bound to exercise ordinary care and diligence in guarding them. Such a responsibility was imposed upon him by the very nature of the transaction. The plaintiff was seeking a safe place for the storage of her goods. The defendant had a storehouse in which the storage business was carried on, and he assured her that her goods would

be safe therein, and that they would be under the guard of a watchman by night and a responsible or reliable man by day. The price for the space in the storehouse allotted to the plaintiff was fixed in reference to these circumstances. The parties could not have understood that the defendant was to take no care of the goods. The very nature of the contract and the relation between the parties imposed upon the defendant the obligation of ordinary care and prudence in keeping the goods. It is like the case of one who hires a box contained in the safe of a safe-deposit company. He may keep the key, but the company, without special contract to that effect, would be held to at least ordinary care in keeping the deposit, and the duty of such care would arise from the nature of the business it was carrying on, and the obligation to discharge it would be implied from the relation between the parties. But we are of opinion that the judge was right in holding that the contract was one of bailment. The building in which the goods were stored was a storehouse, and the business therein carried on was the storage business. The business was advertised as such, and the plaintiff went to the storehouse to have her goods stored there. When she paid money on account of the space occupied by her in the building, it was always paid for storage and receipted to her as such. It matters not that in some of the conversations between the parties the price charged was called rent. It was generally called the price of storage, and by whatever name it was called it is clear that the parties always understood it to be the price or charge for storage. It matters not that a space was assigned to the plaintiff for the storage of her goods, and separated from the rest of the room in which it was by board partitions. That was by special arrangement between the parties, and the defendant accepted the goods in that way. They were in bulk in his storehouse, under his charge and in

² Story on Bailments, sec. 373.

In bailments of this character, there must be a recompense or reward;¹ it is not necessary to show a reward expected or implied, or that the bailee really claimed at the time he took the goods to be recompensed, or that anything was then agreed on; it is enough if, by his course of dealing, the bailee had a right to expect and demand compensation.² But in an action for the defendant's negligence in suffering a note given to him for collection to be barred by the statute of limitations, there is no presumption that he was to have compensation, and the burden of proof is on the plaintiff to show his liability.³ A secret purpose of a bailee not to make any charge does not exempt him from the duty of taking the care required of a bailee who is to be compensated, if the understanding and just expectation of the other party was that compensation was to be paid.⁴ The law will imply that a broker is not a gratuitous bailee, in an action against him for negligence.⁵ Where bonds are left with a bank as security for a loan, and after payment are allowed to remain for safe-keeping, for collection of coupons, and as security for any future loan, the bank becomes a mandatary rather than a depositary, as it would derive benefit from the collection of the interest, which is within its business scope, as well as from the anticipated profits of a future loan on the same security.⁶ A principal's act in depositing funds with a bailee for protection of his surety is not without consideration, and the receipt of the funds

his keeping, just as they would have been if they had been placed in a large box or in locked-up boxes in the same room. It is a species of bailment like that existing in the case of the depositor in a safe-deposit company, who hires a box for his valuables and keeps the keys, but, as I have before stated, it is unnecessary to define the precise nature of the contract, or to give it a name. The defendant assumed the obligation of ordinary care and prudence in keeping the goods, and that is sufficient to sustain the charge of the judge."

¹ Story on Bailments, secs. 372, 373.

² *Pattison v. Syracuse Nat. Bank*, 1 Hun, 606; 4 Thomp. & C. 96.

³ *Kincheloe v. Priest*, 89 Mo. 240; 58 Am. Rep. 117.

⁴ *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. 362.

⁵ *Swartz v. Hauser*, 10 Week. Not. 434.

⁶ *Ouderkerk v. Central Nat. Bank*, 22 N. Y. St. Rep. 127; *Hollister v. Central Nat. Bank*, 22 N. Y. St. Rep. 131.

is in itself a consideration for a promise by the bailee to pay the surety.¹

Mutual assent is likewise essential. "This mutual assent must relate to the particular subject-matter whose continuous identity our law of bailment so carefully preserves; likewise to the particular compensation. For if I promise to hire a certain horse, the bailor's assent must not attach to a different horse, else there would be no mutual understanding, but rather a misunderstanding. So, too, if the bailee offered one recompense, while the bailor assented to another, the essential mutuality would be wanting."²

ILLUSTRATIONS.—A gratuitously allows B to use his shed. This is not a bailment (*commodatum*), but a license to use, the shed being realty, and not personalty: *Williams v. Jones*, 3 Hurl. & C. 256. T. stored goods with R., and nothing was said as to R.'s compensation for storage. *Held*, that the law would imply a contract that R. should be paid a reasonable compensation therefor, unless there was something in the relation of the parties, or the circumstances of the case, which would preclude the idea of such compensation, in which case there would be an implied agreement or understanding that no such compensation was to be paid: *Rea v. Trotter*, 26 Gratt. 585.

§ 1729. **Bailee Liable for Ordinary Negligence.**—In these bailments for mutual benefit the bailee is held to ordinary diligence, i. e., such care and diligence as prudent persons of the same class are wont to exercise in the conduct of their own affairs under like circumstances. For a loss or injury, then, caused by ordinary negligence on the part of the bailee, he is liable.³

¹ *Keller v. Rhoads*, 39 Pa. St. 513; 80 Am. Dec. 539, the court saying: "It cannot be objected that the consideration did not move from the plaintiff, for it was indirectly through his agency that the money came to the hands of the defendant. And even if it were not so, the defendant has received money deposited with him by the principal for the use of

the plaintiff. It is indubitably settled, that if one pay money to another for the use of a third person, or, having money belonging to another, agree with that other to pay it to a third, action lies by the person beneficially interested."

² Schouler on Bailments, 95.

³ *Taussig v. Schields*, 26 Mo. App. 318.

Ordinary care is required of an agister,¹ forwarders,

¹ *Smith v. Cook*, 1 Q. B. Div. 79; *McCarthy v. Wolfe*, 40 Mo. 520; *Halty v. Markel*, 44 Ill. 225; 92 Am. Dec. 182; *Eastman v. Patterson*, 38 Vt. 146; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Swann v. Brown*, 6 Jones, 150; 72 Am. Dec. 568; *Owens v. Geiger*, 2 Mo. 39; 22 Am. Dec. 435; *Sargent v. Slack*, 47 Vt. 674; 19 Am. Rep. 137; *Rey v. Toney*, 24 Mo. 600; 69 Am. Dec. 444. It is want of ordinary care to neglect to have a proper fence around the grounds: *Cecil v. Preuch*, 4 Martin, N. S., 256; 16 Am. Dec. 171; *Umlauf v. Bassett*, 38 Ill. 96; *Winston v. Taylor*, 28 Mo. 82; 75 Am. Dec. 112. In *Maynard v. Buck*, 100 Mass. 45, the defendant, in an action to recover for cattle lost while being driven by the defendant's servants from A to B, had asked an instruction, among others, which was refused, that "the defendant was bound to exercise the same degree of care and diligence that men of common prudence engaged in driving cattle for hire over this and similar routes ordinarily exercise with regard to the property intrusted to them." On appeal to the supreme court, Wells, J., said: "The instruction that the defendant 'was bound to use the same care in regard to' the cattle, which he undertook to drive for hire, 'that men of ordinary prudence would exercise over their own property under the same circumstances,' was correct, and in accordance with numerous authorities: *Cayzer v. Taylor*, 10 Gray, 274; 69 Am. Dec. 317; *Shaw v. R. R. Co.*, 8 Gray, 46; *Shrewsbury v. Smith*, 12 Cush. 177; *Sullivan v. Scripture*, 3 Allen, 564; *Giblin v. McMullen*, L. R. 2 P. C. 317. The degree of care to be required of one who is intrusted with the property of another for reward is not less than that which is to be expected of one who deals with his own property. If the first instruction asked for is based upon a recognition of such an obligation, it is only equivalent to that which was given by the court. But if the comparison with those 'engaged in driving cattle for hire' was intended to indicate that one who drives for hire is bound to a less degree of care, 'because he is an hireling and careth not' for his charge,

it asked for a rule which has never been recognized either as good law or good morals. The evidence as to the usual practice or mode of proceeding ordinarily adopted by drovers was held at the previous hearing to be admissible upon the question of ordinary care, because it tended to show what had been found by the experience of others to be most judicious or expedient in like emergencies; not because they were drovers for hire, as distinguished from owners driving their own cattle. The defendant further insisted that the jury should be instructed that 'if he did do the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable in this action.' But this is not the legitimate application of evidence admitted to show the usual practice in similar cases. The usual practice is made up of particular instances of conduct, by the limited number of individuals similarly engaged, within the knowledge of the witnesses who may be called to testify. That which is admissible in evidence is, not the particulars, but what the witnesses state from their knowledge of those particulars to be usual, or the course ordinarily pursued. The character for prudence of those whose conduct or acts go to make up this usual practice is not required to be shown. It forms no part of the inquiry. The effect and purpose of the evidence is to aid the jury in forming their judgment of what the party was bound to do, or was justified in doing, under all the circumstances of the case. What had been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed. It is not to control the judgment of the jury, if they see that in the case under consideration it is not such conduct as a prudent man would adopt in his own affairs, or not such as a due regard to the obligations of those employed in the affairs of others would require them to adopt. It is evidence of what is proper and reasonable to be done,

and private carriers,¹ a safe depositary,² a wharfinger,³ a warehouseman,⁴ a workman, artisan, or artificer of

from which, together with all the other facts and circumstances of the case, the jury are to determine whether the conduct in question in the case before them was proper and justifiable.

To think the instruction asked for, in this particular, was not such as should have been given. The instruction asked for, to the effect that 'the defendant was not obliged to make any outlay disproportionate to the compensation he received, to recover cattle that had strayed from the drove without his negligence,' and therefore that the price he received was 'to be taken into account,' upon the question of due diligence, was inadmissible. The price is undoubtedly graduated by the well-known risks of the business, and accepted in view of those risks. The obligation to seek the recovery of straying cattle does not rest upon the ground that that special service is paid for in the consideration of the original contract to which it is incident. It arises because it is incident to the principal contract, and as such is covered by its consideration. When an emergency occurs to bring that obligation into operation and make it onerous, he is not justified in any lack of faithful performance because in that particular event his compensation has proved inadequate to the burden." An agister must notify his customers of any unusual risk to which their cattle are exposed in his pasture-ground: *McLain v. Lloyd*, 5 Phila. 195.

¹ Story on Bailments, sec. 444; *Forstythe v. Walker*, 9 Pa. St. 148; *Pennell v. Cullen*, 5 Harr. (Del.) 238; *White v. Bascom*, 28 Vt. 268; *Baird v. Daly*, 57 N. Y. 236; 15 Am. Rep. 488; *Bush v. Miller*, 13 Barb. 488; *Powers v. Mitchell*, 3 Hill, 545; *Roberts v. Turner*, 12 Johns. 232; 7 Am. Dec. 311; *Dillon v. R. R. Co.*, 1 Hilt. 231; *Brown v. Denison*, 2 Wend. 593; *Platt v. Hibbard*, 3 Cow. 497; *Stannard v. Prince*, 64 N. Y. 300; *Holtzclaw v. Duff*, 27 Mo. 392. A bailee to keep for hire (here a railroad company keeping goods left in its care after transportation, in its warehouse) is liable for reasonable care; and storing gun-

powder in quantities in the same warehouse is not an exercise of reasonable care: *White v. R. R. Co.*, 5 Dill. 428; 3 McCrary, 559.

² *Safe Deposit Co. v. Pollock*, 85 Pa. St. 391; 27 Am. Rep. 660.

³ *Sideways v. Todd*, 2 Stark. 400; *Cox v. O'Riley*, 4 Ind. 368; 58 Am. Dec. 633; *Foot v. Storrs*, 2 Barb. 326; *Platt v. Hibbard*, 7 Cow. 497; *Blin v. Mayo*, 10 Vt. 56; 33 Am. Dec. 175; *Merchants' Wharf-boat Ass'n v. Wood*, 64 Miss. 661; 60 Am. Rep. 76. "Defendant was a wharfinger, . . . a bailee for hire, and by general engagement liable to extend over plaintiff's lumber, like that of others, ordinary care and protection. What is meant by ordinary care was properly explained and defined. It is such as the generality of mankind use in their own affairs. This is required when the contract of bailment, express or implied, is reciprocally beneficial. This kind of care and skill is by law required of all persons employed in any business": *Rodgers v. Stophel*, 32 Pa. St. 115; 72 Am. Dec. 775.

⁴ *Chase v. Washburn*, 1 Ohio St. 244; 59 Am. Dec. 623; *Calliff v. Danvers*, Peake, 155; *Batut v. Hartley*, L. R. 7 Q. B. 594; *Moulton v. Phillips*, 10 R. I. 218; 14 Am. Rep. 663; *Myers v. Walker*, 31 Ill. 353; *Morehead v. Brown*, 6 Jones, 367; *Titsworth v. Winnegar*, 51 Barb. 148; *Vincent v. Rather*, 33 Tex. 77; 98 Am. Dec. 516; *Jones v. Hatchett*, 14 Ala. 743; *Norway Plains Co. v. R. R. Co.*, 1 Gray, 263; 61 Am. Dec. 423; *Platt v. Hibbard*, 7 Cow. 497; *Schmidt v. Blood*, 9 Wend. 268; 24 Am. Dec. 143; *Knapp v. Curtis*, 9 Wend. 60; *Arent v. Squire*, 1 Daly, 350; *Madan v. Covert*, 42 N. Y. Sup. Ct. 135; *Ducker v. Barrett*, 5 Mo. 97; *Cowles v. Pointer*, 26 Miss. 253; *Holtzclaw v. Duff*, 27 Mo. 392; *Claffin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467; *Foot v. Storrs*, 2 Barb. 328; *Brown v. Hitchcock*, 28 Vt. 452; *Neal v. R. R. Co.*, 8 Jones, 482; *Spangler v. Eicholtz*, 25 Ill. 297; *Taylor v. Secrist*, 2 Disn. 299; *Buckingham v. Fisher*, 70 Ill. 121; *Hatchett v. Gibson*, 13 Ala. 587; *McCullom v. Porter*, 17 La. Ann. 89; *Bogart v.*

any kind doing work or performing labor upon chattels.¹ When one delivers logs at a custom saw-mill to be sawed at an agreed price, the owner of the mill becomes bound to exercise ordinary care in keeping and manufacturing the logs, and in case of their loss, to prove that it was without his fault.² So as to public officers, a part of whose paid duties is to take care of chattels in their hands.³ A canal company is only responsible for the exercise of or-

Haight, 20 Barb. 251; Dimmick v. R. R. Co., 18 Wis. 471; Macklin v. Frazier, 9 Bush, 3; Moose v. Mayor, 1 Stew. 284; Cincinnati etc. R. R. Co. v. McCool, 26 Ind. 140; Smith v. Simms, 51 How. Pr. 305; Backus v. Start, 13 Fed. Rep. 67; McCarthy v. R. R. Co., 30 Pa. St. 69; Madan v. Cover, 13 Jones & S. 245; Aldrich v. R. R. Co., 100 Mass. 31; 97 Am. Dec. 74. In *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581, a quantity of cigars had been stolen from a warehouse by thieves. The plaintiff alleged that the warehouse had not been properly secured and guarded. The following instruction as to what was required of the defendant was affirmed on appeal from a judgment for plaintiff: "In determining the means used in protecting goods stored against loss, they were not to occupy their time in endeavoring to find out in what form the highest exertion of the most acute intellect and experience would enable a man to devise means to protect goods in a warehouse against danger, but to determine what a man would do in the exercise of ordinary prudence to protect his property. They must be careful not to say at once, 'Such and such things ought to have been done,' because they were suggested or then suggested themselves to them, but reflect what a merely ordinarily prudent man would do in taking charge of property of this kind, and therefore to determine 'whether this warehouse was put in proper condition, such as a prudent man taking care of his own goods in his own warehouse would have put it, who guarded and cared for his own property.' 'If there is extra precaution that a prudent man would use as

to fastenings, or as to the use of fence, watch-dogs, or private watchmen outside, it was for them to say whether these were such things as a prudent man would use in ordinary cases, and whether the want of such safeguards was the cause of the abstraction of the goods.'"

¹ *Smith v. Meegan*, 22 Mo. 150; 64 Am. Dec. 259; *Halyard v. Dechelman*, 29 Mo. 459; 77 Am. Dec. 585; *Hillyard v. Crabtree*, 11 Tex. 264; 62 Am. Dec. 475; *Russell v. Koehler*, 66 Ill. 459; *Spangler v. Eicholtz*, 25 Ill. 297; *Gamber v. Wolaver*, 1 Watts & S. 60; *McCaw v. Kimbrel*, 4 McCord, 220; *Chambers v. Crawford*, Addis. 151; *Kelton v. Taylor*, 11 Lea, 264; 47 Am. Rep. 284; the case of a cotton ginner receiving cotton to gin and bale. And see *Foster v. Taylor*, 2 Brev. 348. One who agrees to manufacture goods from materials to be furnished is bound to apply a degree of skill equal to the undertaking, and to perform the work in a workmanlike manner. A substantial failure to do this constitutes a breach of the contract: *Keith v. Bliss*, 10 Ill. App. 424. Where the defendant agreed to gin the plaintiff's cotton in preference to all other, but ginned other cotton before that of a part of the plaintiff's, and the gin and plaintiff's cotton were burnt, he is liable, though there was no negligence as to the fire: *Pattison v. Wallace*, 1 Stew. 48.

² *Gleason v. Beers*, 59 Vt. 581; 59 Am. Rep. 757.

³ *Aurentz v. Porter*, 56 Pa. St. 115; *Burke v. Trevit*, 1 Mason, 96; *Blake v. Kimball*, 106 Mass. 115; *Cross v. Brown*, 41 N. H. 283; *Witowski v. Brennan*, 41 N. Y. Sup. Ct. 284.

dinary care and diligence in guarding against obstructions in its canal.¹

One who has a boat in his possession for repairs is answerable for damages sustained by ice, if he launch her carelessly at a time when danger from such a source might easily have been foreseen.² One who is hired to drive horses, in whose hands they are injured, is like a bailee for hire, and liable only for negligence, unskillfulness, or willful misconduct, and the burden of proof is on the plaintiff.³ A livery-stable keeper is liable for the loss of a horse where he permits a stage-driver to enter the stable at night and take out the stage-horses, and in the morning part of the stable-door is found open and the plaintiff's horse is missing; and whether the horse escaped with the other horses, or afterwards, makes no difference.⁴ So if he, through his watchman, permits drunken men with pipes and matches to spend the night in the hay-loft, and the stable is burned and the horses lost, the owner of the stable is liable to the owner of the horse.⁵

ILLUSTRATIONS. — The keeper of a livery-stable permitted the owner of certain horses to go into the stable at a late hour of the night, and take them out, in consequence of which a horse belonging to the plaintiff made his escape and was lost, either by passing out with the other horses, or afterwards, a part of the door being left open. *Held*, that the owner of the stable was liable for such loss: *Swann v. Brown*, 6 Jones, 150; 72 Am. Dec. 568. A intrusted B (who was a chronometer-maker) with a chronometer to be repaired, and B suffered his servant to sleep in the shop in which the chronometer was deposited. B was held liable to A for its value, B's servant having stolen it, and B, at the same time when the theft was committed, having deposited his watches in a more secure place than that in which the chronometer was left: *Clark v. Earnshaw*, Gow. 30. Defendant, having taken charge of plaintiff's horse, hitched the horse near another one, which he knew, but the plaintiff did not, to be addicted to kicking other horses, whereby plaintiff's horse was kicked and injured. *Held*, that the defendant

¹ *Pennsylvania Canal Co. v. Burd*, 90 Pa. St. 281.

² *Smith v. Meegan*, 22 Mo. 150; 64 Am. Dec. 259.

³ *Newton v. Pope*, 1 Cow. 109.

⁴ *Swann v. Brown*, 6 Jones, 150; 72 Am. Dec. 568.

⁵ *Eaton v. Lancaster*, 79 Me. 477.

was chargeable with negligence, and plaintiff, though he knew where his horse was hitched, was not: *Clary v. Willey*, 49 Vt. 55. A stored certain of his carriages in B's barn, paying storage therefor. The roof of the barn, from being overloaded with snow, fell in and injured them. B was held liable: *Moulton v. Phillips*, 10 R. I. 218; 14 Am. Rep. 663. A horse kept in a livery-stable became sick and died. The owner recovered a verdict against the livery-stable keeper. The owner was not immediately notified of the horse's sickness, and the evidence as to the degree of care and attention given was somewhat contradictory. The court charged that it was the stable-keeper's duty either to see that proper treatment was furnished, or immediately to notify the owner. *Held*, correct: *Hexamer v. Sonthal*, 49 N. J. L. 682. A person storing salt for another did so so ineffectually that fifty barrels a week were rolled out and taken by thieves, — 240 being gone before the theft was discovered. *Held*, that he was liable: *Clenowith v. Dickinson*, 8 B. Mon. 156. An agister turned a colt into a field in which there was a bull. This was held actionable negligence: *Smith v. Cook*, 1 Q. B. Div. 79. A married women left securities with a bank for safe-keeping, taking a receipt which stated that they would be delivered up on its surrender. *Held*, that the bank could not escape liability by delivering the securities to the woman's husband at his request, but without a production of the receipt or of an order from the woman: *Ganley v. Troy City Bank*, 98 N. Y. 487. Plaintiff was hired by the owner of a cow to pasture her in the daytime, and while so pastured, the owner used her for his family, taking her from the pasture every night and returning her in the morning. *Held*, that plaintiff was an agister in the daytime, and could maintain an action against one who took the cow from the pasture: *Bass v. Pierce*, 16 Barb. 595. A banker twice a year examined special deposits to which K., his assistant cashier, had access. K. stole a deposit and absconded. More than a year before, the banker was warned that K. was speculating, but K. was retained even after a second warning two months before he fled. *Held*, that this constituted gross negligence: *Prather v. Kean*, 29 Fed. Rep. 498. A letter-carrier delivered a registered letter to the clerk of a hotel where the addressee was stopping as a guest. The clerk signed the return receipt, and also the letter-carrier's book, and placed the letter in the letter-box of the hotel, from whence it was stolen. *Held*, that the receipts signed by the clerk were sufficient to charge him with notice that the letter was of more than ordinary importance, and required special care, and that the letter-carrier, having paid the amount contained in the letter to the addressee, could enforce a liability against the clerk: *Joslyn v. King*, Neb., 1889.

§ 1730. **Bailees not Responsible when.**—Such bailees are not responsible for a loss occasioned by fire,¹ or by the act of God, or inevitable accident,² or by burglary, robbery, or theft,³ or a public enemy.⁴

ILLUSTRATIONS.—A bailee, to whom cotton was delivered to gin, removed the cotton from the gin-house, and leaves it in a field, and allows it to go to waste, moved by well-grounded and real fears that unless he did so an armed force of soldiers, in accordance with previous threats, would return and burn his gin-house and the cotton in it, or inflict upon him grievous personal violence, or both, and he is without the means of preventing or resisting the threatened violence. *Held*, that he is not chargeable for the removal and waste of the cotton: *Waller v. Parker*, 5 Cold. 476. A horse, left over night at a livery-stable, got untied, and ate from an open bag of corn on the floor. In the morning his owner drove him eighteen miles in the heat without water, and he was injured. *Held*, that the stable-keeper was not an insurer, and could only be held liable upon a finding by the jury that he was negligent, and that the owner was not negligent: *Dennis v. Huyck*, 48 Mich. 620; 42 Am. Rep. 479. A treasurer of a benefit building society covenants with its trustees that he will faithfully discharge the duties of treasurer, obey the directions of the trustees in relation to such duties, and punctually account to the trustees for all and every sum and sums of money, bills, notes, securities, goods, and chattels, which he in his office of treasurer shall receive on the society's account. He is bound

¹ *Norway Plains Co. v. R. R. Co.*, 1 Gray, 263; 61 Am. Dec. 423; *Francis v. R. R. Co.*, 25 Iowa, 60; 95 Am. Dec. 769; *Russell v. Koehler*, 66 Ill. 459; *Francis v. Castleman*, 4 Bibb, 282; *McCullum v. Porter*, 17 La. Ann. 89; *Macklin v. Frazier*, 9 Bush, 3; *Aldrich v. R. R. Co.*, 100 Mass. 31; 97 Am. Dec. 74; *Gibson v. Hatchett*, 24 Ala. 201; *Hatchett v. Gibson*, 13 Ala. 587; *Irons v. Kentner*, 51 Iowa, 88; 33 Am. Rep. 119. As to agreements of warehousemen to store in fire-proof building, see *Hatchett v. Gibson*, 13 Ala. 587; *Gibson v. Hatchett*, 24 Ala. 201; *Vincent v. Rather*, 31 Tex. 77; 98 Am. Dec. 516; *Jones v. Hatchett*, 14 Ala. 743.

² *Knapp v. Curtis*, 9 Wend. 60; *McCullum v. Porter*, 17 La. Ann. 89; *Jones v. Gilmore*, 91 Pa. St. 310.

³ *Schwerin v. McKie*, 51 N. Y. 180;

10 Am. Rep. 581; *Platt v. Hibbard*, 7 Cow. 497; *Schmidt v. Blood*, 9 Wend. 268; 24 Am. Dec. 143; *Clafin v. Meyer*, 75 N. Y. 260; 31 Am. Rep. 467; *Moore v. Mayor*, 1 Stew. 284; *Cincinnati etc. R. R. Co. v. McCool*, 26 Ind. 140; *Lamb v. R. R. Co.*, 7 Allen, 98; *Cass v. R. R. Co.*, 14 Allen, 448; *Williams v. Holland*, 22 How. Pr. 137; *Neal v. R. R. Co.*, 8 Jones, 482; *Pike v. R. R. Co.*, 40 Wis. 583; *Berry v. Mareix*, 16 La. Ann. 248.

⁴ *Abraham v. Nunn*, 42 Ala. 51; *Yale v. Oliver*, 21 La. Ann. 454; *Smith v. Frost*, 51 Ga. 336; *Waller v. Parker*, 5 Cold. 476; *Babcock v. Murphy*, 20 La. Ann. 399; *McCranie v. Wood*, 24 La. Ann. 406. Thieves, tramps, and robbers are not "public enemies," within the rule exempting bailees: *State v. Moore*, 74 Mo. 413; 41 Am. Rep. 322.

by the rules of the society to pay over in a given time the same moneys which he shall receive. *Held*, that he does not violate such obligation if, after receiving moneys, and before he has an opportunity of paying them over, he is robbed of them by irresistible violence, and without fault of his own; such obligation being that only of a bailee: *Walker v. British Guarantee Association*, 18 Q. B. 277; 16 Jur. 885; 21 L. J. Q. B. 257.

§ 1731. Exception—Negligence Contributing to Accidental Loss.—But if any of these losses have been brought about by the negligence of the bailee in the first instance, either in preventing such a calamity or in lessening the injurious effects, he is liable.¹ A watchmaker who receives a watch to repair is bound to use ordinary diligence in its safe-keeping; if the watch while in his custody is stolen through his negligence, he will be liable.² A bailee is liable for a negligent injury, though after the happening of the injury the goods were destroyed without his fault, and would have been so destroyed had they not been previously injured.³

ILLUSTRATIONS.—The defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place, where, without any negligence on his part, they were destroyed. In an action to recover as damages the value of the goods, *held*, that the damage was not too remote, and that the defendant by his breach of contract had rendered himself liable for the loss of the goods: *Lilley v. Doubleday*, L. R. 7 Q. B. D. 510; 51 L. J. Q. B. D. 310; 44 L. T., N. S., 814. G. sold ten barges of coal to B. in June, to be delivered at Memphis, Tennessee, the barges to be returned to Louisville, Kentucky, within sixty days or within a reasonable time. Two of these barges were not returned in November, and the Mississippi River freezing up in that month, they could not be returned. In December, by reason of an extraordinary ice-gorge, these two barges were swept away from their moor-

¹ *Schwerin v. McKie*, 51 N. Y. 180; 10 Am. Rep. 581; *Smith v. Meegan*, 22 Mo. 150; 64 Am. Dec. 259; *Jones v. Morgan*, 90 N. Y. 4; 43 Am. Rep. 131; *Gibson v. Hatchett*, 24 Ala. 201; *Francis v. Castleman*, 4 Bibb, 282; *Hatchett v. Gibson*, 13 Ala. 587; *Vincent v. Rather*, 31 Tex. 77; 98 Am. Dec. 516; *Stevens v. R. R. Co.*, 1

Gray, 277; *Madan v. Covert*, 42 N. Y. Sup. Ct. 135; *Schwartz v. Baer*, 21 La. Ann. 601; *Smith v. Frost*, 51 Ga. 336; *Merchants' Trans. Co. v. Story*, 50 Md. 4; 33 Am. Dec. 293.

² *Halyard v. Dechelman*, 29 Mo. 459; 77 Am. Dec. 585.

³ *Powers v. Mitchell*, 3 Hill, 545.

ings at Memphis and lost. G. sued B. for the value of the barges. *Held*, that as the detention of the barges was the remote, and not the proximate, cause of the loss, and they had been destroyed by an extraordinary accident that could not be forecast, B. was not responsible: *Jones v. Gilmore*, 91 Pa. St. 310.

§ 1732. Liability of Warehousemen and Wharfingers — Public Millers.—The liability of a warehouseman begins when he commences to take the goods into his warehouse,¹ or before they even reach there, if he has taken charge of them earlier.² The warehouseman's liability ends when the goods are delivered or in process of delivery,³ or when he is divested of his possession by others.⁴ Where his possession is wrongfully divested, it seems not to be his duty to pursue the property.⁵ A warehouseman may deliver the goods stored with him to a person to whom the bailor has unconditionally sold them, without taking up the receipt or seeing that it has been indorsed to the vendee.⁶ The holder of a warehouse receipt by indorsement has a right of action against the warehouse company for injury to the goods stored, whether injured before or after the assignment.⁷ The transfer of a warehouseman's receipt clothes the transferee with constructive possession of the goods, although

¹ *Thomas v. Day*, 4 Esp. 262.

² *Ducker v. Barnett*, 5 Mo. 97. A warehouseman's liability for goods commences from the time the crane is applied to raise them into the warehouse; and it is no defense that they were injured by falling into the street, from the breaking of tackle, the carman who brought the goods having refused the offer of slings for further security: *Thomas v. Day*, 4 Esp. 262. Storehouse-keepers having a wharf adjoining their store, who receive goods in the store for compensation, are liable, not as wharfingers, but as warehousemen: *Platt v. Hibbard*, 7 Cow. 497. The keeping of a floating warehouse is an employment requiring skill, and the owner is liable for a less degree of negligence than the keeper of an ordinary warehouse; e. g., if he receive on

board goods on storage, and they are subsequently damaged by leakage which might have been prevented: *Hamilton v. Elstner*, 24 La. Ann. 455. The state of Maryland in requiring that tobacco be brought to the state warehouses for inspection for revenue purposes, etc., in no sense becomes a bailee to the tobacco, nor answerable for its safe-keeping as a warehouseman in the legal acceptance of that term: *Moore v. State*, 47 Md. 467; 28 Am. Rep. 483.

³ *The Winslow*, 4 Biss.

⁴ *Sessions v. R. R. Co.*, 16 Gray, 132.

⁵ *Id.*; and see *Smith v. Frost*, 51 Ga. 336.

⁶ *Mortimore v. Ragsdale*, 62 Miss. 86.

⁷ *Sargent v. Central Warehouse Co.*, 15 Ill. App. 553.

the warehouseman has no notice, and does not agree to hold for the transferee.¹ A carrier is not obliged to give notice that he has stored with a warehouseman goods which the consignee refuses to receive, in order that the warehouseman may enforce a lien for storage.² Demand and refusal make out a *prima facie* case of negligence and conversion against a warehouseman who refuses to deliver property stored with him. If, however, it appears that the property has been burned, the bailor must prove the fire to have resulted from the negligence of the warehouseman.³ The fact that an adverse claim is made to the property does not entitle a warehouseman to require a bond of indemnity from the true owner as a condition of delivering the property. The remedy is by an interpleader.⁴ Where a person puts grain in a warehouse for the purpose of storage, and the warehouseman converts the grain to his own use by manufacturing it into flour, and selling the flour, the owner of the grain may waive the tort, and recover from the warehouseman the sum he received for the flour, in an action for money had and received.⁵ Where grain is stored with a private warehouseman, the presumption is, in the absence of any agreement on the subject, that he undertakes to keep the grain in the condition in which he received it, and if mixed with his own grain by consent of the owner, that it shall remain with the warehouseman until demanded.⁶ When wheat is stored in mass in a warehouse by several depositors, and there is a deficiency not occasioned by the fault of either, each must share it, and if one has withdrawn the full quantity deposited by him, he is liable for his share of the loss.⁷ When one deposits wheat for storage in a warehouse, knowing that the warehouse-

¹ Durr v. Hervey, 44 Ark. 301; 51 Am. Rep. 594.

² Barker v. Brown, 138 Mass. 340.

³ Wilson v. R. R. Co., 62 Cal. 164.

⁴ Banfield v. Haegar, 7 Abb. N. C. 318; 45 N. Y. Sup. Ct. 428.

⁵ Ives v. Hartley, 51 Ill. 520.

⁶ Ives v. Hartley, 51 Ill. 520.

⁷ Brown v. Northcutt, 14 Or. 529.

man will sell from the common mass, such depositor cannot assert ownership as against an innocent purchaser.¹ A wharfinger's liability, it has been laid down, begins when the goods are delivered at or on his wharf.² A wharfinger on whose wharf coal had been deposited by mistake has no power to sell for unpaid wharfage.³ A warehouseman is estopped from denying the description of property in a receipt, so far as it relates to matters which are or ought to be within his knowledge or that of his agents; but not in respect to matters not open to ordinary inspection and visible.⁴ A warehouseman who receives wheat on storage, giving memoranda stating that the wheat was No. 2 wheat, is not estopped from showing that the wheat delivered to him was not No. 2 wheat, nor from showing that he is entitled to discharge his contract by returning the same wheat that he received. And a purchaser to whom the owner of the wheat transferred the memoranda, and delivered written orders directing the warehouseman to deliver the wheat to the bearer, has no greater right as against the warehouseman than his vendor had.⁵

The nature and value of the property affect the question of ordinary care. The warehouseman is not expected to take the same care of a bag of oats as of a bag of money; of a bale of cotton as of a box of jewelry; of a load of wood as of a box of valuable paintings;⁶ of a quantity of pig-iron as of a bale of hemp in wet weather.⁷ But one who delivers to him a small quantity of a thing has the right to expect the same care as a large quantity of the same thing would receive.⁸ A contract for storage implies, ordinarily, the liability of a warehouseman,—

¹ *Preston v. Witherspoon*, 109 Ind. 457; 58 Am. Rep. 417.

² *Rodgers v. Stophel*, 32 Pa. St. 111; 72 Am. Dec. 775; *Blin v. Mayo*, 10 Vt. 56; 33 Am. Dec. 175.

³ *Kusenbergh v. Browne*, 42 Pa. St. 173.

⁴ *Hale v. Milwaukee Dock Co.*, 23 Wis. 276; 99 Am. Dec. 169.

⁵ *Robson v. Swart*, 14 Minn. 371; 100 Am. Dec. 238.

⁶ *Hatchett v. Gibson*, 13 Ala. 587; and see *Brown v. Hitchcock*, 28 Vt. 452.

⁷ *Holtzclaw v. Duff*, 27 Mo. 392.

⁸ *Hatchett v. Gibson*, 13 Ala. 587.

certainly not that of a common carrier.¹ The obligation of warehousemen to exercise ordinary care for the protection and safety of goods committed to their custody depends upon and is co-extensive with actual and continued possession. If they lose that possession through any omission of duty, they are liable for all the consequences that ensue from it. But if the property is taken from their possession without fault on their part, or lost by means for which they are not responsible, they are not required to go in pursuit of it, or to incur any expense of time, labor, or money in endeavoring to discover or regain it.² In order to avoid liability for the loss of cotton on storage, the warehouse-keeper must show that the loss occurred without his fault. He cannot be relieved by showing that the loss occurred by an overpowering force. He must also show that he used all possible means to preserve it.³ In an action against a warehouseman for a failure to keep safely goods intrusted to him, if it appears that the damage was caused by the fall of the warehouse, the burden is on plaintiff to show that such damage was caused by the negligence of the defendant.⁴ Where a trunk containing clothing is left for storage, if, when returned, the clothing is water-soaked and mildewed, there is a presumption against the warehouseman of a want of ordinary care, which justifies a recovery against him, in the absence of explanation.⁵ A private warehouseman and wharfinger is not subject to the full obligation of a common carrier, particularly a railroad company, of exercising the highest care for safety of passengers, and in constructing safe platforms and approaches about their premises. He is not under any specific legal duty to place guards on the wharf to prevent teams from falling into the water, or to provide places for

¹ *Armfield v. Humphrey*, 12 Ill. App. 90.

² *Sessions v. R. R. Co.*, 82 Mass. 132.

³ *Schwartz v. Baer*, 21 La. Ann. 601.

⁴ *Willett v. Rich*, 142 Mass. 356; 57 Am. Rep. 684.

⁵ *Reed v. Crowe*, 13 Daly, 164.

hitching horses at his warehouse, and is not liable for an injury growing out of the want of such provision being made; but is liable for ordinary care, or such care as prudent men usually exercise over their own property.¹ The law does not require a warehouseman to construct his buildings secure from all possible contingencies. If they are reasonably and ordinarily safe against ordinary and common occurrences, it is sufficient.² An agreement to store cotton in a fire-proof warehouse does not devolve on the warehouseman the necessity of providing water and buckets for the extinguishment of fire, there being no such terms in the contract, or custom among warehousemen.³ A warehouseman is not liable for the neglect of his servants, casually present at an accidental fire at night which destroys the goods, to rescue them. At such time such persons are not "servants," but only individuals and citizens.⁴ A government store-keeper and a bonded warehouseman, being of equal authority in opening and closing the warehouse, the latter is bound to exercise reasonable diligence in seeing that no combustible matter is left in the house in a condition likely to become ignited, and his liability is not affected by any carelessness of the store-keeper in that regard.⁵ In a Texas case, a plaintiff was held not entitled to recover from a warehouseman for damages to cotton from rain-water, the plaintiff having directed that it be compressed and delivered to a steamship, without regard to the weather.⁶ The warehouseman is not liable for an injury to the goods by rats.⁷ A warehouseman receiving grain on storage, and mixing it with other grain of the same kind, which he sells from, but always reserving enough to answer the owner's demand, is not liable for losing it

¹ *Buckingham v. Fisher*, 70 Ill. 121.

² *Cowles v. Pointer*, 26 Miss. 253.

³ *Jones v. Hatchett*, 14 Ala. 743.

⁴ *Aldrich v. R. R. Co.*, 100 Mass. 31; 97 Am. Dec. 74; 1 Am. Rep. 76.

⁵ *Macklin v. Frazier*, 9 Bush, 3.

⁶ *Brandon v. Gulf City etc. Mfg. Co.*, 51 Tex. 121.

⁷ Story on Bailments, sec. 444. Especially if he keep a cat: *Cailiff v. Danvers*, 1 Peake, 155; or terrier-dog: *Taylor v. Secrist*, 2 Disn. 299.

in an accidental fire.¹ He is liable for a delivery to a wrong person, or contrary to orders.² He is bound to redeliver to the bailor on demand, at the expiration of the time for which the property is stored.³ A purchaser of a warehouse receipt for grain on storage is liable for the storage charges, though he has removed the grain without the consent of the warehouseman.⁴ A warehouseman with whom a common carrier stores goods may hold them, when so instructed by the carrier, until "back charges" are paid.⁵ Warehousemen have of late years been considered by the courts as in some measure public agencies, subject to public regulation and control,⁶ and not to be permitted to discriminate in the selection of their customers.⁷ And a strict liability is enforced as against public millers.⁸

ILLUSTRATIONS. — The defendant being a storage and forwarding merchant, a roll of carpeting was delivered to him, at his store, on the Erie canal, to be forwarded as directed, in the usual course of business, the charges to be paid at the end of the route. The defendant omitted to take a receipt, or make a memorandum of the transaction, and failed, when requested, to give any account of the property, which was never received by the owner. *Held*, that the neglect to take a receipt, or make and keep a memorandum of the transaction, rendered him liable, in his character of warehouseman and forwarder, for the value, without further proof of negligence: *Bush v. Miller*, 13 Barb. 481. A hogshead of tobacco was deposited in a warehouse for the purchaser, who, unable to find it when wanted, took another belonging to the same seller, which proved not half as valuable. The warehouseman being sued by the seller for one hogshead of tobacco, *held*, that the jury were at lib-

¹ *Rice v. Nixon*, 97 Ind. 97; 49 Am. Rep. 430.

² *Bank of Oswego v. Doyle*, 91 N. Y. 32; 43 Am. Rep. 634; *Jeffersonville R. R. Co. v. White*, 6 Bush, 251; *Alabama etc. R. R. Co. v. Kidd*, 35 Ala. 209; *Willard v. Bridge*, 4 Barb. 361; *Dufour v. Mefham*, 31 Mo. 577; *Graves v. Smith*, 14 Wis. 5; 80 Am. Dec. 762. One buying wheat from a warehouseman who has no title buys at his peril. The true owner may maintain trover, and this, without a demand:

Velsian v. Lewis, 15 Or. 539; 3 Am. St. Rep. 184.

³ *Pribble v. Kent*, 10 Ind. 325; 71 Am. Dec. 327.

⁴ *Cole v. Tyng*, 24 Ill. 99; 76 Am. Dec. 735.

⁵ *Alden v. Carver*, 13 Iowa, 253; 81 Am. Dec. 430.

⁶ *Munn v. State*, 94 U. S. 113.

⁷ *Nash v. Page*, 80 Ky. 539; 44 Am. Rep. 490.

⁸ *Wallace v. Canaday*, 4 Sneed, 364; 70 Am. Dec. 250.

erty to infer that the property of that not found by the purchaser reverted when he took another in the seller: *Grady v. Leavell*, 1 Dana, 427. A special agreement for right to store, repair, and sell pianos in a store, *held*, not an agreement with a warehouseman for storing goods: *Trust v. Pirsson*, 1 Hilt. 292. Salt transported by canal-boat was consigned to defendant, a warehouseman, and the boat being stopped by the close of navigation a mile and a half from the warehouse, part of the salt was removed to the warehouse, the rest left in the boat, and defendant gave a receipt for the whole, but the master left the boat in charge of a third person till the owner arrived, who paid the warehouseman his charges and advances. *Held*, by the latter act the warehouseman's custody was at an end, and he was not liable for subsequent injuries to the property: *Titsworth v. Winnegar*, 51 Barb. 148. Cotton was sent by rail to warehousemen to be stored in their warehouse, but by some mistake on the part of the railroad company it was sent to another firm and stored in another warehouse. The cotton was subsequently turned over to the proper warehousemen, but they failed to remove it to their warehouse, which was fire-proof. The warehouse and cotton was burned. *Held*, that the warehousemen to whom the cotton was assigned were liable. They should have removed the cotton to their warehouse as soon as it was turned over to them: *Vincent v. Rather*, 31 Tex. 77; 98 Am. Dec. 516. A warehouseman accepted from the previous occupant a transfer of possession of goods already stored, with a written list of their owners, including ten bales of cotton owned by P., but inadvertently credited to H. P. held a warehouse receipt for the cotton, but such receipting was not a prevailing usage in the city. After eight months, the warehouseman, in good faith, gave notice to H. to remove the cotton, and H. came, receipted for, and took it away. *Held*, that the warehouseman was not liable for negligence in not ascertaining its ownership, or for its conversion in delivering it to H: *Parker v. Lombard*, 100 Mass. 405. A was possessed of a wharf, and had a mast projecting therefrom over the river. B moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A's wharf, and on the falling of the tide, the bowsprit of B's vessel, coming in contact with A's mast, broke it. *Held*, that B was not responsible: *Dalton v. Denton*, 1 Com. B., N. S., 672. Grain was delivered to K., a warehouseman, and by him stored in a separate bin, and a receipt returned to the owner, which stated the grain to be "bought at owner's risk as to fire," but stipulated no price. It appeared to be a local custom so to receive grain, and afterwards purchase or return it; also that K. offered to purchase the wheat while it was in store, but the owner refused to sell. *Held*, that

K. was not liable for the subsequent destruction of the grain by fire: *Irons v. Kentner*, 51 Iowa, 88; 33 Am. Rep. 119. Goods were sent by canal carriers, directed to a person in the Isle of Man, to the care of the defendant at Liverpool. On the arrival of the goods at Liverpool, they were landed on a public wharf, and notice sent to the defendant, who was the agent of a steam-vessel company. He signed the carrier's book, and afterward entered them in the manifest and clearance of the steam-vessel going to the Isle of Man. There was also evidence that on former occasions the defendant had desired that goods sent to him should remain on the wharf. *Held*, that there was evidence of a delivery to and acceptance by the defendant of the goods so as to make him liable for a subsequent loss by negligence: *Quiggin v. Duff*, 1 Mees. & W. 174; 1 Gale, 420. Grain was delivered to wharfingers to be shipped to a party in New Orleans, where certain rates could be had, and before shipment they were notified not to ship to such a party, but to another, which they neglected to do, but shipped according to the first direction, and the price of the grain was lost, in consequence of the insolvency of the consignee. *Held*, that the wharfingers were liable to the shipper for its value: *Howell v. Morlan*, 78 Ill. 162. A warehouseman *held* not liable for conversion of cotton stored with him because he refused to deliver it to one who claimed to be the assignee of the party who originally stored it with him, unless such assignee produced the receipt for the cotton, or accounted for its loss, and gave good security to indemnify him: *Patten v. Baggs*, 43 Ga. 167. A warehouseman agreed to have a lot of barrels which were stored with him insured in responsible companies, which he did, in his name, to their full value, and on a loss by fire, prosecuted the company in good faith on the policy, but was defeated on the ground that he had given a receipt to the owner at his request, and that he had received the same to be held up to a day anterior to the loss. *Held*, that the warehouseman was not liable to the owner, on the ground that he failed to recover of the insurance company, he having complied with his contract: *Cole v. Favorite*, 69 Ill. 457. The contract of defendant was to deliver certain wheat stored for plaintiffs only upon their order indorsed on the elevator receipt. *Held*, that this might be so modified by letters and telegrams by plaintiffs to their agent to sell the wheat, and the intrusting him with the receipt for that purpose, as to justify defendant in surrendering the wheat to him without the indorsement: *Holman v. R. R. Co.*, 67 Ga. 595. A railroad company, liable as a warehouseman, stored plaintiff's goods in a wooden building, in which was also stored a lot of gunpowder. The building caught fire, the firemen were afraid to go near it, and plaintiff's

goods were burned. *Held*, that the company was liable for their value: *White v. R. R. Co.*, 3 McCrary, 559. A shipped a barouche to B, his salesman. B sent his servant to the wharf-boat, which was used as a warehouse for the storage of freight, to get the barouche. The owner of the wharf-boat let him have it, and while B's servant was getting the barouche on shore, it slipped overboard. *Held*, that the owner of the wharf-boat could not be made responsible: *Reamer v. Davis*, 85 Ind. 201. A warehouseman received bales of cotton to store, the covers being torn. He left them in an open lot of ground so exposed that the under bales sunk into the mud and were damaged. *Held*, that he was liable: *Morehead v. Brown*, 6 Jones, 367. The owner of a warehouse in which plaintiff was about to store bulbs stated that it was free from frost, and that there was no danger of the bulbs freezing. *Held*, that this was not enough to give plaintiff a right of action as on a warranty, the bulbs having frozen in the warehouse: *Hallock v. Mallett*, 55 N. Y. Sup. Ct. 265. The rate-table of a dock company contained the following provisions: "Wines and spirits (rum and British spirits excepted) landed in the docks will be chargeable with the following rates: The company will not be responsible for deficiencies on wines or spirits imported in casks not made of oak, nor on spirits exceeding twenty per cent overproof; but are answerable for deficiencies in quantity on those contained in other casks housed with the company beyond one gallon per cask for each year or part of a year the goods shall remain in their custody, provided such deficiencies be claimed of the company within six months after delivery, and shall be satisfactorily established by the custom's gauge on landing and delivery. . . . Rates and charges on rum: When rum is imported in casks made of proper oak, the company engages to be responsible for deficiencies in measure which shall exceed one gallon per cask for each year," etc. *Held*, in an action for loss of brandy housed with the company, that, under the above provisions, they would not be liable for a diminution in alcoholic strength, though exceeding one gallon per cask, the deficiency contemplated being a deficiency in actual bulk; but that if such diminution was caused by their negligence, they were liable, apart from contract: *Lamare v. London and St. Katherine Docks Co.*, 39 L. T., N. S., 330. A's goods were burned in a warehouse belonging to a railroad company. The liability of the company at the time was that of a warehouseman, the goods remaining there at A's request. The fire broke out, not in the warehouse, but near by. Before the warehouse caught fire A sought permission to remove his goods. Permission was refused, on the ground that if the warehouse were opened other goods there might be stolen, and also because the company did not then think the warehouse

in danger. The company had goods stored there of great value, and every effort was made to save the building, and finally, to remove the goods. *Held*, that A had no right of action against the company: *Turrentine v. R. R. Co.*, 100 N. C. 375; 6 Am. St. Rep. 602.

§ 1733. **Rights of Bailee—To Bring Action.**—A hired bailee has a right of action against any one interfering with his possession or injuring the property.¹ While the term of the bailment continues he may bring an action against one interfering with his possession, even though the latter is an assignee of the bailor.² If the cars injured by a collision were at the time the property of another railroad company, but were in plaintiff's possession under a contract of bailment for hire, he has such special property as will maintain an action for the injury.³ Where a bailee of goods intrusted to him to do work

¹ *Burdiet v. Murray*, 3 Vt. 302; 21 Am. Dec. 588; *White v. Bascom*, 28 Vt. 268; *Hare v. Tuller*, 7 Ala. 717; *Cox v. Easley*, 11 Ala. 362; *Hopper v. Miller*, 76 N. C. 402; *Eaton v. Lynde*, 15 Mass. 242; *Shaw v. Kaler*, 106 Mass. 448; *Bradley v. Spofford*, 23 N. H. 444; 55 Am. Dec. 205; *Adams v. O'Connor*, 100 Mass. 515; 1 Am. Rep. 137; *Murray v. Warner*, 55 N. H. 546; 20 Am. Rep. 227.

² *McConnell v. Maxwell*, 3 Blackf. 419; 26 Am. Dec. 428. In *Burdiet v. Murray*, 3 Vt. 302, 21 Am. Dec. 588, Messrs. Murray had delivered to B. a quantity of skins to be dressed by B. at a certain price. Before they were finished they were taken by M., an assignee and creditor of the Murrays. "The plaintiffs," said the court, "under the contract with the Murrays, were bailees having an interest, and had a right to retain the skins for the purpose for which they were bailed to them. Until the skins were dressed and made into morocco, the plaintiffs were entitled to the possession of them; and even then they would have a lien upon the skins for the price agreed to be paid for their labor upon them. A workman who has bestowed his labor upon a chattel has a lien for the remuneration due to

him, whether the amount was fixed by the express agreement of the parties or not; though it is otherwise if, by the bargain, a future day of payment was agreed upon, for then the detention of the chattel would be inconsistent with the terms of the contract: *Chase v. Westmore*, 5 Maule & S. 180. Here there was no particular time or mode of payment agreed upon, and if the plaintiffs had completed the manufacture of the skins according to the agreement, they would have had an unquestionable right to detain them until the price was paid, unless they had already in their hands a balance sufficient to pay the price. But the skins were in an unfinished state, and the plaintiffs had a right under the contract to retain them to earn the price. If at the time of taking the skins the Murrays had offered and agreed to allow the plaintiffs the full price stipulated to be paid for furnishing them, out of moneys actually in the plaintiffs' hands sufficient to pay the price, it might have been a good defense. But as no such offer appears to have been made, the evidence proposed by the defendants could not avail them."

³ *Montgomery Gas Light Co. v. R. R. Co.*, 86 Ala. 372.

upon them, with the knowledge and privity of the bailor, employs another to aid in doing the work, and through the negligence and unskillfulness of the latter the goods are injured, the owner may maintain an action against him therefor.¹ A bailee of yarn who is to procure it to be made into cloth for a commission has a special property in the yarn, and may maintain an action against any one who wrongfully takes it from his servant, to whom he delivers it to be woven.² A bailee, plaintiff in an action of trover, can recover only the value of his special property in the bailment, where there has been no actual conversion, and the property was returned before suit brought.³ The rule that a bailee without interest has a title arising simply from his possession sufficient to maintain trover against a wrongful invader has been applied, although the general owner had made a demand upon the defendant, after his conversion of the property, which was not complied with.⁴ Unlike the case of a gratuitous bailment, an action will lie for a non-feasance in a mutual-benefit bailment by the failure of one to make or the other to accept the promised bailment delivery.⁵

§ 1734. **Rights of Bailee — To Compensation.** — The bailee is of course entitled to compensation when he completes his contract. The amount and time of payment is regulated by agreement or by custom. Under a contract for wintering cattle, stipulating that the expressed amount therefor shall be paid "before moving the cattle" from the agister's farm, he is entitled to retain possession of them until paid the agreed amount.⁶

§ 1735. **Completion of Bailment Interrupted.** — If the bailee has been unable to complete his services on account

¹ *Baird v. Daly*, 57 N. Y. 237.

² *Eaton v. Lynde*, 15 Mass. 242.

³ *Eldridge v. Adams*, 54 Barb. 417.

⁴ *Harrington v. King*, 121 Mass. 269.

⁵ *Story on Bailments*, secs. 384, 436.

⁶ *McCoy v. Hock*, 37 Iowa, 436.

of its accidental destruction, or its destruction without his fault, he is entitled to recover for his services upon it up to that time¹ (unless special contract or local usage has established a different rule²), and especially is this so where the fault of the bailor has occasioned the loss.³ If the interruption has been caused by the wrongful act of the bailor, the bailee may recover full indemnity under the contract.⁴ An agreement by a bailee not to remove a chattel from premises without the bailor's consent is not broken by its removal by an attaching officer on mesne process against the bailee; and the bailor will not by reason of such removal acquire a right of possession sufficient to entitle him to maintain replevin against the officer.⁵ If the bailee left the work uncompleted, the ancient doctrine was that he could recover nothing for what he had done;⁶ but the courts at present favor the allowance of the price of what he has done to the bailee, less the damage to the bailor in having to get the work finished elsewhere.⁷ But if the loss arose from the bailee's neglect or fault, then he not only must respond for the loss of the chattel, but he must also forfeit his claim for compensation, so far, at all events, as to put the bailor where he would have been had the service been properly performed.⁸

ILLUSTRATIONS. — A bailee is building cars for a company, which is to furnish certain parts necessary to their completion. These are not furnished promptly, and during the consequent delay the cars are destroyed by fire. *Held*, the bailee's loss, and he cannot recover for his labor: *McConihe v. R. R. Co.*, 20 N. Y. 495; 75 Am. Dec. 420.

§ 1736. **Other Rights and Duties of Bailee.** — The bailee has a right to the undisturbed possession of the chattel pending the proper accomplishment of the bail-

¹ Schouler on Bailments, 112. See *Lord v. Wheeler*, 1 Gray, 282.

² Schouler on Bailments, 113.

³ *Blakemore v. R. R. Co.*, 8 El. & B. 1035.

* *Story on Bailments*, 441.

⁵ *Wade v. Mason*, 12 Gray, 335; 74 Am. Dec. 597.

⁶ *Cutter v. Powell*, 6 Term Rep. 320; 2 Smith's Lead. Cas. 1.

⁷ *Hillyard v. Crabtree*, 11 Tex. 264.

⁸ Schouler on Bailments, 113.

ment purpose.¹ A bailee is not bound to insure the property in his hands.² In an Ohio case the proprietors of stock-yards were held authorized to sell live-stock left in their custody, whose owner could not be found, for his account when found.³ The bailee must not use the property in a different manner and for other purposes than those designated in the contract of bailment; if he does, he becomes guilty of a conversion.⁴

§ 1737. Duty of Bailee to Redeliver Property.—The bailee is bound to deliver the property to the bailor or on his order.⁵ He must obey the directions of his bailor.⁶ Where a bailee denies a bailor's right to take the goods, and refuses to deliver them, the bailor may maintain an action without having tendered fees for storage.⁷ Where the owner of personal property makes a contract with his bailee, whereby the bailee is not bound to deliver the property except on the written order of such owner, the bailee cannot justify a refusal to deliver to a person succeeding to the ownership on the ground of non-presentation of a written order of such former owner.⁸ A bailor has no title to other goods remaining in the bailee's hands, though of like character, and intended to be put in the place of the bailed goods, where such goods have not been actually confused, but disposed of, by the bailee.⁹ Where one to whom property has been bailed for a speci-

¹ Schouler on Bailments, sec. 112.

² Story on Bailments, sec. 456.

³ Trustees of Millcreek Township v. Brighton Stock-yards Co., 27 Ohio St. 435.

⁴ Crocker v. Gullifer, 44 Me. 491; 69 Am. Dec. 118. Intrusted with property to be used in his business, he has no right to lease it to another: Crocker v. Gullifer, 44 Me. 491; 69 Am. Dec. 118.

⁵ Schouler on Bailments, 118; Pribble v. Kent, 10 Ind. 326; 71 Am. Dec. 327. Putting a mare to pasture in consideration of her services does not entitle the bailee to the increase: Allen v. Allen, 2 Pa. St. 166.

⁶ Parker v. Lombard, 100 Mass. 405; Compton v. Shaw, 1 Hun, 441; Howell v. Morlan, 78 Ill. 162. A deposited bonds with B, instructing him not to deliver them to any one except on a written order from him. B delivered them to his wife on a forged order. Held, that B was liable to A for their value: Kowing v. Manley, 49 N. Y. 192; 10 Am. Rep. 346.

⁷ Long Island Brewery Co. v. Fitzpatrick, 18 Hun, 389.

⁸ Willner v. Morrell, 40 N. Y. Sup. Ct. 222.

⁹ Wood v. Fales, 24 Pa. St. 246; 64 Am. Dec. 655.

fied time violates his trust and transfers the property to another, the owner may maintain replevin against the latter, although the term of the bailment has not expired.¹ The bailor may countermand his instructions given when the thing was placed in the hands of the bailee, even as to a delivery to a third person.²

The bailee cannot evade his duty to deliver the property to the bailor by disputing his title or setting up title in another.³ He may protect himself, where there are adverse claims set up, by filing a bill of interpleader.⁴ And he is excused when the goods are taken from him by authority of the law at the instance of a third person.⁵

¹ *Dunlap v. Gleason*, 16 Mich. 158; 93 Am. Dec. 231.

² In *Winkley v. Foye*, 33 N. H. 171, 66 Am. Dec. 715, the law is thus stated: "Where a consignment or remittance is made, with instructions to pay over the proceeds to a third person, the appropriation is not absolute, for it amounts to no more than a mandate from a principal to his agent. It may be revoked at any time before it is executed, or at least before any engagement is entered into by the mandatary with the third person to execute it for his benefit; and it will be revoked by any prior disposition of the property inconsistent with such execution: 2 Story's Eq. Jur., secs. 972, 1046, 1036 a, 1036 b, 1045; *Scott v. Porcher*, 3 Mer. 652, 664; *Acton v. Woodgate*, 2 Mylne & K. 492. Where goods are delivered to a bailee to be delivered over to another, if the delivery over is not for a valuable consideration, the bailor, at any time before the actual delivery, may countermand his bailment, and after such countermand a delivery over by the bailee will not be good: Story on Bailments, sec. 104; Bac. Abr., tit. Bailment, D. Where one person remits a bill to another for the use of third persons, it is the right of the remitter to give and countermand his own directions respecting the bill as often as he pleases, and the person to whom the bill is remitted will still hold it and its amount when received for the use of the remitter himself, until, by some

arrangement entered into by himself with the person who is the object of the remittance, he has precluded himself from so doing, and appropriated the remittance to the use of such person: *Williams v. Everett*, 14 East, 597. Until both the party receiving a consignment or remittance has done some act recognizing the appropriation of it to the particular purposes specified, and the person for whose benefit it was remitted or consigned has signified his acceptance of the consignment or remittance, so as to create a privity between them, the property or proceeds remain at the risk and on account of the remitter or owner, and subject to his order: *Tierman v. Jackson*, 5 Pet. 601."

³ *Canrice v. Spanton*, 7 Man. & G. 903; *Rogers v. Weir*, 34 N. Y. 463; *Maxwell v. Houston*, 67 N. C. 305; *Peebles v. Farrar*, 73 N. C. 342; *Foltz v. Stevens*, 54 Ill. 180; *Estes v. Boothe*, 20 Ark. 583; *Ball v. Liney*, 48 N. Y. 6; 8 Am. Rep. 511; *Gosling v. Birnie*, 7 Bing. 339; *Holl v. Griffin*, 10 Bing. 246; *Holbrook v. Wright*, 24 Wend. 169; 35 Am. Dec. 607.

⁴ *Ball v. Liney*, 48 N. Y. 6; 8 Am. Rep. 511.

⁵ *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145. In *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145, it is said: "It is undoubtedly true that when a wharfinger receives goods, or acknowledges the title of another, and agrees to receive or keep goods for such person, he cannot dispute the

But it has been held that he may deny his bailor's title by showing that the bailor obtained possession of the goods fraudulently, tortiously, or feloniously.¹ It is a good excuse for non-delivery that the goods have been already taken out of his hands by process of law;² or that some one with a better right than the bailor has taken them out of his hands without his fault.³ Otherwise, if he deliver to the wrong person, even though innocently, he is liable for a conversion of the chattel.⁴ The bailee has no right to sell property bailed;⁵ to do so ends the bailment; nor to loan it;⁶ but he may assign his interest in the property.⁷ An agreement by which cattle are to be kept and fed during the winter, and the stock to be liable for the expense of keeping them, with authority to the bailee to sell them to pay such expense, gives to the bailee a right to sell so much of the stock as may be necessary to pay him his debt; but if he sells more, it will be a conversion.⁸

title in an action brought by such person against him. The cases of *Gosling v. Birnie*, 7 Bing. 339, 20 Eng. Com. L. 153, *Holl v. Griffin*, 10 Bing. 246, 25 Eng. Com. L. 118, *Harmon v. Anderson*, 2 Camp. 243, and *Stonard v. Dunkin*, 2 Camp. 344, establish this point. The wharfinger is the agent of the person of whom he receives the goods, and cannot dispute the title of his principal in an action brought by the principal against him. But this cannot protect the goods thus received from an execution against the person thus depositing them; and if they are taken from the wharfinger or warehouseman by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner. If the person from whom the wharfinger or warehouseman receives the goods claims the same by a title illegal, so that he cannot lawfully hold them, and they are taken by authority of the law out of the custody and care of the wharfinger, the latter may show this in excuse for not delivering them."

¹ *King v. Richards*, 6 Whart. 418; 37 Am. Dec. 420; *Humphrey v. Reed*, 6 Whart. 443; *Floyd v. Bovard*, 6

Watts & S. 76; *Hostler v. Skull*, Tayl. 152; 1 Am. Dec. 583.

² *Cook v. Holt*, 48 N. Y. 275; *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145.

³ *Stephens v. Vaughan*, 4 J. J. Marsh. 206; 20 Am. Dec. 216.

⁴ *Parker v. Lombard*, 100 Mass. 405; *McGinn v. Butler*, 31 Iowa, 160; *Dufour v. Mefham*, 31 Mo. 577; *Stevenson v. Price*, 30 Tex. 715; *Willard v. Bridge*, 4 Barb. 361; *Collins v. Burns*, 63 N. H. 1; *Alabama etc. R. R. Co. v. Kidd*, 35 Ala. 209; *Jeffersonville etc. R. R. Co. v. White*, 6 Bush, 251; *Lichtenhein v. R. R. Co.*, 11 Cush. 70; *Forsythe v. Walker*, 9 Pa. St. 140; *Hall v. R. R. Co.*, 14 Allen, 439; 92 Am. Dec. 783.

⁵ *Emerson v. Fisk*, 6 Greenl. 200; 19 Am. Dec. 206; *Crimp v. Mitchell*, 34 Miss. 449; *Calhoun v. Thompson*, 56 Ala. 160; 28 Am. Rep. 754; *Medlin v. Wilkerson*, 81 Ala. 147.

⁶ *Walker v. Wilkinson*, 35 Ala. 725; 76 Am. Dec. 315.

⁷ *Bailey v. Colby*, 34 N. H. 29; 66 Am. Dec. 753.

⁸ *Whitlock v. Heard*, 13 Ala. 776; 48 Am. Dec. 73.

ILLUSTRATIONS.—D received goods from B, and on demand by a third person claiming to be the owner, neither set up claim to them, nor disputed claimant's right, but stated, in substance, that he did not know the claimant to be the owner; that the property was left by B; and that he desired an order before delivering the same, or an opportunity to inquire. *Held*, that this was not such a refusal as amounted to a conversion of the goods. An evasive refusal is not a defense, but reasonable excuses made in good faith are allowable: *Carroll v. Mix*, 51 Barb. 212. A, a diamond dealer, delivered to B, also a diamond dealer, a diamond to sell to a customer, and took a receipt stating that B took the diamond on approval, to be returned on demand. B sold it to one who purchased in good faith, and who paid for it, and who had purchased from B other diamonds obtained in the same way. *Held*, that A could not reclaim the diamond: *Smith v. Clews*, 105 N. Y. 283; 18 Abb. N. C. 477.

(b) *Hire of Chattels.*

§ 1738. **This Bailment how Created.**—This bailment for hire is created where one obtains for a compensation the temporary use of a chattel. Compensation to be paid is necessary; but this is presumed from the chattel being in the hirer's possession with the right to use it as he desired.¹ Where the least consideration can be found, the contract will be construed as one of hiring, and not as a loan.² Where by custom of trade the purchaser of a barge-load of coal is bound to take care of the barge until called for by the owner, his liability is that of a bailee for hire.³ But proof of a loan of property will not sustain an action for hire.⁴ A contract of hiring need not be in writing.⁵

ILLUSTRATIONS.—A lends B his oxen for a week in consideration of B lending his to him the following week. This is a contract for hire, and not a loan: Story on Bailments, sec. 224. A delivered to B a number of cows and sheep, which B promised to redeliver within a year, with the natural increase, and to pay

¹ *Reilly v. Rand*, 123 Mass. 215.

² *Carpenter v. Branch*, 13 Vt. 161; 37 Am. Dec. 587; *Chamberlin v. Cobb*, 32 Iowa, 160; *Francis v. Schrader*, 67 Ill. 272.

³ *Gaff v. O'Neill*, 2 Cin. Rep. 246.

⁴ *Dunham v. Kinnear*, 1 Watts, 130.

⁵ *Foreman v. Drake*, 98 N. C. 311.

for such as should be lost or destroyed. *Held*, a hiring, and not a loan: *Putnam v. Wyley*, 8 Johns. 432; 5 Am. Dec. 346.

§ 1739. **Hirer Liable for Ordinary Negligence.**—Such a hirer is bound to ordinary care and diligence in the use and keeping of the thing, and is liable for ordinary neglect whereby it is destroyed or injured.¹ He is not liable for loss by fire, inevitable accident, or superior force.² An agreement of a bailee for hire to return the chattel in good order is excused if, without fault of his, it is destroyed by an irresistible force.³ The owner of a thing let out to hire is not entitled to indemnity for an injury it may sustain in the service in which it is used, unless such injury is caused by an abuse of it, or by such negligence as brings responsibility upon the hirer. The owner must be his own insurer against the perils that belong to the service of the thing.⁴ A bailor makes a *prima facie* case when he shows such loss or damage to the chattel as ordinarily does not happen where the care which the law requires in the particular kind of bailment is exercised.⁵ The hirer of an animal is not responsible for its falling sick, or lame, or dying while in his care.⁶ One who hires a carriage and horses for a journey is not liable for an injury to the horses from immoderate driving, if the owner sent his own driver, and the bailee does no act which occasions the injury.⁷ One who hires a horse to drive, and by carelessness allows the horse to run away, to his injury, is liable to an

¹ Schouler on Bailments, 132; Story on Bailments, sec. 398; *Handford v. Palmer*, 2 Bos. & P. 359; *Chamberlain v. Cobb*, 32 Iowa, 61; *Eastman v. Sanborn*, 3 Allen, 594; 81 Am. Dec. 677; *Mooers v. Larry*, 15 Gray, 451; *Jackson v. Robinson*, 18 B. Mon. 1; *Angus v. Dickerson*, 1 Meigs, 459; *Milton v. Salisbury*, 13 Johns. 211; *Brown v. Waterman*, 10 Cush. 117; *Swigert v. Graham*, 7 B. Mon. 661; *Downey v. Stacey*, 1 La. Ann. 426.

² *Field v. Brackett*, 56 Me. 121; *McEvers v. Steamboat Sangamon*, 22 Mo.

187; *Watkins v. Roberts*, 28 Ind. 167; *Hyland v. Paul*, 33 Barb. 241; *St. Paul etc. R. R. Co. v. R. R. Co.*, 26 Minn. 243; 37 Am. Rep. 404; *Longman v. Caleni*, *Abbott on Shipping*, 270, note.

³ *McEvers v. Steamboat Sangamon*, 22 Mo. 187.

⁴ *Reeves v. The Constitution*, Gilp. 579.

⁵ *Arnot v. Branconier*, 14 Mo. App. 431.

⁶ *Millon v. Salisbury*, 13 Johns. 211; *Buis v. Cook*, 60 Mo. 391.

⁷ *Hughes v. Boyer*, 9 Watts, 556.

action.¹ The hirer of a horse at a livery-stable is liable for a want of reasonable care and skill in driving him; and unless he is manifestly incapable of using such care and skill, it is immaterial whether the keeper of the stable expected, or had reason to expect, that he would or would not be careless or unskillful.² For the owner of a horse to receive it back from a person who has hired it and injured it by hard driving is not a waiver of his right of action for the injury.³ Where a cause of injury can be in any way traced to the bailee's want of care, then he is liable.⁴

ILLUSTRATIONS.—A steamboat while hired out is injured by a boiler explosion resulting from some hidden, unknown defect or misfortune that the hirer's reasonable skill, care, and diligence could not prevent. *Held*, he is not answerable for the damage: *Stewart v. R. R. Co.*, 4 Biss. 362. The hirer of a horse was told before he had accomplished more than a small portion of his journey that the horse was sick. He continued on, however, and the animal died at the end of the journey. *Held*, that the hirer was liable for the value of the horse: *Thompson v. Harlow*, 31 Ga. 348. The hirer of a horse stopped at an inn, and owing to the neglect of the hostler to put the bits in the horse's mouth on leaving, the horse was unmanageable and ran away. *Held*, that the hirer of the horse was liable to the owner for the damage occasioned by the negligence of the hostler: *Hall v. Warner*, 60 Barb. 198. A hired a team of four horses to drive twelve miles and back the same day. He brought three of the horses back in good condition, but the fourth one took sick on the way and died. *Held*, that, in the absence of circumstances showing negligence on A's part, he was not liable for the value of the horse: *Carrier v. Dorrance*, 19 S. C. 30. The hirer of a horse overfeeds and overwaters him. The horse in consequence dies. *Held*, the hirer is liable: *Eastman v. Sanborn*, 3 Allen, 594; 81 Am. Dec. 677. A let an ass

¹ *West v. Blackshear*, 20 Fla. 457. The hirer of a horse to ride is authorized to put on the horse, in addition to his own weight, such reasonable baggage as is usual for men to carry on horseback: *McNeill v. Brooks*, 1 Yerg. 75.

² *Mooers v. Larry*, 15 Gray, 451.

³ *Austin v. Miller*, 74 N. C. 274.

⁴ *Eastman v. Sanborn*, 3 Allen, 594;

81 Am. Dec. 677; *Buis v. Cook*, 60 Mo. 391; *Wentworth v. McDuffie*, 48 N. H. 402; *Edwards v. Carr*, 13 Gray, 234; *Gross v. Brown*, 41 N. H. 283; *Rowland v. Jones*, 73 N. C. 52; *Ray v. Tubbs*, 50 Vt. 688; 26 Am. Rep. 519; *McNeill v. Brooks*, 1 Yerg. 73; *Thompson v. Harlow*, 31 Ga. 348; *Banfield v. Whipple*, 10 Allen, 27; 87 Am. Dec. 618.

to B for a season, B warranting against "accidents," and agreeing to return him sound, or pay one thousand dollars if damage should be done to him. Injuries from sickness, lightning, and "accident" were excepted. Soon after the season commenced the ass was returned diseased and disabled by a wound inflicted on him. There was no evidence of negligence or misconduct on the part of B; but witnesses expressed the opinion that the ass had been poisoned, and also that the spermatic cord had been punctured. The jury gave a verdict for the defendant, and the court sustained the verdict: *Conwell v. Smith*, 8 Ind. 530.

§ 1740. Hirer may Enlarge Liability by Contract. —

The hirer may enlarge his liability by special contract; but such contracts must be clearly proved, and are always strictly construed;¹ and even a special agreement to return the thing at a certain time would not bind the party for a loss caused by inevitable accident or the act of God.² A person who hires a piano, agreeing to return it "in as good order as when received, customary wear and tear excepted," is liable for an injury to it caused by the house blowing down.³ The hirer of a carriage by the year, under a written agreement binding the carriage-maker "to keep the same in perfect repair without any further charges whatever," is not liable for repairs made necessary by accident, and not by the willful default of the hirer.⁴

ILLUSTRATIONS. — A let to B a certain number of sheep of a given weight, to be kept well and returned in one year, all to be of good age and the same weight of sheep, and the bailee was also to deliver a certain weight of washed wool as good as should be averaged from the flock. *Held*, that the same sheep were to be returned, with a sufficient number of other sheep of

¹ *Harrington v. Snyder*, 3 Barb. 380. A bailee for hire, with an express undertaking to keep safely, is liable at all events for the safe-keeping of the property intrusted to him: *Vaughan v. Webster*, 5 Harr. (Del.) 256.

² *Singleton v. Carroll*, 6 J. J. Marsh. 527; 22 Am. Dec. 95; *Young v. Bruce*, 5 Litt. 324. Where nothing more appears, a mere verbal promise to return

the thing hired within a specified time does not import a contract on the part of the hirer to insure it against inevitable casualties or losses occurring without fault on his part: *Field v. Brackett*, 56 Me. 121.

³ *Harvey v. Murray*, 136 Mass. 377.

⁴ *Reading v. Menham*, 1 Moody & R. 234.

equal quality to make up losses, if any occurred: *Bellows v. Denison*, 9 N. H. 293. A clause in a lease of furniture bound the lessee to "surrender the property in as good a condition as reasonable use and wear thereof would permit." *Held*, not to vary the duty imposed by the law of bailments, and therefore a loss by fire, without fault on the part of the hirer, falls on the owner: *Hyland v. Paul*, 33 Barb. 241.

§ 1741. **Use by Hirer beyond Terms of Hiring.**—The hirer has no right to put the chattel to a use more extensive or even materially different from the terms of the hiring; if he do so he will be, if a loss occur, strictly, and in many cases absolutely, liable.¹ A bailor of a mare may maintain trover against the bailee for willful immoderately fast driving, seriously endangering her life. Such use is an invasion of the owner's rights, and inconsistent with the idea of an existing bailment.² A person who hires a horse of its owner to drive to a particular place, and in returning unintentionally takes the wrong road, and after traveling on such road a few miles discovers his mistake, and takes what he considers the best way back to the place of hiring, which is by a circuit through another town, is not liable in trover for the conversion of the horse.³

ILLUSTRATIONS.—A person hires a horse to go a certain distance. While driving him beyond that distance, the horse is injured through no neglect of the hirer. He is responsible nevertheless: *Wheelock v. Wheelwright*, 5 Mass. 104; *Frost v. Plumb*, 40 Conn. 14; *Rotch v. Hawes*, 12 Pick. 135; 22 Am. Dec. 414; *Fisher v. Kyle*, 27 Mich. 454; *Woodman v. Hubbard*, 25 N. H. 67; 57 Am. Dec. 310; *Lucas v. Turnbull*, 15 Gray, 306. A per-

¹ *Fisher v. Kyle*, 27 Mich. 454; *Tex.* 382; *Butler v. Walker*, *Rice*, 182; *Lewis v. McAfee*, 32 Ga. 465; *Wentworth v. McDuffie*, 48 N. H. 402; *McNeill v. Brooks*, 1 Yerg. 75; *Schenck Ray v. Tubbs*, 50 Vt. 688; 27 Am. Rep. 519; *Lane v. Cameron*, 38 Wis. 603; *Lucas v. Trumbull*, 15 Gray, 309; *Buchanan v. Smith*, 10 Hun, 474; *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Stewart v. Davis*, 31 Ark. 518; 25 Am. Rep. 576; *Gorman v. Campbell*, 14 Ga. 137; *Duncan v. R. R. Co.*, 2 Rich. 613; *Robinson v. Parnell*, 15

² *Wentworth v. McDuffie*, 48 N. H. 402.

³ *Spooner v. Manchester*, 133 Mass. 270; 43 Am. Rep. 514.

son hires a horse to go to a certain place. He drives him to another place, and while so engaged the horse is injured without his fault. The hirer is liable: *Ray v. Tubbs*, 50 Vt. 688; 28 Am. Rep. 519; *Homer v. Thwing*, 3 Pick. 492; *Hart v. Skinner*, 16 Vt. 138; 42 Am. Dec. 500; *Martin v. Cuthbertson*, 64 N. C. 328. T. hired a horse of R., agreeing not to drive it beyond G., but soon returned it sick, and took another, intending to drive it beyond G., but not disclosing the intent to R., who understood he was not to drive it beyond G. This horse T. overdrove beyond G., causing its death. *Held*, that T. was liable in tort for the damage: *Ray v. Tubbs*, 50 Vt. 688; 28 Am. Rep. 519. K. hired of M. teams to transport goods from F. to N., and agreed to return the teams immediately after the transportation of the goods to N. After the goods were delivered at N., and while the drivers of the teams were about starting back with the wagons, K. prevailed upon the drivers to convey the goods to a place some distance from N., and on this trip the teams were lost, and never returned to M. *Held*, that K. was responsible for the value of the teams: *Murphy v. Kaufman*, 20 La. Ann. 559. A slave was hired to work on the streets of a town. The hirer put him to work at the mouth of a sewer under a bank. The bank caved in and killed him. The hirer was held liable for his value: *Mayor v. Howard*, 6 Ga. 213. A slave, hired as a house-servant, was put to work on a plantation. While crossing a stream on a log he was drowned. The hirer was held liable: *Hooks v. Smith*, 18 Ala. 338. A slave, hired to cut timber in a mill, was employed in other work, and while so employed was injured. The hirer was held liable, irrespective of negligence: *Sims v. Chance*, 7 Tex. 561.

§ 1742. **Hirer has No Right to Transfer Thing.**—The hirer has no right to sell, pawn, or otherwise transfer title in the thing hired, and to attempt to do so is a violation of duty, for which the bailor may treat the bailment as ended and recover the chattel.¹ Yet it seems that the hirer may make an assignment of his beneficial interest.² A bailee intrusted with property to be used in his service has no right to lease it to another.³ So even a *bona fide* purchaser from a bailee can obtain no title against the

¹ *Bryant v. Wardwell*, 2 Ex. 479; *Marner v. Banks*, 16 Week. Rep. 62; *Swift v. Moseley*, 10 Vt. 208; 33 Am. Dec. 197; *Johnson v. Wiley*, 46 N. H. 75; *Dunham v. Lee*, 24 Vt. 432; *Seargent v. Gile*, 8 N. H. 325.

² *Bailey v. Colby*, 34 N. H. 29; 66 Am. Dec. 752; *Nash v. Mosher*, 19 Wend. 431; *Vincent v. Cornell*, 13 Pick. 294; 23 Am. Dec. 683.

³ *Crocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 118.

bailor;¹ nor can one who does work on the thing at the request of the bailee impose a lien on it against the owner.²

ILLUSTRATIONS. — One having hired the use of certain personal property wrongfully converted it by annexing it to and making it a part of his real estate, and then sold the real estate to a third person, who had no notice of the facts. *Held*, that the party injured could not reclaim his property from the purchaser, but that his only remedy was by action against the original wrong-doer: *Fryatt v. Sullivan Co.*, 7 Hill, 529.

§ 1743. **Hirer Liable for Injury to Thing by Servants or Others.** — The hirer is liable for any injury done to the chattel by his servants within the scope of their employment, and by any one whom he may permit to participate in the use;³ but not, on the other hand, for the unauthorized act of a servant, friend, or anybody else.⁴

ILLUSTRATIONS. — The servant of a bailee for hire takes and uses the goods bailed in the business in which he is employed by the bailee, and a loss results by the carelessness of the servant. The master is liable for it, though no express assent by him is shown: *Sinclair v. Pearson*, 7 N. H. 219. The defendant hired a derrick of the plaintiff in August, and agreed to return it in as good condition as it then was in, ordinary wear excepted. He did not take it away at the time, it being understood that he would want it some time during the coming fall. M. also wishing the use of a derrick, the defendant informed him that the plaintiff's could be had. Soon afterwards a servant of M. called on the plaintiff, and said he had come for the derrick engaged by the defendant, and it was delivered to him, and used for some time by M., after which it was taken and used by the defendant. While in the latter's use, some part of the derrick was broken, and it was otherwise injured, and in this condition the defendant returned it to the plaintiff, the expense of repairing it being left to future adjustment. At the time of hiring the machine, the defendant did not profess to be hiring it for M., and had no authority from M. so to do. The plaintiff

¹ *Kitchell v. Vanadar*, 1 Blackf. 356; 12 Am. Dec. 249; *Emerson v. Fisk*, 3 Greenl. 200; 19 Am. Dec. 206; *Russell v. Favier*, 18 La. 585; 36 Am. Dec. 662; *Chism v. Woods*, Hardin, 531; 3 Am. Dec. 740.

² *Small v. Robinson*, 69 Me. 425; 31 Am. Rep. 299.

³ *Schouler on Bailments*, 142, 143.

⁴ *Schouler on Bailments*, 143, 144.

delivered it to the person who came for it, supposing that the defendant had sent for it, and solely upon the defendant's credit, and it was used by M. by the defendant's permission only. *Held*, that the plaintiff was entitled to recover of the defendant, in an action on book-account, for the use of the derrick while in M.'s hands as well as his own, and also for the expense of repairing the injuries done to it while in the use of the defendant: *Woodward v. Cutter*, 33 Vt. 49.

§ 1744. Bailor Liable for Letting Defective Thing.—The bailor is liable for letting to the hirer a thing which he knows is unsuitable for the purpose for which it is hired.¹ But he is not liable for a hidden defect.² A livery-stable keeper who lets a horse for hire impliedly promises that the horse is kind, and suitable for the purpose for which he is let, and not vicious.³ The owner of a thing which he knows is defective at the time he lets it cannot recover compensation for its use from the hirer, when the latter, as soon as he discovers the defect, offers to return it.⁴ Where the horse fails on the journey, without fault of the hirer, he may, in an action for the use of the horse, recoup expenses arising from such failure.⁵

ILLUSTRATIONS.—An agister, as compensation for feeding and caring for certain sheep for a year, was to receive part of the wool and increase, and the fact was fraudulently concealed from him that a portion of the sheep were diseased. *Held*, that he was entitled, as damages, to cost in time and expense of caring for them, including that required by the disease, less any profits which he realized under the contract: *Parker v. Marquis*, 64 Mo. 38.

§ 1745. Bailment may be Terminated how.—The bailment may be terminated by the accomplishment of the bailment purpose, or the expiration of the period of hire; by the loss or destruction of the article; by recession of the contract; by consent; by misuse by the bailee; or by operation of law, as where the bailee becomes owner of

¹ *Horne v. Meakin*, 115 Mass. 326.

⁴ *Reading v. Price*, 3 J. J. Marsh.

² *Hadley v. Cross*, 34 Vt. 586; 80

61; 19 Am. Dec. 162.

Am. Dec. 699.

⁵ *Harrington v. Snyder*, 3 Barb.

³ *Windle v. Jordan*, 75 Me. 149.

380.

it.¹ Where the bailment was for a fixed time, or where the thing has been wrongfully converted or destroyed, no demand is necessary before bringing suit.²

§ 1746. **Hirer may Sue for Injury to Thing.**—Like all other bailees, the hirer may sue for injury to the thing while in his custody, or for a trespass.³ If the owner has bailed it for a specified time, the owner cannot during that time maintain trespass for it; for, until the bailment is at an end, he has parted both with the possession and right of possession.⁴ But at the expiration of the time for which the thing has been bailed, the owner may sue;⁵ and so also if the bailee violates the terms of the bailment by his use of the chattel.⁶

§ 1747. **Other Rights of Hirer.**—The hirer has an exclusive right to the chattel during the term of the bailment, if it be for a time certain; and the bailor must not molest him, unless for cause.⁷

ILLUSTRATIONS.—A railroad company enters into an agreement with A for the delivery to them during a certain period of a

¹ Schouler on Bailments, 153; Bailey v. Colby, 34 N. H. 29; 66 Am. Dec. 752; Cobb v. Wallace, 5 Cold. 539; 98 Am. Dec. 435. One who hired a slave for a fixed and definite period is liable for the entire hire, although the slave was emancipated during the term: Buford v. Tucker, 44 Ala. 89.

² Negus v. Simpson, 99 Mass. 388; Ross v. Clark, 27 Mo. 549; Morse v. Crawford, 17 Vt. 499; 44 Am. Dec. 349.

³ White v. Bascom, 22 Vt. 286; Bliss v. Schaub, 48 Barb. 339; Hopper v. Miller, 76 N. C. 402; McGill v. Monette, 37 Ala. 49; Woodman v. Nottingham, 49 N. H. 387; 6 Am. Rep. 526; Rindge v. Inhabitants, 11 Gray, 158; Phillips v. Harriss, 3 J. J. Marsh. 122; 19 Am. Dec. 166; Little v. Fossett, 34 Me. 545; 56 Am. Dec. 671; Drake v. Redington, 9 N. H. 243. In Brewster v. Warner, 136 Mass. 57, 49 Am. Rep. 5, while the hirer of a wagon was in possession of it, it was negligently in-

jured by A. The owner had it repaired, and charged the expense to the hirer. It was held that the latter might recover from A without having first paid the owner.

⁴ Bell v. Monahan, Dud. (S. C.) 38; 31 Am. Dec. 548; McFarland v. Smith, 1 Miss. 172; Lunt v. Brown, 13 Me. 236; Lacoste v. Pipkin, 13 Smedes & M. 589; Clark v. Carlton, 1 N. H. 110; Corfield v. Coryell, 4 Wash. C. C. 371; Lewis v. Carsow, 15 Pa. St. 31; Hume v. Tufts, 6 Blackf. 136; Wilson v. Martin, 40 N. H. 88; Putnam v. Wiley, 8 Johns. 432; 5 Am. Dec. 346; Mugridge v. Eveleth, 9 Met. 233; Swift v. Moseley, 10 Vt. 208; 33 Am. Dec. 197.

⁵ Keyes v. Howe, 18 Vt. 411.

⁶ Root v. Chandler, 10 Wend. 110; 25 Am. Dec. 546; Swift v. Moseley, 10 Vt. 208; 33 Am. Dec. 197; Clarke v. Poozer, 2 McMull. 434.

⁷ Hickok v. Buck, 22 Vt. 149; Hartford v. Johnson, 11 N. H. 145.

certain quantity of coals, to be carried by them for hire, to be paid by A and in A's wagons, the company to have the right to detain any wagons of A on certain defaults on his part. In order to complete this agreement, A agrees with B to supply a portion of the coals to be sent on to the line in wagons which had been hired for a term from A by B, but relet for hire by him to A for this purpose. A having made default, the company seized and detained the wagons then on the line as being A's, but they are, in fact, wagons sent on by B under his agreement with A. The company cannot retain them against B: *North v. R. R. Co.*, 6 Jur., N. S., 98.

§ 1748. Duty of Hirer to Restore Thing.—The bailment being ended, it is the bailee's duty to restore the article to the bailor in good order.¹ On a bailment for a specified time, the identical property reverts to the bailor at the expiration of the time.² A hirer of property for a term, or a bailee who has a lien upon the property, may have an assignable interest in it; and though his sale of property absolutely will put an end to the bailment, yet his transfer of his interest merely, that is, of the property subject to the rights of the general owner, will convey his interest, and the purchaser will hold the property in the same manner as the seller did.³

§ 1749. To Make Compensation.—The compensation may be fixed by contract or by usage.⁴ Where a carriage is hired for a certain time, and sent back before the expiration of it, if the party of whom it was hired sells it within the time, he cannot recover his charge for the hire.⁵

ILLUSTRATIONS.—A hired a negro of B, for a certain sum, for a year. The negro died at the end of the month. *Held*, that A must pay for the full term: *Hicks v. Parham*, 3 Hayw. 224; 9 Am. Dec. 745.

§ 1750. Bailor must Bear Expenses when.—The bailor must recoup the hirer for extraordinary expenses which

¹ Schouler on Bailments, 154; Loy v. Lawson, 23 Ala. 377; Bailey v. Colby, 34 N. H. 29; 66 Am. Dec. 752. ² Hurd v. West, 7 Cow. 752. ³ Bailey v. Colby, 34 N. H. 29; 66 Am. Dec. 752. ⁴ Schouler on Bailments, 155. ⁵ Wright v. Melville, 3 Car. & P. 542.

he has incurred in keeping the thing.¹ As to ordinary expenses of keeping the thing in repair or condition, the bailor is also, as a rule, liable, but this may be otherwise by custom and usage.² A bailee has authority to bind the bailor by a contract for the preservation and care of the property in his possession, even though the bailee is liable in such case upon a particular contract.³

¹ Story on Bailments, sec. 389.

² Story on Bailments, sec. 388. The hirer of a horse is bound to supply it with food: *Handford v. Palmer*, 5 Moore, 74; 3 Ball & B. 359. In *Leach v. French*, 69 Me. 398, 31 Am. Rep. 296, D. hired a horse from F., and while he was using it it became sick, whereupon he left it with a third person for care and cure. It was held that F. was liable to him for the expense. Said the court: "If a man hires a horse," remarks Lumpkin, J., in *Mayor of Columbus v. Howard*, 6 Ga. 213, "he is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food." Thus doing, if the animal falls sick or lame, without any want of ordinary care on the part of the hirer, he is not responsible to the owner for the consequences. The owner of the animal must bear them. But if the horse falls sick or becomes exhausted, the hirer is bound not to use it. And if he does pursue his journey, and use it when reasonable care and attention would forbid, he would make himself responsible to the owner for that act: *Bray v. Mayne, Gow*, 1; 5 Eng. Com. L. Rep. 437. On the other hand, one who lets a horse impliedly undertakes that the animal shall be capable of performing the journey for which he is let, and if, without the fault of the hirer, he becomes disabled by lameness or sickness, so that the hirer is compelled to incur expense to procure other means of returning, such expense may be recouped against the demand of the bailor for the services: *Harrington v.*

Snyder, 3 Barb. 380. Upon whom, then, as between *Devereux* and the defendant, should the expense of keeping and caring for the defendant's horse, which 'became diseased and sick while in *Devereux's* hands,' fall? Up to the time when he fell sick it was *Devereux's* business to furnish him at his own proper expense with 'meat for his work.' But how was it when he could no longer lawfully use him under his contract? Unless the horse was disabled through some fault or neglect of *Devereux*, the owner is the one who bears the burdens occasioned by his failure to perform the work for which he was hired, and among them would be the expense of the care and cure of the animal,—an expense which inures directly to his benefit. There would be good reason for holding that in such case the hirer is *ex necessitate* the agent of the owner to procure such reasonable and necessary sustenance and farrier's attendance as might be required until the animal could be got home; for while the hirer is not responsible for any mistakes which a regular farrier whom he calls in may make in the treatment of the animal, still if, instead of applying to a farrier, he undertakes to prescribe for the beast himself, and by his unskillfulness does it a mischief, he assumes a new degree of responsibility, and becomes liable to the owner for the result of any want of such care as a man of ordinary prudence would take of his own horse: *Deane v. Keate*, 3 Camp. 4."

³ *Harter v. Blanchard*, 64 Barb. 617.

PART II. — PAWNS AND PLEDGES.

CHAPTER LXXXIX.

PAWNS AND PLEDGES.

- § 1751. Definition of pledge or pawn — “Collateral security.”
- § 1752. Title does not pass to pledgee.
- § 1753. Delivery of property pledged essential.
- § 1754. Actual manual possession not necessary.
- § 1755. Who may pledge.
- § 1756. What may be pledged.
- § 1757. Property not in existence.
- § 1758. What debts or engagements pledge may cover.
- § 1759. Extent of the security.
- § 1760. Right of pledgee to possession of pledge.
- § 1761. Right of pledgee to use thing.
- § 1762. Right of pledgee to sell pledge.
- § 1763. Demand and notice necessary.
- § 1764. Sale must be public.
- § 1765. Pledgee may not purchase.
- § 1766. Pledgee of several securities.
- § 1767. Pledgor may ratify irregular sale.
- § 1768. Pledgee not obliged to sell.
- § 1769. Pledgee may also sue personally.
- § 1770. Right of pledgee to transfer pledge — Rights of purchasers.
- § 1771. Pledgee must use ordinary care.
- § 1772. Special contract may enlarge or restrict.
- § 1773. Duty of pledgee to collect pledged negotiable paper.
- § 1774. Right of pledgor to redeem.
- § 1775. Duty of pledgee to return pledge.
- § 1776. Other duties of pledgor and pledgee.
- § 1777. Pledge how extinguished.

§ 1751. **Definition of Pledge or Pawn — “Collateral Security.”**—A pawn or pledge is the bailment of a chattel as security for some debt or engagement.¹ The terms

¹Story on Bailments, sec. 286; Schouler on Bailments, 158. “A bailment of goods by a debtor to his creditor to be kept till the debt is discharged”: Jones on Bailments, 117; Stearns v. Marsh, 4 Denio, 227; 47 Am. Dec. 248; Doak v. Bank, 6 Ired. 309. A pledge of personal property is a “mortgage” within the attachment law: Payne v. Bensley, 8 Cal. 260; 68 Am. Dec. 318.

“pawn” and “pledge” are synonymous.¹ Of late years a new term, viz., “collateral security,” has been coined to describe pledges, generally where the subjects are incorporeal chattels. The term “collateral security,” however, has been used by the courts in a wider sense than simply that of a pledge or pawn, and as including chattel-mortgage transactions.²

ILLUSTRATIONS. — The owner of flour shipped it, taking a mere forwarder's receipt, and drew a bill against the shipment upon the consignee. He procured this bill to be discounted,

¹ Story on Bailments, 286; Schouler on Bailments, 159. “Hypothecation is conventional, and implies the power of rendering the subject available by way of sale to satisfy the debt on default of payment”: *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525. In a hypothecation in the civil law the possession of the thing did not pass, as it did in the case of a pawn: By the law of Louisiana, there are two kinds of pledges: the pawn and the antichresis. A pawn relates to movables, and the antichresis to immovables: *Livingston v. Story*, 11 Pet. 351.

² Story on Bailments, sec. 287, note. In *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248, a delivery of personal property by a debtor as “collateral security” for his debt is said to be a pledge. Mr. Schouler says (*Schouler on Bailments*, 159): “The terms ‘pawn’ and ‘pledge’ in our language appear interchangeable, and law-writers so employ them: See 2 Bla. Com. 157; 3 Bla. Com. 274, 280. But ‘pawn,’ which is the more characteristic of the particular transaction, and was almost always applied in the humbler days of this bailment, keeps its unpleasant savor; for the modern disposition has been to use in its stead ‘pledge,’ a term admitting of various senses, some of them truly Norman, where the transaction may be detached from the three golden balls. And, once more, commercial paper and personalty of other incorporeal kinds are now found so highly convenient for pledge that brokers and bankers have put us lately to using still another term, that of ‘col-

lateral security.’ We may find this third expression used in some of the late reports in an uncertain way, as though courts were bewildered in distinguishing between the pledge and chattel mortgage: *Fraker v. Reeve*, 36 Wis. 85; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *First Nat. Bank v. Kelly*, 57 N. Y. 34. From some judicial expressions, one might infer that a transfer by way of collateral security was thought something altogether distinct from a pledge: See *Coulter, J., in Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120. But the better view is that ‘collateral security’ embraces, in the broadest sense, both pledge and chattel-mortgage transactions, while more appropriately applied to the former class, and in the strict phrase to pledges of incorporeal personalty alone. ‘Collateral security’ is certainly the most patrician of expressions applied to the present bailment. And now that pledge may be made of great things as well as small, of mercantile as well as household articles, the capitalist who advances money on staple merchandise, bonds, or commercial paper, refuses blood-brotherhood with the primitive lender upon garments, furniture, and personal ornaments; and while the pawnbroker still plies, under license, the individual trade with misery and humble station, a corporation, organized for a wider reach of the same business, sinks the pawn, and is styled a ‘collateral loan company,’ or ‘merchandise security bank.’”

delivering to the lender the forwarder's receipt, upon parol agreement that it should be held as security for the acceptance of the draft. The consignee sold the flour, and refused to accept the draft, being already in advance to the consignor. *Held*, in an action by the lender against the consignee, that these facts showed a sale in trust, or pledge, of the flour: *Bank of Rochester v. Jones*, 4 N. Y. 497; 55 Am. Dec. 290; overruling 4 Denio, 489. A borrows money from B, and transfers to him, "as collateral security" for its repayment, the note of a third person for nearly double the amount of the sum borrowed, with the condition that, in case of A's default, "B is to hold the note as his own property." *Held*, that such transfer, notwithstanding the condition, is a security merely, and not a conditional sale: *Williamson v. Culpepper*, 16 Ala. 211; 50 Am. Dec. 175. The plaintiff stored corn in the defendant's warehouse, upon the following agreement by the defendant: "February 9, 1860. We hereby agree to store ear-corn for [the plaintiff] till the 1st of June next for three cents per bushel; two cents for shelling. If sold before the 1st of June, we are not to charge for shelling; if not sold by the 1st of June, we are to charge one half per cent per month till it is sold. The corn to be good and merchantable." *Held*, that after the 1st of June the relation of the parties became analogous to that of pledgor and pledgee, and that upon giving the proper notice to the plaintiff, the defendant might then sell the corn at public auction for the charges upon it: *Cushman v. Hayes*, 46 Ill. 145. A lease was assigned by the lessor to "secure payment of a note drawing interest"; the assignee, in a written application to the tenant, only claimed the amount of note and interest; the debtor was still liable upon the note, if unsatisfied by rents. *Held*, that the assignment was a pledge, giving the assignee the right to collect rents to the amount of his debt, with no power to sell till after demand and notice, and accountability over for all surplus: *Dewey v. Bowman*, 8 Cal. 145. A tenant placed a lot of corn in the hands of the administrator of his landlord as security for the payment of rent due. *Held*, the legal status was that of pledged property; and the mere fact that the pledgor had the right to determine the time when the corn should be sold did not affect the legal character of the contract: *Belden v. Perkins*, 78 Ill. 449. The owner of wood-land leased it, and gave the right to the lessee to cut and remove wood during the term. The lessee gave a note for a sum of money, and it was agreed that the wood should be held by the lessor as a guaranty for the payment of the amount. *Held*, that the transaction was not a conditional sale of the wood, but was in the nature of a pledge, and that after the lessee's failure the lessor's rights in the wood were those of the pledgee: *Wilkie v. Day*, 141 Mass. 68.

§ 1752. **Title does not Pass to Pledgee.**—In the case of a mortgage, the right of property passes to the mortgagee, by the conveyance, and actual possession of the thing is not absolutely essential to support his title.¹ But in the case of a pledge the title does not pass to the pledgee, but only a special property in the thing.² Where one has delivered a chattel, with authority conferred on the bailee to sell it, and credit the amount on a debt owing by himself to the bailee, the bailor may afterwards, and before such sale is effected, sell the same chattel to a third party, and vest in him a good title. And the sale will convey an immediate and valid title, notwithstanding that at the time the possession is in the bailee, and that no formal delivery is made by him to the purchaser. In the sale of personal property it is not necessary that the vendor should be in possession at the time. And the possession of his agent or bailee, after the sale, is the possession of the purchaser.³

ILLUSTRATIONS. — A debtor gave his creditor certain personal property for the latter "to sell, and apply the proceeds to the payment of" a pre-existing debt. *Held*, that the creditor was not a purchaser, but a pledgee: *Harris v. Lombard*, 60 Miss. 29.

¹ Story on Bailments, sec. 287; Schouler on Bailments, 162, 163; *Homes v. Crane*, 2 Pick. 610; *Langdon v. Buel*, 9 Wend. 80. *Contra*, *Bonsey v. Amee*, 8 Pick. 236. A pledge is a "mortgage" within the California attachment act: *Payne v. Bensley*, 8 Cal. 260; 68 Am. Dec. 318.

² *Cortelyou v. Lansing*, 2 Caines Cas. 200; *Brownell v. Hawkins*, 4 Barb. 491; *Badlam v. Tucker*, 1 Pick. 397; 11 Am. Dec. 202; *Brewster v. Hartley*, 37 Cal. 15; 99 Am. Dec. 237; *Dewey v. Bowman*, 8 Cal. 145; *Garlick v. James*, 12 Johns. 146; 7 Am. Dec. 294; *Sims v. Canfield*, 2 Ala. 555; *Barrow v. Paxton*, 5 Johns. 258; 4 Am. Dec. 354; *McLean v. Walker*, 10 Johns. 471; *Eastman v. Avery*, 23 Me. 248; *Day v. Swift*, 48 Me. 368; *Gleason v. Drew*, 9 Me. 82; *Conard v. Atlantic Ins. Co.*, 1 Pet. 449; *Gay v. Moss*, 35 Cal. 125; *Haven v. Low*, 2 N. H. 13; 9 Am. Dec.

25. "A mortgage of goods is a pledge, and more; for it is an absolute pledge, to become an absolute interest if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged; whereas a pawnee has but a special property in the goods to detain them for his security": *Brown v. Bement*, 8 Johns. 96. "A radical distinction between a pledge and a mortgage is, that by a mortgage the general title is transferred to the mortgagee, subject to be revested by performance of the condition, but in case of a pledge the pledgor retains the general title in himself, and parts with the possession for a special purpose": *Walker v. Staples*, 5 Allen, 34; *Ash v. Savage*, 5 N. H. 545; *Heyland v. Badger*, 35 Cal. 404.

³ *Erwin v. Arthur*, 61 Mo. 386.

§ 1753. **Delivery of Property Pledged Essential.**— In a mortgage of chattels, the legal title to the property is transferred to the mortgagee, who becomes, technically, the owner of it, subject to the right of the mortgagor to regain his title on the performance of its conditions.¹ But in the case of a pledge there must be a delivery to the pledgee of the property pledged.² The delivery may be to the pledgee, or to a third person for him.³ Though on an agreement to pledge, without delivery, an executory pledge contract arises for the breach of which damages may be given, or in some cases specific performance would be decreed, yet the intended pledgee's rights would be subject to rights which might have intervened, —such as attaching or execution creditors of the intended pledgor, or his general creditors if he meantime die insolvent or is forced into bankruptcy.⁴ But a subsequent delivery will validate the pledge as against an intermediate creditor not entitled to a specific lien on the thing, in the absence of fraud, and under ordinary circumstances.⁵

¹ *Parks v. Hall*, 2 Pick. 211; *Langdon v. Buel*, 9 Wend. 80; *Patchin v. Pierce*, 12 Wend. 61; *Ackley v. Finch*, 7 Cow. 290; *Atwater v. Mower*, 10 Vt. 75; *Parshall v. Eggart*, 52 Barb. 367.

² *Brewster v. Hartley*, 37 Cal. 25; 99 Am. Dec. 237; *Wilson v. Little*, 2 N. Y. 447; 51 Am. Dec. 307; *Goldstein v. Hort*, 30 Cal. 372; *Homes v. Crane*, 2 Pick. 610; *Bonsey v. Amee*, 8 Pick. 236; *Pinkerton v. R. R. Co.*, 42 N. H. 421; *Owens v. Kinsey*, 7 Jones, 245; *Beeman v. Lawton*, 37 Me. 543; *Casey v. Cavaroc*, 96 U. S. 467; *Fletcher v. Howard*, 2 Aiken, 115; 16 Am. Dec. 686; *Lucketts v. Townsend*, 3 Tex. 119; 49 Am. Dec. 723; *First Nat. Bank v. Nelson*, 38 Ga. 391; 95 Am. Dec. 400; *Nevan v. Roup*, 8 Iowa, 207; *Walcott v. Keith*, 22 N. H. 196; *Propst v. Roseman*, 4 Jones, 130; *Haskins v. Patterson*, 1 Edm. Sel. Cas. 120; *Ceas v. Bramley*, 18 Hun, 187; *Corbett v. Underwood*, 83 Ill. 324; 25 Am. Rep. 392; *Wright*

v. Ross, 36 Cal. 414; *Smyth v. Craig*, 3 Watts & S. 14.

³ *Brown v. Warren*, 43 N. H. 430.

⁴ *Schouler on Bailments*, 179; *City Fire Ins. Co. v. Olmstead*, 33 Conn. 476. A pledge is inoperative as against an attaching creditor, unless there is a delivery of the property to the pledgee: *Siedenbach v. Riley*, 111 N. Y. 560.

⁵ In *Parshall v. Eggert*, 54 N. Y. 18, this rule is maintained. Said Johnson, C., delivering the judgment of the court: "I know of no authority denying the right of a party who has a contract for a pledge, ineffectual for want of delivery, to obtain a delivery at a subsequent time, and thus to validate the pledge. Upon general principles, the only obstacle which can prevent such a transaction from being effectual must be the intervention of fraud. Certainly there is no rule of law which requires a pledge in writing to be filed as a chattel mortgage; nor is it consonant with any rules for the

In respect to most kinds of property, a delivery of the property to the pledgee without any written transfer of the title is sufficient. But incorporeal property, being incapable of manual delivery, cannot be pledged without a written transfer, and therefore this is the mode followed; such transfer of the title performing the same office as the delivery of possession of corporeal property.¹ Therefore, the transfer in writing of shares of stock does not prove that the transaction is not a pledge.²

construction of statutes to borrow such a requirement as to pledges from the positive provisions which, when enacted, were introductive of a new rule, and which declared unfiled chattel mortgages absolutely void as against creditors; nor is there any warrant for saying that because a chattel mortgage unfiled could not be afterward filed with the effect to cut off the right of an intermediate creditor to avoid it as under the statute conclusively fraudulent; therefore, a pledge of undelivered goods cannot be made effectual against an intermediate creditor by delivery, in the absence of fraud. Though a contract of pledge should be regarded, when unaccompanied by delivery, as within the other provisions of the statutes in regard to fraudulent conveyances and contracts as to personal property, the question of fraud then arising would be a question of fact upon which the party would have a right to go the jury. In the absence of any intermediate right, the parties could perfect a written contract of pledge by subsequent delivery. Even between successive pledgees, without any communication with each other, that one who lawfully obtains possession at the time of the pledge, or subsequently, is entitled to be preferred according to the maxims, *In pari causa possessor potior haberi debet*, and *In æquali jure, melior est conditio possidentis*: Story on Bailments, secs. 312, 313. A creditor who acquires a specific right to or lien on the thing pledged may prevent the pledgee's interest in an undelivered chattel from attaching. But such is not the condition of the creditor at large."

¹ Rhodes, J., in *Brewster v. Hartley*, 37 Cal. 25; 99 Am. Dec. 237; Welch v. Mandeville, 1 Wheat. 236; Gold-

stein v. Hort, 30 Cal. 376. In *Wilson v. Little*, 2 N. Y. 447, 51 Am. Dec. 307, the court say: "It is true that possession must uniformly accompany a pledge. The right of the pledgee cannot otherwise be consummated. And on this ground it has been doubted whether incorporeal things, like debts, money in stocks, etc., which cannot be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge: Story on Bailments, secs. 290, 297. The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually depends on its by-laws."

² *Brewster v. Hartley*, 37 Cal. 16; 99 Am. Dec. 237; *Wilson v. Little*, 2 N. Y. 447; 51 Am. Dec. 307; *Hasbrouck v. Vandervoort*, 4 Sand. 78.

ILLUSTRATIONS. — After the maturity of a note, B, the surety, agreed with C, the principal, to remain surety one year longer, and C to turn over to him a horse which was to be B's property, if B had to pay the note, and B was to have the right to go and take the horse, but the horse was not present nor delivered to B, and after C's death B paid the note and took the horse. *Held*, that the agreement conferred no title in the horse to B, and that C's administrator could recover it: *Ceas v. Bramley*, 18 Hun, 187.

§ 1754. **Actual Manual Possession not Necessary.**— Actual manual possession is not always essential. Thus it has been held a good delivery of logs in a river to go within sight of them and point them out to the pledgee as the property pledged.¹ Goods may be pledged by the mere delivery of the warehouse receipt without its indorsement.² A delivery of a savings-bank book will be a sufficient delivery of the deposit.³ "It is sufficient," says Story,⁴ "if there are any of those acts or circumstances which in construction of law are deemed sufficient to pass the possession of the property." For example, the transfer of a bill of lading in pledge passes the possession of the property described;⁵ the delivery of the key of a warehouse will transfer the goods there;⁶ or the delivery of a warehouse receipt, or the receipt of a wharfinger or other hired custodian.⁷ Or if the pledgee

¹ *Jewett v. Warren*, 12 Mass. 300; 7 Am. Dec. 74.

² *St. Louis Bank v. Ross*, 9 Mo. App. 399.

³ *Boynton v. Payrow*, 67 Me. 587.

⁴ *Bailments*, sec. 297; *Sumner v. Hamlet*, 12 Pick. 76.

⁵ *Cartwright v. Wilmerding*, 24 N. Y. 521; *Tibbetts v. Flanders*, 18 N. H. 284; *Whitney v. Tibbetts*, 17 Wis. 359; *Nevan v. Roup*, 8 Iowa, 207; *Dows v. National Ex. Bank*, 91 U. S. 618; *First Nat. Bank v. Kelly*, 57 N. Y. 34; *Pettit v. First Nat. Bank*, 4 Bush, 334; *Meyerstein v. Barber*, L. R. 2 Com. P. 38; 4 H. L. Cas. 317; *Muller v. Pondir*, 6 Lans. 480. Upon a pledge or transfer of personal property no formal delivery is necessary.

It is sufficient that the property is present and within the control of the pledgee or vendee, and that he exercises any act of possession: *Tibbetts v. Flanders*, 18 N. H. 284.

⁶ See *Whittaker v. Sumner*, 20 Pick. 405.

⁷ *Cartwright v. Wilmerding*, 24 N. Y. 521; *Whitney v. Tibbetts*, 17 Wis. 359. "If there is a specific pledge or appropriation of certain ascertained goods, accompanied with an intention that they shall be a security, or the proceeds as a payment, and they are deposited with a bailee, then the property is changed and vests in the individual to whom they are to be delivered by the depositary": *Desha v. Pope*, 6 Ala. 690; 41 Am. Dec. 76.

has the thing already in possession in another character, the contract of pledge transfers to him possession as pledgee by operation of law.¹ A pledge of bank stock cannot be made by merely delivering the certificate to the pledgees, though they be the directors of the bank. There must be a transfer on the books, or some written contract by which the pledgee may assert title or compel a transfer.²

ILLUSTRATIONS.—A and B cultivated a farm jointly, A furnishing a horse, harness, etc., and B a horse, for their joint use; and B, who had pledged his horse to A, on being arrested on a criminal charge, told A to take his horse home, that he, B, would be back in a few days, and A did so, afterwards using and claiming the horse as his own. *Held*, a sufficient delivery from B to A to enable the latter to keep the horse as against other creditors of B: *Parsons v. Overmire*, 22 Ill. 58. Manufacturers of cloth agreed to give A security for a debt, and for that purpose authorized one of their workmen to select and hold a certain number of pieces of cloth for the use of A. The workman afterwards, at A's instance, selected and removed the cloths to another room in the factory, and gave notice to the manufacturers and to others. *Held*, that this was a valid pledge: *Sumner v. Hamlet*, 12 Pick. 76. A was a wheat-dealer in Portland, Oregon, and contracted with a bank to make advances on his wheat, from time to time, as required. The advances were secured by transfers of the warehouse receipts. The bank had the power to sell in case of default, and the receipts contained a provision that in case of flood the wheat was at the risk of the owner. It was stored in warehouses on wharves by third parties. A sudden and unexpected flood damaged some of it. A made an effort to remove it, and did get a small portion away. Upon the question of whether A or the bank should bear the loss, *held*, that the contract was similar to a pledge, rather than to a mortgage, and that A must bear the loss: *British Columbia Bank v. Marshall*, 8 Saw. 29. Plaintiff, a commission merchant, accepted a draft drawn on him upon advices from the drawer that he would make a shipment of goods to him to cover the amount, and the drawer shipped goods with the clear intention on his part of appropriating them to the plaintiff for his security. *Held*, that the property in the goods passed to the plaintiff upon their shipment, and from that time the plaintiff was in constructive possession, and on

¹ Story on Bailments, sec. 297.

² *Nisbet v. Trust Co.*, 4 Woods, 464.

their arrival was entitled to the actual possession as against an attaching creditor of the shipper: *Heard v. Brewer*, 4 Daly, 136.

§ 1755. **Who may Pledge.**—The thing pledged need not necessarily belong to the pledgor;¹ a holder may pledge with the consent of the owner, or an agent, or an officer of a corporation.² But a person having only a qualified property in goods cannot pledge them.³ A bailee pledging another's property without authority is guilty of conversion; and both bailee and pledgee are liable in trover, whether the pledgee knew the real state of the title or not.⁴ Delivery of goods to a merchant engaged in sale of similar articles is such evidence of the bestowal of the right to dispose of the same as to protect the purchaser from the possessor. But the authority to pledge cannot be inferred from possession in such case; for to pledge is a special transaction, outside of the usual course of business, and consequently outside of the protection extended to ordinary transactions of commerce.⁵ Where goods stolen are pawned, the owner may maintain trover against the pawnbroker.⁶ A pawnbroker has no lien on plate, after the death of a tenant for life who pawned it with him, as against the remainderman, although the pawnbroker had no notice of the settlement.⁷ Where a debtor left the state on account of pecuniary embarrassments, having given verbal directions to a friend "to assist him in the settlement of his affairs," such friend has no authority thereby to pledge the debtor's personal property as security for his debt.⁸ Where the property of one is pledged without his knowledge or consent to secure the debt of another, and upon being informed of the transaction the owner agrees that if the pledgee will for-

¹ Story on Bailments, sec. 291.

² *Jarvis v. Rogers*, 13 Mass. 105.

³ *Agnew v. Johnson*, 22 Pa. St. 471.
62 Am. Dec. 303.

⁴ *Thrall v. Lathrop*, 30 Vt. 307; 73
Am. Dec. 306.

⁵ *Wright v. Solomon*, 19 Cal. 64; 79
Am. Dec. 197.

⁶ *Packer v. Gillies*, 2 Camp. 336,
note.

⁷ *Hoare v. Parker*, 2 Term Rep. 376.

⁸ *Swett v. Brown*, 5 Pick. 178.

bear the debt for a time the property may remain in pledge to secure the debt, there is a valid pledge. The forbearance is a sufficient consideration for such an agreement, and a redelivery of possession is not necessary.¹

As to negotiable paper, the holder, though not the owner, may pledge it, and bind the owner.² But it is held that where the paper does not represent money but chattels,—as, for example, a bill of lading,—the rule is different.³ And as to negotiable securities, if there is anything on their face to put the pledgee on inquiry as to the true title, he takes it at his peril.⁴

ILLUSTRATIONS.—P. had loaned his brother a horse, which the latter had pledged to D. P. went to see D., and first found the latter's partner, who told him that D. had the horse in pledge, and stated what he thought was the amount of the claim. P. said that he would see D., and see what the bill was, and would either pay it and take the horse or let the horse go to pay it. *Held*, that this was no ratification of the pledge, since it was not made to the pledgee, nor to any one who was his agent in that regard, nor with knowledge of the amount of the debt: *Cox v. McGuire*, 26 Ill. App. 315.

§ 1756. **What may be Pledged.**—Any kind of personal property, corporeal or incorporeal, capable of transfer by delivery of the thing itself, or by an assignment of a written evidence of its existence, may be the subject-matter of a pledge or pawn:⁵ Bills of exchange and promissory notes,⁶

¹ *Smith v. Mott*, 76 Cal. 171.

² Story on Bailments, sec. 296; *Fisher v. Fisher*, 98 Mass. 303; *Bealle v. Southern Bank*, 57 Ga. 274. The notes must have been in circulation: *Francis v. Joseph*, 3 Edw. Ch. 182.

³ Story on Bailments, sec. 296.

⁴ *Schouler on Bailments*, 174.

⁵ *Houser v. Kemp*, 3 Pa. St. 209; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248. A power to pledge the franchises and rights of a railroad corporation carries with it the power to pledge everything that may be necessary to the enjoyment of the franchise and upon which its real value

depends: *Phillips v. Winslow*, 18 B. Mon. 431; 68 Am. Dec. 729.

⁶ *Appleton v. Donaldson*, 3 Pa. St. 381; *White v. Phelps*, 14 Minn. 27; *Louisiana State Bank v. Gareuini*, 21 La. Ann. 555; *Garlick v. James*, 12 Johns. 146; 7 Am. Dec. 294; *McLean v. Walker*, 10 Johns. 471; *Bowman v. Wood*, 15 Mass. 534. A negotiable instrument not due pledged as collateral security is not subject to equities between the original parties: *Payne v. Bensley*, 8 Cal. 260; 68 Am. Dec. 318; *Robinson v. Smith*, 14 Cal. 98; *Manning v. McClure*, 36 Ill. 495; *Naglee v. Lyman*, 14 Cal. 454.

bonds,¹ certificates of stock,² chattel mortgages,³ deposits in bank,⁴ insurance policies (fire, life, or marine),⁵ judgments,⁶ leases,⁷ mortgages of realty,⁸ municipal corporation vouchers,⁹ ordinary personal property,¹⁰ shares of stock,¹¹ stock purchased "on margin,"¹² title deeds.¹³ A person may pledge any kind of personal property, corporeal or incorporeal,—even necessities of life,¹⁴ or articles exempt by statute from attachment or sale on execution.¹⁵ The pensions, bounties, or pay of soldiers and sailors cannot be pledged,¹⁶ nor a cause of action growing out of a personal wrong.¹⁷ A thing in which a person has only a limited title he may pledge to the extent of that title.¹⁸ A pledge obtained by false representations of the creditor, though unredeemed by the debtor, vests no interest in the pledgee.¹⁹

§ 1757. **Property not in Existence.**—At common law there cannot be a pledge of property not at the time in

¹ *Strong v. National Bank Ass'n*, 45 N. Y. 718; *Loomis v. Stave*, 72 Ill. 623; *Ringling v. Kohn*, 4 Mo. App. 59; *Morris Canal Co. v. Lewis*, 12 N. J. Eq. 323; *White Mountain R. R. Co. v. Bay State Iron Co.*, 50 N. H. 57; *Potter v. Thompson*, 10 R. I. 1.

² *Jarvis v. Rogers*, 13 Mass. 105; 15 Mass. 389; *Hasbrouck v. Vandervoort*, 4 Sand. 74.

³ *Franker v. Reeve*, 36 Wis. 35; *Jerome v. McCarter*, 94 U. S. 734.

⁴ *Boynton v. Payrow*, 67 Me. 587.

⁵ *Soule v. Union Bank*, 45 Barb. 111; *West v. Carolina Ins. Co.*, 31 Ark. 476; *Merrifield v. Baker*, 9 Allen, 29; *Brace v. Garden*, L. R. 5 Ch. 32; *Edwards v. Martin*, L. R. 1 Eq. 121; *Latham v. Chartered Bank*, L. R. 17 Eq. 205; *Wells v. Archer*, 10 Serg. & R. 412; 13 Am. Dec. 682; *Luckey v. Gannon*, 37 How. Pr. 134; *Boardman v. Holmes*, 124 Mass. 438.

⁶ *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20.

⁷ *Dewey v. Bowman*, 8 Cal. 145.

⁸ *Campbell v. Parker*, 9 Bosw. 322; *Jerome v. McCarter*, 94 U. S. 734;

Wright v. Ross, 36 Cal. 414; *Ponce v. McElvy*, 47 Cal. 154.

⁹ *Talty v. Freedman's Sav. Inst.*, 93 U. S. 321.

¹⁰ *Houser v. Kemp*, 3 Pa. St. 209; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248.

¹¹ *Brewster v. Hartley*, 37 Cal. 16; 99 Am. Dec. 237; *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 307; *Heath v. Silverthorn Co.*, 39 Wis. 147; *Worthington v. Towney*, 34 Md. 182; *Pinkerton v. R. R.*, 42 N. H. 424; *Conyngnam's Appeal*, 57 Pa. St. 474; *Thompson v. Toland*, 48 Cal. 99; *Fisher v. Brown*, 104 Mass. 259; 6 Am. Rep. 235; *Rozet v. McClellan*, 48 Ill. 345; 95 Am. Dec. 551.

¹² *Markham v. Jaudon*, 41 N. Y. 235.

¹³ *In re Kerr*, L. R. 8 Eq. 331.

¹⁴ *Story on Bailments*, 293.

¹⁵ *Frost v. Shaw*, 3 Ohio St. 270.

¹⁶ *Story on Bailments*, sec. 293; *Schouler on Bailments*, 170; *Moffat v. Van Doren*, 4 Bosw. 609.

¹⁷ *Findell v. Grooms*, 18 B. Mon. 501.

¹⁸ *Story on Bailments*, 295; *Dewey v. Bowman*, 8 Cal. 145.

¹⁹ *Mead v. Bunn*, 32 N. Y. 275.

existence, or to be acquired by the pledgor *in futuro*.¹ But at the present time this rule as to property to be afterwards acquired has been somewhat relaxed, and contracts of this kind are regarded and upheld as agreements for the pledging of the things when they come into existence.² Therefore where it was agreed by a brick-maker that the lessees of a brick-yard should retain the bricks as fast as they were made, as security for their advances to the brick-maker, it was held that the bricks became pledged as they were manufactured.³ And the same rule has been applied to a pledge of furniture in a hotel, and what should be added by the proprietor from time to time,⁴ and the future product of a farm pledged as security for the rent.⁵ A subsequent acquisition of title by the pledgor inures to the benefit of the pledgee.⁶ A debtor's agreement, made in the spring, that the season's crop shall belong to the creditor until he is paid, will not operate as a transfer of the crop until the creditor has taken possession.⁷

ILLUSTRATIONS. — S., a wagon-maker, and W., a blacksmith, entered into an arrangement for the building of wagons, by which S. was to do the wood-work, and W. the iron-work, and W. was also to furnish the materials for the wood-work, for which he was to have a lien as security on the interest of S. in the wagons. *Held*, that the contract constituted an hypothecation of the interest of S. in the wagons while they were being made, and that when the wagons came into the possession of W. he became a pledgee in possession thereof, and was entitled to retain such possession until paid. *Waldie v. Doll*, 29 Cal. 555. For the purpose of borrowing money from B to form a limited partnership, A executed an instrument pledging to B all his interest in the limited partnership of A and C, A to remain in possession, but to make an assignment of his interest on demand. The proposed partnership was formed, but under another name, including additional parties. B lent the money to A, who con-

¹ *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Strickland v. Turner*, 7 Ex. 208; *Story on Bailments*, sec. 294; *Bonsey v. Amee*, 8 Pick. 236.

² *Macomber v. Parker*, 14 Pick. 497; *Smithurst v. Edmunds*, 14 N. J. Eq. 408.

³ *Macomber v. Parker*, 14 Pick. 497.

⁴ *Smithurst v. Edmunds*, 14 N. J. Eq. 408.

⁵ *Smith v. Atkins*, 18 Vt. 461.

⁶ *Goldstein v. Hort*, 30 Cal. 372; *Parshall v. Eggart*, 54 N. Y. 18.

⁷ *Gittings v. Nelson*, 86 Ill. 591.

tributed it to the capital of the partnership. No assignment was ever made nor demanded. A died insolvent, but upon the subsequent winding up of the partnership a balance of profits remained, and A's share thereof was paid to his executor. Upon distribution of said fund, *held*, that B was entitled to receive the amount of the pledge to the exclusion of a general creditor of A: *Collins's Appeal*, 107 Pa. St. 590; 52 Am. Rep. 479.

§ 1758. What Debts and Engagements Pledge may Cover.—The thing must be delivered as security for some debt or engagement, either of the pledgor or of some other person.¹ It may be for a past or future debt, for a limited or for an indefinite period, upon condition or absolutely; for money or something else.² It is no valid objection by a creditor of the pawnor or mortgagor, that the property is agreed to be held as security for further advances to be made by the pawnee, if it is also made to secure an existing debt.³ One may give security for the

¹ Story on Bailments, sec. 300.

² Story on Bailments, sec. 269. Mr. Schouler (Bailments, 171) sums up this requisite of a valid pledge thus: "As to the debt or engagement, this may be primary or secondary, on the pledgor's part, absolute or conditional, for the payment of money, or for any other lawful performance of an engagement. The pledgor may be bound to the debt or engagement as indorser or surety for another, or as himself the maker or principal: Story on Bailments, sec. 300; *Brick v. Freehold Co.*, 37 N. J. L. 307; *Stewart v. Davis*, 18 Ind. 74; *Wilcox v. Fairhaven Bank*, 7 Allen, 270. So, too, may the security be taken by the pledgee for the repayment of money loaned (which is the usual case), or so as to indemnify him for becoming an indorser or surety at the pledgor's instance. The pledgee was a surety to be indemnified, in *Blackwood v. Brown*, 34 Mich. 4; *Gilson v. Martin*, 49 Vt. 474. He was an indorser for the pledgor, in *Third Nat. Bank v. Boyd*, 44 Md. 47; 22 Am. Rep. 35. And see *Clay v. Creditors*, 9 Mart. 519. In every case some lawful debt or engagement which is or may be owing the pledgee consti-

tutes the foundation of the security upon which the thing is given: 1 Schouler on Personal Property, 540; Story on Bailments, sec. 300. The object may be to secure a general or a specific indebtedness; to protect what is now outstanding from the pledgor, or so as to include future liabilities as they may arise in favor of the same pledgee: *Berry v. Gibbons*, L. R. 8 Ch. 747; *Eichelberger v. Murdock*, 10 Md. 373; 69 Am. Dec. 140; *Third Nat. Bank v. Boyd*, 44 Md. 47; 22 Am. Rep. 35; *Badlam v. Tucker*, 1 Pick. 389; 11 Am. Dec. 202; *Holbrook v. Baker*, 5 Me. 309; 17 Am. Dec. 236. But see *Divver v. McLaughlin*, 2 Wend. 596; 20 Am. Dec. 655; to cover obligations for a fixed or for an indefinite period: *United States v. Hooe*, 3 Cranch, 73; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; Story on Bailments, sec. 300; provided always, that the transaction be not, as against third parties, a device for defrauding them."

³ *Badlam v. Tucker*, 1 Pick. 398; 11 Am. Dec. 202; *Holbrook v. Baker*, 5 Me. 309; 17 Am. Dec. 236; *D'Wolf v. Harris*, 4 Mass. 515; *Conard v. Atlantic Ins. Co.*, 1 Pet. 448.

payment of ten thousand dollars of a debt of seventeen thousand dollars; and after the ten thousand dollars has been paid, he is entitled to a return and cancellation of the security. The creditor cannot apply the payments so as to deprive the debtor of such right.¹ A liability of the pawnee to pay another's debt is a sufficient consideration for a pledge of property to secure his indemnity.² If a pledged note is delivered to the pledgor to have it discounted, and a third person advances money upon it in ignorance of the pledgee's title, he can retain the note, as against the pledgee, as security for the advance; but not if he knew of the pledgee's title, nor can he hold it as security for any former indebtedness of the pledgor to him.³

ILLUSTRATIONS. — A corporation passed a resolution appropriating a certain fund in certain proportions as collateral security for a debt to A and for a debt to B. B afterwards settled with the company. *Held*, in a suit brought by B against A to recover what B claimed, that A had received from the aforesaid fund in excess of his share thereof; that the settlement between B and the corporation precluded a recovery: *Callanan v. Smart*, 60 Iowa, 305. A bank discounts a note for A, taking as collateral security a bond belonging to B, and, at about the time the note matures, takes a new note from A without B's knowledge or consent. *Held*, that the bank cannot hold B's bond as collateral for the new note: *Burnap v. Potsdam Bank*, 96 N. Y. 125. A wife assigned a stock certificate to a bank "as security for the payment of any demands" the bank "may from time to time have or hold against" her husband, who was then largely indebted to the bank, and on the verge of insolvency. In an action to foreclose the lien, *held*, that the assignment included demands accruing after its execution as well as those existing before; that the circumstances disclosed this to have been the intention of the parties; that the assignment was a continuing security; and that an extension of time by renewals in the ordinary course of business did not discharge the lien upon the stock: *Merchants' Bank v. Hall*, 83 N. Y. 338; 38 Am. Rep. 434. A bank lent money to M., H.'s agent, for H., knowing that the stocks pledged as collateral belonged to H. The bank afterwards claimed the right to hold

¹ *Fridley v. Bowen*, 103 Ill. 633.

³ *Kellogg v. Tompson*, 142 Mass.

² *Jewett v. Warren*, 12 Mass. 300; 76.

7 Am. Dec. 74.

the collateral as security for further loans made to M. *Held*, that H. was entitled to her collateral upon repayment of the amount lent to her; that the bank was chargeable with notice of M.'s want of authority to borrow more money for himself; and that the fact that H. before bringing suit had tendered a larger amount than she in fact owed, for the sake of preventing litigation, could not be construed into an admission of her liability for the larger amount: *Talmage v. New York Bank*, 91 N. Y. 531.

§ 1759. **Extent of the Security.**—A pledge is presumed to be a security for the whole debt between the parties, and a payment of a part, therefore, still leaves it a pledge for the residue.¹ But of course where the pledge is made for a specific purpose, it can be applied to and held for that purpose alone.² Where different loans are made at different times on different pledges, the presumption is that each transaction was intended to be separate.³ So the pledge made for one debt cannot be held for a former debt, unless such was the intention of the parties.⁴ So as to a subsequent debt, it will not be deemed to attach to the pledge, unless it in some way appears that it was made upon the credit of the pledge.⁵ In an action on a note held as collateral security, the amount of the indebtedness for which it is held is the limit of recovery.⁶ In general, one recovering on an instrument held as collateral (not being the obligation of the pledgor) may

¹ Story on Bailments, sec. 301; Post v. Tradesman's Bank, 28 Conn. 420; Phillips v. Thompson, 2 Johns. Ch. 418; 7 Am. Dec. 535; Eichelberger v. Murdock, 10 Md. 373; 69 Am. Dec. 140.

² Phillips v. Thompson, 2 Johns. Ch. 418; 7 Am. Dec. 535; St. John v. O'Connell, 7 Port. 466; Gilliat v. Lynch, 2 Leigh, 493; Duncan v. Brennan, 83 N. Y. 487.

³ Baldwin v. Bradley, 69 Ill. 32. "A number of securities may be taken for the same debt, and a pledge may go with a mortgage or some third person's engagement; the creditor in such case having his election as to enforcing

any or all upon default, but with the right of only one possible satisfaction": Schouler on Bailments, 178; citing Union Bank v. Laird, 2 Wheat. 390; Cullum v. Emanuel, 1 Ala. 23; 34 Am. Dec. 757; Buchanan v. International Bank, 78 Ill. 500; Andrews v. Scotton, 2 Bland, 629.

⁴ Id.; Story on Bailments, sec. 304.

⁵ Id.; Post v. Tradesman's Bank, 28 Conn. 420; Teutonia Nat. Bank v. Loeb, 27 La. Ann. 110; Jarvis v. Rogers, 15 Mass. 389; Pettibone v. Griswold, 4 Conn. 158; 10 Am. Dec. 106; Van Blarcom v. Broadway Bank, 37 N. Y. 540.

⁶ Steere v. Benson, 2 Ill. App. 560.

recover the entire amount thereof; and if such amount be greater than that due from the pledgor, he recovers the excess for the use of the latter. Where, however, the maker of the instrument has a good defense against the pledgor, the better rule appears to be that a *bona fide* holder without notice can recover the amount of his principal debt only.¹ A broker or banker to whom securities are specifically pledged to secure payment of a particular loan or debt has no lien thereon for a general balance or for payment of another claim.² A pledgee cannot retain a pledge to secure other debts or to apply to other objects than those for which it is given; nor can the government, where one of its revenue officers acts as pledgee, and pays the money into the treasury upon another and different debt than that for which it was deposited.³ Where one who has purchased securities which have been pledged to secure a usurious loan obtains a further usurious loan from the same lender, giving one note for the total amount, and pledges other property to secure the whole, the property last pledged cannot be retained by the lender as security for the original loan.⁴ A consent that certain property shall be pledged for a certain debt does not justify the pledgee in holding it for another debt.⁵ Whether a pledgee of personal property as security for money loaned can retain the same for subsequent advances to the pledgor depends upon the understanding and agreement of the parties at the time such subsequent advances were made.⁶ If a creditor having two demands against a debtor, and holding a third person's note as security for one, and a pledge of property as security for both, sells the pledge for enough to pay both, it is a satisfaction of both.⁷ Where two notes are secured by a lien on land,

¹ Union Bank v. Roberts, 45 Wis. 393.

² Wyckoff v. Anthony, 9 Daly, 417.

³ Boughton v. United States, 12 Ct. of Cl. 331.

⁴ Beecher v. Ackerman, 1 Abb. Pr., N. S., 141.

⁵ Woolley v. Louisville Banking Co., 81 Ky. 527.

⁶ James's Appeal, 89 Pa. St. 54.

⁷ Strong v. Wooster, 6 Vt. 536.

and through the failure of an assignee thereof to use due diligence to collect the assignor is released from his liability on one, the proceeds of the land should be applied equally to the two notes.¹ Application of a surplus arising from sale of securities may be made *pro rata* to all liabilities mentioned in a letter by the debtor to the pledgee, directing him to hold the stock as a general collateral security for all the pledgor's liability to the pledgee at present existing, or which may hereafter be incurred by him.²

With the pledge of a thing its natural increase also goes.³ Thus a pledge of animals carries the young born during the term;⁴ the pledge of stock or securities bearing interest carries the dividends or payments of interest falling due during the term.⁵ And the pledge will cover interest on the debt, and incidental charges and expenses⁶ necessary and proper for preservation of the pledge. Expenses necessarily and properly incurred by the creditor in realizing on collaterals are chargeable against the proceeds.⁷ The pledgee, while bound to make useful and necessary repairs, cannot make new, expensive, and unusual improvements, or such as materially change the mode of cultivating or using the estate. If he does, he cannot recover his outlay, but only the increased value resulting therefrom. When, however, the debtor consents to the outlay, there is, as between him and the grantee, no reason for complaint.⁸

ILLUSTRATIONS.—An irrevocable power of attorney given by a director of a national bank, wherein he constituted and appointed an attorney for the purposes therein set forth, being

¹ Green v. Cummins, 14 Bush, 174.

² Eichelberger v. Murdock, 10 Md. 373; 69 Am. Dec. 140.

³ Story on Bailments, sec. 292.

⁴ Id.; Schouler on Bailments, 170; Smith v. Atkins, 18 Vt. 461.

⁵ Swasey v. R. R. Co., 1 Hughes, 17; Merrifield v. Baker, 9 Allen, 29. As between the pledgor and the pledgee, a pledge of stock *per se* includes a

pledge of dividends which may be declared during the life of the pledge although the stock is not transferred: Herrman v. Maxwell, 47 N. Y. Sup. Ct. 347.

⁶ Story on Bailments, sec. 306; In re Kerr's Policy, L. R. 8 Eq. 331.

⁷ Hurst v. Coley, 22 Fed. Rep. 183.

⁸ Pickersgill v. Brown, 7 La. Ann. 298.

a general power covering any indebtedness of such director to the person so appointed attorney, *held*, a pledge of the shares of stock owned by him and mentioned therein as long as there was any debt due from him to the person named as attorney: *United States v. Neale*, 14 Fed. Rep. 767; 4 Woods, 464. A, by his will, left B, a minor, twenty thousand dollars, to be invested by his executors in an institution for savings, to be paid on B's marriage or arrival at age, and in the mean time the interest thereon to be paid to his wife for the maintenance of B; and he ordered all the public stock to remain in his name in a certain loan-office, to be bound to pay the legacy, adding that his reason for so doing was to make good any deficiency or depreciation that might take place in the savings bank. *Held*, that the whole public stock, amounting to upwards of fifty thousand dollars, was pledged as security for the principal legacy, but not for the accruing interest: *Vernon v. De Wolf*, 4 Mason, 123. Defendant delivered certain stock to plaintiff as collateral security for demands that it "may from time to time have and hold against H." *Held*, that it applied to antecedent debts held after such delivery, and, being a continuing security, defendant was not discharged by an extension of time to the debtor. But, it seems, defendant by giving notice could have restricted the security to demands actually held by plaintiff at the time of notice, and thus have terminated the responsibility: *Merchants' Nat. Bank of Whitehall v. Hall*, 83 N. Y. 338; 38 Am. Rep. 434; affirming 18 Hun, 176. A pawned three articles at different times, which, upon being sold, realized more than sufficient to pay the principal money, interest, and expenses of sale; but other articles pawned by him with the same pawnbroker did not, upon sale, realize sufficient to repay the principal money, interest, and expenses of sale. *Held*, that the pawnbroker had no right to set off the loss upon these latter articles against the overplus upon the sale of the others, under 39 & 40 Geo. III., c. 99, sec. 20; *Dobree v. Norcliffe*, 23 L. T., N. S., 552. A deposited with a bank, of which he was a customer, as collateral security for his current indebtedness, the note of a third person secured by mortgage, and after the note had matured, withdrew it and the mortgage for the purposes of foreclosure and collection, under an agreement to return the proceeds, or to replace the note by securities of equal value. At the foreclosure sale A became the purchaser, and at the request of the bank deposited with it his deed of the property. He had then paid all his indebtedness to the bank, and his dealings with it were temporarily suspended. Having afterwards become indebted to the bank, he became bankrupt, and the bank brought a bill against his assignee, claiming an equitable lien on the property; but there was no allegation

therein of money loaned; or debt created on the faith of the deposit of the deed. *Held*, that the deposit created no equitable lien in favor of the bank: *Biebinger v. Continental Bank*, 99 U. S. 143. The plaintiffs agreed that if A would procure for them from F. & R. a storage receipt for four thousand bushels of flax-seed, they would make advances to him on that receipt as security, and A agreed to consign to plaintiffs all the oil he should manufacture, except, etc. The receipt was procured and delivered to the plaintiffs, and they made advances thereon to the amount of \$4,987.69, and A paid them, by sales of oil, \$4,989.67. But the plaintiffs held a note against A of a previous date, and claimed to apply enough of the payments by sales of oil to pay it and hold F. & R. liable for what would then be deficient. *Held*, that the storage was given and deposited as collateral security only for advances to be made; and that the flax-seed could not be held as a lien for any previous debt; and that the receipt could be explained by parol evidence of independent and collateral facts: *Robinson v. Frost*, 14 Barb. 536. The Broadway Bank loaned money to C, for which they received from him a pledge of stocks as collateral security. They also discounted several notes for him, and received from him a draft on a distant place for collection. Before it was known whether the draft was paid or not, he applied to the president of the bank, saying that he must have the proceeds of the draft immediately, or must suspend payment; and the president asking for collateral security, he answered: "The bank holds all my stocks, and they are security for all my discounts, and this draft"; to which the president replied: "If that is so, the bank will put the proceeds of this draft to your credit," which was thereupon done. *Held*, that this was a pledge *in præsenti* of the stocks, as security for all the discounts which had been made for C, as well as for the draft in question: *Van Blarcom v. Broadway Bank*, 9 Bosw. 532. The terms of a pledge of stock to secure a loan required additional securities, by way of "margin," to be furnished when called for during the continuance of the loan. *Held*, that the pledgee had the same rights in regard to the additional securities so furnished as over the original pledge: *Baltimore etc. Ins. Co. v. Dalrymple*, 25 Md. 269. S. gave to a savings institution, to secure a loan, a bond, which in the condition was expressed to be "as collateral security for sundry notes given or drawn by S., or indorsed by him or his firm, and held by the institution." The notes were renewed from time to time, but there was no agreement that the bond should stand for the renewals. Certain judgment creditors contended that the bond was collateral to the notes merely, and not the debt represented thereby; and that the lifting of the old notes by the renewals was a novation, and satisfied the condition

of the bond. This contention was sustained by the court. *Held*, error: *Shrewsbury Savings Institution's Appeal*, 94 Pa. St. 309. A party pledged a lot of whisky for the repayment of a sum of money borrowed, with interest, storage, etc., and, a few weeks after, pledged another lot for a similar loan, and there was no proof that either pledge was dependent on the other, or that when the first pledge was made a future loan was anticipated, or that when the second one was made the first was alluded to. *Held*, that each pledge was a security for the loan made at the time, and not both for the first loan: *Baldwin v. Bradley*, 69 Ill. 32. R. deposited in a bank of which he was a director certain mortgage notes, and agreed that they be held as collateral security for his liability to the bank. Forgetting the agreement, he withdrew the notes with the cashier's consent, and assigned them and the mortgage for their full value to W., who did not know of the agreement. At W.'s request, R. placed the notes in his package at the bank, and collected the interest as W.'s agent. The bank officers did not rely upon the notes as security for any loan afterwards made to R. The mortgage was never in the bank, nor was the assignment recorded, nor inquiry made as to the mortgage until May, 1877, when R.'s credit had become bad. *Held*, that a loan made by the bank to R. in July, 1876, in reliance on the package, as collateral security, was not in reliance upon the notes as such security: *Wyeth v. Market Bank*, 132 Mass. 597.

§ 1760. Right of Pledgee to Possession of Pledge.—The pledgee has a right to the possession of the thing, and may sue, either for the restitution of the thing¹ or for damages, as he elects, the owner,² or a stranger³ who may take it from his possession. The pledgor of a chattel cannot maintain an action for its recovery from the pledgee before the payment of the debt for which it is pledged.⁴ A pledgee of a promissory note may maintain an action against the pledgor for conversion of the note, where the latter has obtained the note, though without fraud, under an agreement that he is to return it or an-

¹ *Coleman v. Shelton*, 2 McCord Ch. 126; 16 Am. Dec. 639; *Noles v. Marable*, 50 Ala. 366.

² *Treadwell v. Davis*, 34 Cal. 601; 94 Am. Dec. 770; *Lyle v. Barker*, 5 Binn. 457; *Ayre v. South Australian Banking Co.*, L. R. 3 P. C. 548.

³ *Woodruff v. Halsey*, 8 Pick. 333; 19 Am. Dec. 329; *Brownell v. Hawkins*, 4 Barb. 491; *Noles v. Marable*, 50 Ala. 366; *Lyle v. Barker*, 5 Binn. 457.

⁴ *Hendrix v. Harman*, 19 S. C. 483.

other note, which agreement he refuses to comply with.¹ Against the owner he is entitled to recover only his special interest in the chattel, but against a stranger he is entitled to the full value of the pledge.² But after a wrongful sale the pledgor cannot maintain trover or detinue or an action for damages, without first paying or tendering the sum due.³

§ 1761. Right of Pledgee to Use Thing. — The pledgee or pawnee has no right to use the thing pledged: 1. If the use would injure the thing; 2. If the use would not be injurious to the thing itself, but yet would expose it to extraordinary perils.⁴ The pledgee or pawnee has a right to use the thing pledged: 1. If the thing is of such a nature that its preservation requires it to be used; 2. If the keeping of the thing is a charge to the pawnee or pledgee; 3. If the use is beneficial to the thing, or at least not injurious. The pledgee may, with the assent of the pledgor, use it in any way consistent with the general ownership and the ultimate rights of the pledgor.⁵ But by using the pledge to its damage the pledgee, though liable for the loss, does not forfeit the security.⁶ The profits from the pledge while in the pledgee's hands belong to the pledgor.⁷ The pledgee of stock is entitled to dividends accruing while

¹ *Way v. Davidson*, 12 Gray, 465; 74 Am. Dec. 604.

² *Treadwell v. Davis*, 34 Cal. 601; 94 Am. Dec. 770; *Adams v. O'Connor*, 100 Mass. 515; 1 Am. Rep. 137; *Benjamin v. Stremple*, 13 Ill. 466; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670; *Lyle v. Barker*, 5 Binn. 457; *Swire v. Leach*, 18 Com. B., N. S., 479; *Pomeroy v. Smith*, 17 Pick. 85; *Brownell v. Hawkins*, 4 Barb. 491.

³ *Story on Bailments*, sec. 308, note; *Lewis v. Mott*, 36 N. Y. 395; *Bulkeley v. Welch*, 31 Conn. 339; *Donald v. Suckling*, L. R. 1 Q. B. 585; *Johnson v. Stear*, 15 Com. B., N. S., 730. *Contra*, *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 307.

⁴ See *Lawrence v. Maxwell*, 53 N.

Y. 22; *Thompson v. Patrick*, 4 Watts, 414. It has been said that the pledgee of stock has no right to vote on it as owner: *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. Though such a use would not be a conversion: *Heath v. Silverthorn Co.*, 39 Wis. 147. See *Newton v. Fay*, 10 Allen, 505. But it has been held that a person to whom stock is "hypothecated" may vote on it: *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 425; *New York etc. R. R. Co. v. Schuyler*, 38 Barb. 542, *per* Ingraham, J.

⁵ *Lawrence v. Maxwell*, 53 N. Y. 19.

⁶ *Thompson v. Patrick*, 4 Watts, 414.

⁷ *Hunsaker v. Sturgis*, 29 Cal. 142; *Houton v. Halliday*, 2 Murph. 111; 5 Am. Dec. 522.

his lien exists, and can recover them from the pledgor, if collected by the latter.¹ But he is not regarded as so far the owner of the stock as to be entitled to notice of the meetings of the corporation.²

ILLUSTRATIONS. — A tenant took possession under an agreement giving the landlord a lien on the furniture for the rent, and subsequently made a deed of trust of the same furniture to secure certain notes to a third person. After the landlord had taken possession for non-payment of rent, the trustee brought suit for the use of the furniture. *Held*, that the landlord was in the position of a pledgee, and as such entitled to possession of the furniture, but accountable for the value of its use: *State v. Adams*, 76 Mo. 605.

§ 1762. **Right of Pledgee to Sell Pledge.** — At common law the pledgee had no right to sell the property pledged without judicial process, unless he gave the pledgor reasonable notice to redeem, and the pledgor was also entitled to notice of the pledgee's intention to sell, and of the time and place of sale.³ And such right is not lost by the pledgor's bankruptcy.⁴ Three remedies are now open to the pledgee: 1. He may proceed against the pledgor personally for the debt, without selling the pledge; 2. He may file a bill in chancery for a judicial sale under a regular decree of foreclosure; 3. He may sell the pledge, without judicial process, upon reasonable notice to the pledgor.⁵ Where the pledgee is expressly empow-

¹ *Gaty v. Holliday*, 8 Mo. App. 118.

² *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

³ *Odgen v. Lathrop*, 65 N. Y. 158; *Mauge v. Heringhi*, 26 Cal. 577; *Lewis v. Mott*, 36 N. Y. 395; *Hancock v. Franklin Ins. Co.*, 114 Mass. 156; *Richards v. Davis*, 5 Pa. L. J. 471; *Merchants' Bank v. Thompson*, 133 Mass. 482; *Water Power Co. v. Brown*, 23 Kan. 676; *McDowell v. Chicago Steel Works*, 124 Ill. 491; 7 Am. St. Rep. 381. He may, of course, file a bill in equity and obtain a judicial foreclosure, — an ancient method, but tedious and expensive, and not now often resorted to: *Story on Bailments*, sec. 310; *Schouler on Bailments*, 206.

In *Boynton v. Payrow*, 67 Me. 587, the bill in equity is said to be the preferable way. As to foreclosure and sale of negotiable paper, see *Donohoe v. Gamble*, 38 Cal. 341; 99 Am. Dec. 399. Where notice cannot be given to the pledgor, this is, however, still the proper and safest mode: *Schouler on Bailments*, 208; *Garlick v. James*, 12 Johns. 147; 7 Am. Dec. 294; *Coffin v. Chicago Co.*, 67 Barb. 339; *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497; *Smith v. Coale*, 34 Leg. Int. 58; 12 Phila. 177.

⁴ *Jerome v. McCarter*, 94 U. S. 734; *Yeatman v. Savings Inst.*, 95 U. S. 764.

⁵ *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497.

ered to sell the pledge, and he sells it in pursuance of the power, the sale is not a conversion, and the pledgor cannot maintain trover.¹ In the absence of an agreement to the contrary, a pledgee may sell the pledge at public auction after default and reasonable notice, and if the pledgor asserts the existence of an agreement to the contrary, he must show it; nor is the pledgee bound to defer selling until the money market is better.² When stock is pledged as collateral security by delivery of the certificates with blank transfers on the back signed by the owner, and the principal indebtedness is past due, the pledgee can sell the stock as the readiest mode of collection, giving the pledgor and his successor in interest reasonable notice to redeem, and of the time and place of sale.³ To avoid a sale of collateral security by the pledgee on the ground of fraud, it must be shown that the purchaser participated in the fraud.⁴ In a suit to foreclose a pledge, it cannot be contended by way of defense that defendant gave the pledge to defraud his creditors.⁵ The pledgee of a note which is not to mature until long after the principal debt has implied authority on default to sell the note; he need not wait to collect it.⁶ Where goods are deposited as security for the repayment of a loan of money on a future day certain, though without any express stipulation that the pawnee shall have power to sell in default of payment on the day, a power of sale is implied by law from the nature of the transaction.⁷

He is not liable, if he sell honestly and fairly, and after the proper notice, for a loss which may ensue to the owner from the property realizing less than its estimated value.⁸ But he must not sell more of the property—if it is divis-

¹ *Cole v. Dalziel*, 13 Ill. App. 23.

² *King v. Texas Banking and Ins. Co.*, 58 Tex. 669.

³ *Canfield v. Minneapolis Agricultural etc. Ass'n*, 14 Fed. Rep. 801; 15 Rep. 260.

⁴ *Cole v. Cosgrove*, 16 Ill. App. 167.

⁵ *Chafee v. A. & W. Sprague Mfg. Co.*, 14 R. I. 168.

⁶ *Richards v. Davis*, 5 Pa. L. J. 471.

⁷ *Pigot v. Cubley*, 15 Com. B., N. S., 701; 10 Jur., N. S., 318; 3 L. J. Com. P. 134; 12 Week. Rep. 467.

⁸ *Ainsworth v. Bowen*, 9 Wis. 348.

ible—than is enough to pay the debt secured.¹ If he does he is liable in damages to the pledgor; whose acceptance of the surplus will not defeat his right to recover such damages.² If the pledgee of scrip sells more of it than enough to satisfy his debt, he is liable for any loss sustained by the pledgor through the sale of the excess; and the facts that he has paid over to the pledgor, and the latter has accepted, the surplus, will not bar the latter's action for damages; but he can recover the difference between the price at which the excess sold and what he has been obliged to pay to replace it.³ And the pledgee has no right to sell before default,⁴ or after a wrongful demand by the pledgee, or a tender of what is due by the pledgor.⁵ The sale by a pledgee on his own account of a stock note, which he had a general authority to "use, transfer, or hypothecate," before its maturity is a conversion for which an action will lie.⁶ Where a negotiable note pledged as security has at the time of default but a short time to run, the pledgee is not justified in selling it, but should wait and collect it himself.⁷ City scrip or orders

¹ *Lewis v. Graham*, 4 Abb. Pr. 110.

² *Fitzgerald v. Blocher*, 32 Ark. 742; 29 Am. Rep. 3.

³ *Fitzgerald v. Blocher*, 32 Ark. 742; 29 Am. Rep. 3.

⁴ *Johnson v. Stear*, 15 Com. B., N. S., 730.

⁵ *Pigot v. Cubley*, 15 Com. B., N. S., 702; *Hope v. Lawrence*, 1 Hun, 317.

⁶ *Ogden v. Lathrop*, 1 Sweeny, 643.

⁷ *Wheeler v. Newbould*, 16 N. Y. 392. See *Fraker v. Reeve*, 36 Wis. 85. In *Joliet Iron Co. v. Scioto Fire Brick Co.*, 82 Ill. 548, 25 Am. Rep. 341, the supreme court of Illinois carried this principle much further. In an action on a promissory note the defendant pleaded that the plaintiff after suit had sold certain railroad bonds which the defendant had put in its hands as collateral security to the note, and of the value of all the damages sustained by plaintiff by the non-payment of the note. The plaintiff replied, in substance, that such

sale was regularly made at auction to the highest bidder upon due notice. The defendant demurred to the replication, the demurrer was overruled, and the plaintiff had judgment, from which the defendant appealed. *Dickey, J.*, said: "The pledge of commercial paper as collateral security for the payment of a debt does not, in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged, upon default of payment, either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured. A person holding property or securities in pledge occupies the relation of trustee for the owner, and as such, in the absence of special power to do otherwise, is bound to proceed as a prudent owner would with his own. From the very nature of the case, property can only be applied as security through the process

are choses in action, which, if pledged as collateral security, must be collected by the creditor, if not returned by him, and cannot be sold by him, or by a chancery court at his instance.¹

ILLUSTRATIONS.—M. borrowed money on his note at three months from R., and pledged stock as collateral, taking back R.'s receipt for the stock, in which he stipulated not to transfer the stock for three months. *Held*, that, under the terms of agreement, R. might sell the stock at the very expiration of the three months, without waiting for days of grace on the note to expire: *Rankin v. McCullough*, 12 Barb. 103. Under a transfer of bonds as collateral security, stipulating that on default the transferees should have a right to sell in Chicago, on certain notice. *Held*, that the remedy was cumulative, and an action would lie for a sale in a court of this state: *Coffin v. Chicago Northern Pacific Const. Co.*, 67 Barb. 337; 4 Hun, 625. A deposited a dock-warrant for brandies with B as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th B agreed for the sale of the brandies to C, and on the 29th delivered to him the dock-warrant, and C took actual possession of the brandies on the 30th. *Held*, that the sale on the 28th and the delivery of the dock-warrant to the vendee on the 29th, A having the whole of that day to redeem it, amounted to a conversion: *Johnson v. Stear*, 15 Com. B., N. S., 330; 10 Jur., N. S., 99; 33 L. J. Com. P. 130; 12 Week. Rep. 347. Negotiable paper was indorsed over to and held by the creditor as security for the payment of a debt, without any other express agreement between the parties, and where the maker of the note resided in another state, and it was not shown that he had any property subject to seizure and sale within the jurisdiction of the court. *Held*, that, under the circumstances, the holder of the instrument given in pledge was authorized to resort to a court of equity for a foreclosure and sale: *Donohoe v.*

of sale. Not so with bonds, mortgages, or promissory notes: *Wheeler v. Newbould*, 16 N. Y. 392. It is insisted, however, that the bonds mentioned in the plea are not shown to have been commercial paper. It is not perceived that this could in any way alter the case. All the reasoning in support of the doctrine laid down as to commercial paper applies with the same, if not with more, force to bonds payable upon condition. Put up to sale, no bidder can by mere inspec-

tion of the paper form any just judgment as to the value of such paper. The statements of the plea, in some respects, are not so full as they should be, but such defects are fully supplied by the statements in the replication. Upon the facts as stated and confessed in the record, the judgment upon the demurrer should have been for appellant."

¹ *Whitteker v. Charleston Gas Co.*, 16 W. Va. 717.

Gamble, 38 Cal. 341; 99 Am. Dec. 399. A city borrowed money of a bank and gave its bonds as collateral. The bank passed into the hands of a receiver, who sold the bonds—the city being in default—at public auction. The sale was fairly conducted; there was some competition, and no collusion. The receiver recovered against the city a judgment for the balance of the debt, and, on application for *mandamus* to compel a tax levy of the amount, the city claimed the right to show that the bonds brought less than their true value, and that therefore a credit should be given on the judgment for the difference between what the bonds brought and their true value. *Held*, that, as the sale had been lawfully, openly, and fairly conducted, this could not be allowed: *White v. Rahway*, 16 Fed. Rep. 833. Shares of stock were pledged to secure a loan. It was explicitly agreed that they might be sold on default, without demand of payment or further notice. Long after a default, the shares were sold by the pledgee without notice. Afterwards they appreciated in value. *Held*, that the pledgor had no claim to relief, and that it was immaterial that, before the sale, it having been discovered that certain of these shares were spurious, genuine shares had been substituted for them by the corporation whose issue they purported to be: *Jeanes's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624.

§ 1763. **Demand and Notice Necessary.**—The pledgee cannot sell the pledge without first making a demand of payment of the debt,¹ and giving the pledgor a reasonable notice of the time and place of the sale.² Such notice is required, whether the debt which it secured was payable

¹ *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 307; *Stokes v. Frazier*, 72 Ill. 428; *Gay v. Moss*, 34 Cal. 125; *Robertson v. Lippincott*, 1 Phila. 308; *Sitgreaves v. Farmers' Bank*, 49 Pa. St. 359; *Bryan v. Baldwin*, 52 N. Y. 233; *McDowell v. Chicago Steel Works*, 124 Ill. 491; 7 Am. St. Rep. 381.

² *Davis v. Funk*, 39 Pa. St. 243; 80 Am. Dec. 519; *Milliken v. Dehon*, 10 Bosw. 325; *Stevens v. Hurlburt Bank*, 31 Conn. 146; *Nelson v. Edwards*, 40 Barb. 279; *Brass v. Worth*, 40 Barb. 648; *Cushman v. Hayes*, 46 Ill. 145; *Conyngham's Appeal*, 57 Pa. St. 474; *Bryan v. Baldwin*, 52 N. Y. 233; *Washburn v. Pond*, 2 Allen, 474; *Wheeler v. Newbould*, 16 N. Y. 392; *Mauge v. Heringhi*, 26 Cal. 577; *Markham v. Jaudon*, 41 N. Y. 235; *Luck-*

etts v. Townsend, 3 Tex. 119; 49 Am. Dec. 723; *Maryland etc. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779; *Ogden v. Lathrop*, 65 N. Y. 162; *Lewis v. Graham*, 4 Abb. Pr. 110; *Lewis v. Varnum*, 12 Abb. 308; *Wilson v. Little*, 2 N. Y. 448; 51 Am. Dec. 307; *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; *De Lisle v. Priestman*, 1 Browne (Pa.), 176; *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177; *Strong v. Nat. Bank*, 45 N. Y. 718; *Jeanes's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 573. Formal notice is unnecessary, if the pledgor have actual knowledge otherwise: *Alexandria R. Co. v. Burke*, 22 Gratt. 254. Notice of the place of sale was held unnecessary in *Worthington v. Tormey*, 34 Md. 182.

immediately or at a future day.¹ A notice that he will sell unless an excessive sum be paid immediately is not such a notice as will justify the sale.² Upon the sale of stock pledged without notice, the pledgor is entitled, as damages, to the difference between the price obtained and

¹ In *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248, it is said: "It was insisted that the pledge having been made as a security for their debt, which was payable at a future day, the plaintiffs had a right, after a default in payment, to sell the pledge fairly, in the usual course of business, without calling on the defendants to redeem, or giving them notice of the intended sale; and that such sale concluded the defendants. It is said that the law makes a distinction between the case of a pledge for a debt payable immediately, and one where the debt does not become payable until a future day; and that in the latter case the creditor is not bound to call for a redemption or to give notice of sale, though in the former it is conceded that there must be such demand and that notice must be given. Non-payment of the debt at the stipulated time did not work a forfeiture of the pledge, either by the civil or at the common law. It simply clothed the pledgee with authority to sell the pledge and reimburse himself for his debt, interest, and expenses; and the residue of the proceeds of the sale then belonged to the pledgor. The old rule, existing in the time of Glanville, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary. But as the law now is, the pledgee may file a bill in chancery for a foreclosure and proceed to a judicial sale, or he may sell without judicial process upon giving reasonable notice to the pledgor to redeem and of the intended sale. I find no authority countenancing the distinction contended for; but on the contrary, I understand the doctrine to be well settled, that whether the debt be due presently or upon time, the rights of the parties to the pledge are such as have been stated: *Cortelyou v. Lansing*, 2 Caines Cas. 204; 2 Kent's Com., 5th ed., 581, 582;

4 Kent's Com., 5th ed., 138, 139; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 2 Atk. 303; *Johnson v. Vernon*, 1 Bail. 527; *Perry v. Craig*, 3 Mo. 516; *Parker v. Branker*, 22 Pick. 40; *De Lisle v. Priestman*, 1 Browne (Pa.), 176; *Story's Eq.*, sec. 1008; *Story on Bailments*, secs. 309, 310, 346; *Hart v. Ten Eyck*, 2 Johns. Ch. 100; *Patchin v. Pierce*, 12 Wend. 61; *Garlick v. James*, 12 Johns. 146; 7 Am. Dec. 294. Nor do I see any reason for such a distinction. In either case the right to redeem equally exists until a sale; the pledgor is equally interested, to see to it that the pledge is sold for a fair price. The time when the sale may take place is as uncertain in the one case as in the other; both depend upon the will of the pledgee, after the lapse of the term of credit in the one case, and after a reasonable time in the other, unless, indeed, the pledgor resorts to a court of equity to quicken a sale. Personal notice to the pledgor to redeem, and of the intended sale, must be given as well in the one case as in the other, in order to authorize a sale by the act of the party. And if the pledgor cannot be found, and notice cannot be given to him, judicial proceedings to authorize a sale must be resorted to: 2 *Story's Eq.*, sec. 1008. Before giving such notice, the pledgee has no right to sell the pledge; and if he do, the pledgor may recover the value of it from him, without tendering the debt; because by the wrongful sale the pledgee has incapacitated himself to perform his part of the contract, that is, to return the pledge, and it would therefore be nugatory to make the tender: *Cortelyou v. Lansing*, 2 Caines Cas. 204; *Story on Bailments*, 2d ed., 349; *McLean v. Walker*, 10 Johns. 472."

² *Pigot v. Cubley*, 15 Com. B., N. S., 701; 10 Jur., N. S., 318; 3 L. J. Com. P. 134; 12 Week. Rep. 467.

the highest price at which it could have been sold in the market within a reasonable time after actual notice of the sale.¹

It has been doubted whether, if the pledgor cannot be personally reached, a newspaper notice would be sufficient.² If the pledgor be beyond sea, notice may be served on his agent.³ Where the time of repayment is fixed, the pledgor is in default after that time, without a demand.⁴ But where no fixed day of payment was stipulated, or there has been an indefinite extension, then a demand is essential.⁵ The pledgee cannot sell without demanding payment, even where the contract is that the lender may sell without notice.⁶ The rule that the pledgee must make demand and give notice before selling does not apply where the contract fixes a definite time for the payment of the debt.⁷ A stipulation that the pledgee has leave, on default of payment, to sell at public or private sale, and pay the debt and expenses, is a waiver of the right to notice of sale.⁸ A written assignment of stocks and bonds to a trustee, who is empowered to sell at discretion, and required to dispose of enough to discharge a note due a third person, if the interest thereon is not paid at a specified time, does not constitute a pledge, and the assignor is not entitled to demand of the interest or notice before sale.⁹

ILLUSTRATIONS. — A pledgee of bonds claimed to have become the owner through an auction sale on foreclosure of the pledge, but did not show the terms of the sale, or whether demand of

¹ *Clark v. Sparkawk*, 2 Week. Not. Cas. 115.

² *Schouler on Bailments*, 208. Such a notice was held sufficient in *Stokes v. Frazier*, 72 Ill. 428; and see *City Bank of Racine v. Babcock*, 1 Holmes, 180.

³ *Potter v. Thompson*, 10 R. I. 1.

⁴ *Martin v. Reid*, 11 Com. B., N. S., 730.

⁵ *Martin v. Reid*, 11 Com. B., N. S., 730; *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 307; *Stokes v. Frazier*, 72

Ill. 428; *Wadsworth v. Thompson*, 8 Ill. 423.

⁶ *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 307.

⁷ *Chouteau v. Allen*, 70 Mo. 290.

⁸ *Haskins v. Patterson*, 1 Edm. 120; *Jeanes's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624; *McDowell v. Chicago Steel Works*, 124 Ill. 491; 7 Am. St. Rep. 381.

⁹ *Murdock v. Columbus Ins. Co.*, 59 Miss. 152.

payment or notice to redeem was made prior to the sale. *Held*, that, as no right to sell was shown, he was still a pledgee: *Duncomb v. R. R. Co.*, 84 N. Y. 190; reversing 22 Hun, 133. It was agreed by the pledgor of shares in the capital stock of a corporation that the pledgee might sell the stock "without further notice," if the loan it was given to secure was not paid on one day's notice, according to agreement. *Held*, that this dispensed with all notice of sale, and only left upon the pledgee the obligation to sell publicly and fairly for the best price: *Maryland etc. Ins. Co. v. Dalrymple*, 25 Md. 242; 89 Am. Dec. 779; *Baltimore etc. Ins. Co. v. Dalrymple*, 25 Md. 269. A pledge of promissory notes contained an agreement between pledgor and pledgee that if the debt for which the notes are pledged is not paid at maturity the latter may make the money out of them in the best way he can, and that he may sell the notes for that purpose. *Held*, that the pledgee cannot sell the notes without notice to the debtor to redeem, and of the time and place of sale. A notice after the debt matures that if it is not paid within a specified time the pledgee will make the best disposition he can of the notes to raise the money, either by public or private sale, is not sufficient: *Goldsmidt v. Worthington M. E. Church Trustees*, 25 Minn. 202. Bonds were pledged by a bank as security for the performance of an agreement between the bank and the pledgee, and the pledgee was empowered to sell the bonds, in case of breach of the agreement by the bank, on thirty days' notice to it of the intended sale, and credit the proceeds on a debt due from the bank. The bank afterwards failed, closed its place of business, and thereafter transacted no business, and had no office nor acting officers, and did not perform the agreement. About three years afterwards, the pledgee sold the bonds, in good faith, at their market value, without notice to the bank. *Held*, that as the giving of the notice had been rendered impossible by the act of the bank, neither the pledgee nor its agent in the sale was liable for a conversion of the bonds, upon the general principle that where one entitled to insist upon notice as a condition precedent so acts as to put it out of the power of the other party to give him notice, he loses the right to claim it: *City Bank of Racine v. Babcock*, 1 Holmes, 181.

§ 1764. Sale must be Public.—The sale must be at public auction, and not at private sale.¹ And a sale on a

¹ *Washburn v. Pond*, 2 Allen, 474; 25 Md. 424; 90 Am. Dec. 69; *Diller v. Wheeler v. Newbould*, 16 N. Y. 392; *Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177; *Jeanes's Appeal*, 116 Pa. St. 573; 2 Am. St. Rep. 624. Unless more can be realized at private sale:

broker's board of stock has been held a private, and hence illegal, sale of the pledge.¹ An agreement authorizing a pledgee of shares in a corporation "to give the stock to any broker to sell" permits a private sale by a broker for the market price.² A stipulation in the agreement of pledge that the pledgee "may sell at public or private sale, or otherwise, at his option," authorizes him to sell at private sale without giving the pledgor previous notice of time and place.³

§ 1765. Pledgee may not Purchase.— The pledgee cannot become the purchaser, either in person at the sale, or by collusion with a sham bidder.⁴ The president of a corporation pledgee cannot purchase the pledge, or if he does, equity will relieve from the sale.⁵ Where a pledgee improperly buys the pledge at the sale thereof, he takes only the title which he had before the sale; so, likewise, of a subsequent purchaser from such pledgee at private sale, the buyer having notice of the facts.⁶ In New York a special partner of a firm with whom property is pledged is not incapacitated from purchasing the pledge at a sale made by the firm.⁷ Where bonds, part of an issue, all of which are secured by a fund to be realized by a public sale of real estate, upon public notice by a trustee for the bond-holders and the grantors in a trust deed, are pledged,

Ex parte Fisher, 20 S. C. 179; or special authority to sell at private sale: Bryson v. Rayner, 25 Md. 424; 90 Am. Dec. 69.

¹ Markham v. Jandon, 41 N. Y. 235; Dykers v. Allen, 7 Hill, 497; 42 Am. Dec. 89; Brass v. Worth, 40 Barb. 648; Wheeler v. Newbould, 16 N. Y. 392; Raised but not decided in Child v. Hugg, 41 Cal. 519. But see Bryson v. Rayner, 25 Md. 424; 90 Am. Dec. 69; Maryland etc. Ins. Co. v. Dalrymple, 25 Md. 242; 89 Am. Dec. 779. Pledgee of gold in New York may sell at gold board: Schepeler v. Eisner, 3 Daly, 11.

² Bryson v. Rayner, 25 Md. 424; 90 Am. Dec. 69.

³ Milliken v. Dehon, 27 N. Y. 368.

⁴ Bryan v. Baldwin, 52 N. Y. 233; Pigot v. Cubley, 15 Com. B., N. S., 702; Middlesex Bank v. Minot, 4 Met. 25; Hestonville R. R. Co. v. Shields, 2 Brewst. 257; Bank v. R. R. Co., 8 Iowa, 277; 74 Am. Dec. 302; Hope v. Lawrence, 1 Hun, 317; Chicago Artesian Well Co. v. Corey, 60 Ill. 73; Stokes v. Frazier, 72 Ill. 428; Baltimore Ins. Co. v. Dalrymple, 25 Md. 269; Bryson v. Rayner, 25 Md. 424; 90 Am. Dec. 69.

⁵ Star Fire Ins. Co. v. Palmer, 9 Jones & S. 267.

⁶ Canfield v. Minneapolis Agricultural etc. Ass'n, 14 Fed. Rep. 801.

⁷ Lewis v. Graham, 4 Abb. Pr. 106.

the pledgee may purchase the land himself.¹ The assent of the pledgor of chattels to their purchase by the pledgee will be presumed, where the facts are notorious, and no dissent is shown.² So a pledgee of a note and mortgage who deposits them in bank, where they are seized and sold under an execution against the pledgor, may become the purchaser thereof at the sale.³

ILLUSTRATIONS.—A statute declares that “a pledgee or pledgeholder cannot purchase the property pledged, except by direct dealing with the pledgor.” *Held*, that this prohibition does not preclude the pledgee from acquiring a title under a purchase at public sale, provided that such purpose is afterwards ratified by the pledgee: *Hill v. Finigan*, 62 Cal. 426.

§ 1766. **Pledge of Several Articles.**—Where the pledgee has two or more securities, he is not obliged to pursue one in preference to another, but may exercise his choice.⁴ Several things being pledged, each is liable for the whole debt.⁵ If the sale of part satisfies the debt, he can proceed no further to sell the others; the surplus belongs to the pledgor.⁶ And he may release one article or thing without releasing all.⁷

§ 1767. **Pledgor may Ratify Irregular Sale.**—But the pledgor may ratify an illegal or irregular sale.⁸ By his conduct a pledgor may ratify a sale of the pledge by the pledgee in a manner other than that prescribed by statute, and thus cut off his right of redemption.⁹ Where the party allows a sale of pledged stock to stand for six years

¹ *Easton v. German-American Bank*, 24 Fed. Rep. 523.

² *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249.

³ *Clark v. Holland*, 72 Iowa, 34; 2 Am. St. Rep. 231.

⁴ *Brick v. Freehold etc. Co.*, 37 N. J. L. 307; *Comstock v. Smith*, 23 Me. 202; *Buchanan v. International Bank*, 78 Ill. 500.

⁵ *Story on Bailments*, sec. 314.

⁶ *Newport etc. Bridge Co. v. Douglass*, 12 Bush, 673; *Rohile v. Stidger*, 50 Cal. 207; *Van Blarcom v. Broadway*

Bank, 37 N. Y. 540; *Andrews v. Scotten*, 2 Bland, 629; *Jesup v. City Bank*, 14 Wis. 331. A creditor has a right to use two securities for his best advantage. He cannot be compelled to foreclose a mortgage before realizing all that he can on a note: *Morris v. Fales*, 43 Hun, 393.

⁷ *Story on Bailments*, sec. 314.

⁸ *Child v. Hugg*, 41 Cal. 519; *Hamilton v. State Bank*, 22 Iowa, 306; *Clark v. Bouvain*, 20 La. Ann. 70; *Bryan v. Baldwin*, 52 N. Y. 233.

⁹ *Earle v. Grant*, 14 R. I. 228.

after it was made, this constitutes such serious laches as to preclude a recovery; so where, in addition, he received from the company the difference between the real value of the stock and what it sold for, and sued in trover after demand and failure to obtain it for his stock note as having been satisfied by sale of the stock, he is estopped from claiming the sale to be void.¹ So a debtor may ratify his creditor's exchange of pledged property by bringing an action within a reasonable time to recover the property got by the exchange, and against one who has attached it as the creditor's property, unless there is evidence inconsistent with that of ratification.²

ILLUSTRATIONS.—A gave his note to a bank and deposited stock of the bank as security, and authorized a sale on default in payment of the note. The stock was put up at auction and bought by the bank. *Held*, that A had the option to treat the sale as valid or not, and in case he treated it as valid, he was entitled to credit on his note for only the proceeds of the sale: *Killian v. Hoffman*, 6 Ill. App. 200. P. pledged bonds to D. as collateral. There was a default, and D. had the bonds put up for sale, and bought them himself. P. indorsed them so that D. could sell them. Two years afterwards, the bonds having risen in value, P. brought a suit in equity to recover the increased value. *Held*, that the suit could not be maintained: *Lacombe v. Forstall*, 123 U. S. 562.

§ 1768. **Pledgee not Obligated to Sell.**—The pledgee is not obliged to sell on default, and is therefore not liable if the pledge depreciates on his hands before it is redeemed.³

¹ *McDowell v. Chicago Steel Works*, 124 Ill. 491; 7 Am. St. Rep. 381; 22 Ill. App. 405.

² *Strong v. Adams*, 30 Vt. 221; 73 Am. Dec. 305.

³ *Robinson v. Hurley*, 11 Iowa, 410; 79 Am. Dec. 497; *Richardson v. Ins. Co.*, 27 Gratt. 749; *Badlam v. Tucker*, 1 Pick. 389; 11 Am. Dec. 202; *Smith v. Strout*, 63 Me. 205; *Richards v. Davis*, 5 Pa. L. J. 471; *Wood v. Morgan*, 5 Sneed, 79; *Bank of Rutland v. Woodruff*, 34 Vt. 89; *O'Neil v. Wigham*, 87 Pa. St. 394. Pledgee who takes shares of corporate stock as col-

lateral security for a promissory note, with authority to sell in case of the non-payment of the note, is not bound to sell upon default in the payment of the note, and is not liable for a loss occasioned by a depreciation in the value of the stock occurring after the default: *Rozet v. McClellan*, 48 Ill. 345; 95 Am. Dec. 551. In *Granite Bank v. Richardson*, 7 Met. 407, A has pledged bank shares to B as security for a note. When the note fell due, B wrote A that if it was not paid he would sell the shares; but B did not pay, nor did A sell, and meanwhile

That a pledgee agreed that the proceeds of the sale of the pledge should be applied in a certain manner does not impose an obligation to sell, in the absence of a request.¹ The right to sell a pledge is not a peculiar trust reposed in the creditor, but is an incident to the contract of pledge and a part of the security.² But it seems that in the case of a perishable article, or where it would be greatly to the benefit of the pledgor to have a sale at once, a court of equity would order it.³ In *Nourse v. Prime*,⁴ the defendants, being brokers, received in the course of their business a certain number of shares of stock to hold as collateral for the payment of a note given them by the plaintiff, with an agreement that they should be at liberty, in case the note was not paid when due, to sell the stock at once, crediting the plaintiff with any surplus, and holding him liable for any deficiency. The shares of the plaintiff were not marked or identified as his special property, but were

the bank failed, and the shares became worthless. It was held that, in an action on the note by B against A, the omission to sell the stock was no defense. Said Shaw, C. J.: "The bank shares were taken as collateral security for the payment of the note. It afforded the holders an additional remedy, but did not supersede their remedy by action. If they had a right to sell the shares when the note became due, they were not bound to do so. If they had been actually sold, and the value realized in cash, it might have operated as payment *de facto*, but not till then: *Rice v. Catlin*, 14 Pick. 221; *Middlesex Bank v. Minot*, 4 Met. 325. A very different rule may apply where money is advanced or property consigned for sale. There the pledgee takes upon himself the duties, and may be held to the responsibilities, of an agent or factor to sell the goods consigned and account for the proceeds before he can require payment of the advance: *Porter v. Blood*, 5 Pick. 54. But that is a very different question, which it is not now necessary to decide, because here the plaintiffs did not take to themselves the character

or duty of agents to sell the shares, but simply took them to hold as security, with perhaps a power to sell. Till such power executed, they were under no obligation to account for the shares. The remedy of the defendant was in paying his debt, and redeeming them. Nor can we perceive that the letter of the plaintiffs to the defendant of September 15, 1841, made any difference in the relations of the parties. It was notice that they claimed a right to sell, and intended to sell, the shares; but until such intention was carried into effect by an actual sale, the shares remained as they did before. The beneficial interest was in the defendant, subject to a mortgage or pledge to the plaintiffs. Of course they remained at the risk of the defendant."

¹ *Wilkinson v. Culver*, 33 Fed. Rep. 708.

² *Alexandria etc. R. R. Co. v. Burke*, 22 Gratt. 254.

³ Story on Bailments, sec. 320; Story's Eq., secs. 1031-1033; *Kemp v. Westbrook*, 1 Ves. Sr. 278.

⁴ 4 Johns. Ch. 490; 8 Am. Dec. 607.

blended with other shares of the same stock belonging to the defendants. It was held that as the defendants at all times since securing the note were possessed of shares standing in their names, and under their absolute and rightful control, and subject to no contract, to an amount far exceeding the number of shares deposited by plaintiff, and were ready and able at any time to transfer the shares of the plaintiff on payment of the note, they were not bound to account to the plaintiff for his stock at the highest price at which the shares were sold by them at any time during that period, but that the like number of shares held by the defendants when the note became due were to be considered the shares of the plaintiff, which the defendants could sell.

ILLUSTRATIONS.—Stock worth about par was deposited as collateral security. *Held*, that the creditor was not compelled, on failure of the debtor to pay the debt, to sell the collateral, though under Georgia Code, section 2140, he had the option to do so; and his not selling, though he knew that the debtor had failed in business, and the subsequent depreciation of the stock, constituted no defense to an action on the debt, it not appearing that the debtor took any steps to secure a sale; and this, though the stock was transferred on the books, and new stock issued to the creditor: *Colquitt v. Stultz*, 65 Ga. 305. Defendant borrowed money from a bank, and gave as collateral for his notes shares of a factory stock. Before and after the notes became due, defendant notified the bank to sell the collateral. The bank, however, did not make the sale for a considerable time afterwards, when the factory stock was very much lower. In a suit brought by the bank on the notes, defendant charged that the delay in selling was in pursuance of a conspiracy on the part of certain of the bank officers to depreciate the factory stock for their own private purposes. *Held*, that although, ordinarily, the pledgor of collateral cannot force its sale at pleasure, yet the facts charged, if true, would avail defendant: *Napier v. Central Georgia Bank*, 68 Ga. 637. It is agreed that shares of stock pledged as collateral security for a note may be sold by the pledgee at his discretion, and without notice to the pledgor. *Held*, that the former is not bound to sell the stock at the request of the latter immediately upon default; his refusal to do so may or may not be negligent; the pledgee may exercise his own judgment as to the sale of the stock, and is liable only for neg-

ligence: *Franklin Savings Inst. v. Preetorius*, 6 Mo. App. 470. Plaintiff's declaration in tort alleged that he pledged stock to defendant as collateral to a note; that when the note matured, defendant could not find the stock; and that, before he found it (plaintiff not paying the note before the stock was found nor alleging a tender), plaintiff had lost an opportunity to sell it, so that a loss resulted, etc. No conversion was alleged. *Held*, that no cause of action was stated: *Cumnock v. Newburyport Savings Inst.*, 142 Mass. 342; 56 Am. Rep. 679.

§ 1769. Pledgee may also Sue Pledgor Personally.—The pledgee may, notwithstanding the possession of the security, sue the pledgor personally for the debt, without selling the pledge,¹ and judgment against the pledgor does not require the pledgee to give up the pledge.² His promise to give up the pledge would be without consideration, and unenforceable.³ If the thing pledged does not bring sufficient to pay the debt, the balance is a personal charge against the debtor, and may be recovered as such.⁴ If the pledge is lost, the pledgee cannot recover the debt for which it was security, without showing that the loss was not attributable to his fault.⁵ A pledgee is not obliged to present his claim to the administrator of the pledgor unless he seeks recourse against other property of the estate than that pledged.⁶

§ 1770. Right of Pledgee to Transfer Pledge — Rights of Purchasers.—The pledgee has no right to transfer or alienate the property⁷ beyond his interest in it. But a transfer or sale of negotiable securities which pass by

¹ Story on Bailments, sec. 315; *Elder v. Rouse*, 15 Wend. 218; *West v. Carolina Ins. Co.*, 31 Ark. 476; *Bank of Rutland v. Woodruff*, 34 Vt. 89; *Dugan v. Sprague*, 2 Ind. 600; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Jones v. Scott*, 10 Kan. 33. He may even attach the very property he holds as pledgee: *Buck v. Ingersoll*, 11 Met. 226; *Arendale v. Morgan*, 5 Sneed, 703; *Whitwell v. Brigham*, 19 Pick. 117; or other property: *Taylor v. Cheever*, 6 Gray, 146.

² *Smith v. Strout*, 63 Me. 205; *Darst v. Bates*, 95 Ill. 403; *Charles v. Coker*, 2 S. C. 122; *Archibald v. Argall*, 53 Ill. 307; *Butterworth v. Kennedy*, 5 Bosw. 143.

³ *Smith v. Strout*, 63 Me. 205.

⁴ *Faulkner v. Hill*, 104 Mass. 188.

⁵ *Crocker v. Monrose*, 18 La. 553; 36 Am. Dec. 660.

⁶ *Kibbe's Estate*, 57 Cal. 407.

⁷ Story on Bailments, sec. 322; *Lucketts v. Townsend*, 3 Tex. 119; 49 Am. Dec. 723.

delivery to a *bona fide* purchaser for value without notice gives him an absolute property in the pledge.¹ If, however, there was anything to put the purchaser on inquiry as to the pledgee's title, there he will not be protected.² The pledgee of a certificate of stock which has printed thereon a by-law which provides that no transfer of the stock shall be made while the owner is indebted to the corporation takes it with notice.³ The rule as to negotiable securities, however, does not apply to stock,⁴ and the purchaser from the pledgee will not be protected beyond his vendor's interest in it, unless the pledgee had been held out as the pledgor's agent, or otherwise the purchaser had a right to assume he had authority.⁵ Mr. Schouler says: "As distinguished from bailees with merely a lien, our law allows one in possession of a pledge an extensive right of transfer. It has long been admitted that a pledgee may assign over the pledge so that the assignee shall take it subject to all the responsibilities under the original pledge transaction; or may deliver it into the hands of a stranger for safe custody; or may convey his interest conditionally by way of pledge to another person; in all of which cases his security will not be destroyed or impaired.⁶ But any such act on the pledgee's part is understood to be subject to all the original restrictions; for to attempt to pledge property beyond the pledgee's own demand, or to make transfer as though he

¹ Story on Bailments, secs. 322, 323; Coit v. Humbert, 5 Cal. 260; 63 Am. Dec. 128; Morris Canal Co. v. Fisher, 9 N. J. Eq. 667; 64 Am. Dec. 423.

² Shaw v. Spencer, 100 Mass. 382; 97 Am. Dec. 107; Ashton v. Atlantic Bank, 3 Allen, 217.

³ State Savings Association v. Nixon-Jones Printing Co., 25 Mo. App. 642.

⁴ McNeil v. Tenth Nat. Bank, 40 Barb. 59; Ashton's Appeal, 73 Pa. St. 153. Story's statement of the law as different from this (Story on Bailments, sec. 322) is criticised by Mr. Schouler: Bailments, 211.

⁶ Crocker v. Crocker, 31 N. Y. 507;

88 Am. Dec. 291; Ogden v. Lathrop, 65 N. Y. 158; Thompson v. Toland, 48 Cal. 99; Conyngham's Appeal, 57 Pa. St. 474; Merchants' Bank v. Livingston, 74 N. Y. 223; Prall v. Tilt, 27 N. J. Eq. 393; West Transfer Co. v. Marshall, 4 Abb. App. 575.

⁶ Story on Bailments, secs. 314, 322-324; Mores v. Conham, Owen, 123; Whitaker v. Sumner, 20 Pick. 399; 2 Kent's Com. 579; Shelton v. French, 33 Conn. 489; Belden v. Perkins, 78 Ill. 449; Ashton's Appeal, 73 Pa. St. 153; Whitney v. Peay, 24 Ark. 22; Van Blarcom v. Broadway Bank, 37 N. Y. 540.

were the absolute owner, is a breach of trust, and a fraud upon the original pledgor.¹ And it may be questioned whether, under some circumstances, and as to certain kinds of chattels whose intrinsic qualities were presumably regarded, such as a valuable work of art, or private garments, a fair construction of the pledge contract would admit of passing the custody on to strangers at all, at the mere discretion of the pledgee, apart from his pledgor's special permission."² If the pledgee pledges the pledge for his own debt, the original pledgor may redeem on payment of the amount due from him.³ If the pledgee of stock hypothecated to him to secure a loan to the pledgor hypothecates the stock for his own debt, the original pledgor cannot recover it without paying his debt.⁴ Stock pledged as collateral, and wrongfully sold for non-payment without proper notice, cannot be pursued into a *bona fide* purchaser's hands without the clearest proof of knowledge of the loan and pledge.⁵ A pawnee may assign his interest without destroying the original lien, or giving the pawnor a right to reclaim on any other terms than he might before such assignment.⁶ A pledgee of a chattel may sell his interest in the same, and the owner cannot recover the same of the purchaser without tendering him the sum due thereon; and if the pledgee is suffered to retain possession after tender of the sum due, and a sale is made to an innocent purchaser who has no notice of the fact of its being only a pledge, the latter will acquire the title, even as against the real owner.⁷ The pledgee of collateral securities may exchange them without the consent of the pledgor, unless restricted by

¹ Story on Bailments, sec. 324.

² Schouler on Bailments, 201. See Cockburn, C. J., and Blackburn, J., in *Donald v. Suckling*, L. R. 1 Q. B. 585, 615, 618.

³ *Torrey v. Harris*, 12 Daly, 385.

⁴ *New York etc. R. R. Co. v. Davies*, 38 Hun, 477.

⁵ *Little v. Barker*, 1 Hoff. Ch. 487.

⁶ *Bullard v. Billings*, 2 Vt. 309; *Macomber v. Parker*, 14 Pick. 497; *Hunt v. Holton*, 13 Pick. 216; *Ferguson v. Union Furnace Co.*, 9 Wend. 345.

⁷ *Bradley v. Parks*, 83 Ill. 169.

the express terms of the pledge; but if loss result from the want of proper care and diligence, he is responsible to the pledgor for the extent of the injury.¹ Where a creditor, holding his debtor's note, and also the note of another person, as collateral, transfers them after maturity to different persons, the rights of the transferees depend on the priority of the transfers. A first transfer of the collateral extinguishes the original debt *pro tanto*, and the party taking a subsequent transfer of the original note takes it subject to a credit *pro tanto*. But if the original note is first transferred, the collateral will follow it into whosoever hands it passes, being subject in them to any defense the maker might have made in the first hands.²

ILLUSTRATIONS. — A pledgee of parcels of stock belonging to different persons wrongfully repledged them as collateral for a loan. *Held*, that the second pledgee would not be permitted by a court of equity to satisfy the loan out of the stock of any one owner, but that all should be disposed of, and the proceeds applied in such a way as to distribute the burden of the loan equitably upon all the owners: *Gould v. Central Trust Co.*, 6 Abb. N. C. 381. An assignment of a pledge without the debt secured by it, *held*, sufficient to sustain an action at law for the conversion of the pledge: *Easton v. Hodges*, 18 Fed. Rep. 677. M. borrowed six thousand dollars from an association of which B. was president, and deposited certain bonds and stocks to secure the repayment, but B. fraudulently converted them to his own use. On proof that the trustees had not exercised proper vigilance in their duties, *held*, that the receiver of the association could not recover the amount of the loan without allowing M. the value of the collaterals: *Cutting v. Marlor*, 17 Hun, 573. L. delivered to B. a certificate of stock, with transfer and irrevocable power of attorney in blank, as collateral for a loan from B. of three thousand dollars. B. applied to plaintiff's agent for a loan of eight thousand dollars on the stock, stating that he wanted it for a client, and having filled up the blank transfer and power of attorney, except the names of transferee and attorney, delivered it with the certificate to plaintiff's agent, who thereupon made the loan. B. was not in fact authorized by L. to borrow or to pledge the stock. B. having absconded, *held*, that L. might assert his title, and that plaintiff had no lien,

¹ *Girard etc. Insurance Co. v. Marr*, 46 Pa. St. 504.

² *Ware v. Russell*, 57 Ala. 43; 29 Am. Rep. 710.

except at most for three thousand dollars, being the amount loaned by B.: *Merchants' Bank v. Livingston*, 74 N. Y. 223. A corporation reduced its capital stock. *Held*, that a pledgee of some of the shares did not unlawfully convert them by surrendering the certificate to the corporation and accepting a new one: *Donnell v. Wyckoff*, 49 N. J. L. 48. The owner of certain land certificates deposited them with an agent for safe-keeping and sale, together with complete transfers in blank, properly acknowledged. The agent transferred them as collateral security for a loan. *Held*, that the owner could not maintain an action for the recovery of the certificates: *Stone v. Brown*, 54 Tex. 330. The owner of bank shares delivers to his brokers, to secure a balance of account, the certificate of the shares, indorsed with blank assignment and irrevocable power of transfer signed and sealed by himself, and the brokers, without his knowledge, pledge the shares with other securities for advances. *Held*, that one who pays the advances at the brokers' request, and in good faith receives from them the certificate of the shares and the other securities, is entitled to hold the shares, as against the owner, for the full amount of the advances remaining unpaid after the other securities are exhausted: *McNeil v. Tenth National Bank*, 46 N. Y. 325; 7 Am. Rep. 341. R. pledged his pianos to F., who employed him to assist him in caring for and renting them. R. rented one of them in his own name to D. F. notified D. that he was the owner, and D. agreed to hold it for and return it to him at the end of the lease. To satisfy his own debt, R. subsequently sold it to P., and assigned to him the lease, P. having notice of F.'s claim. P. notified D. of the sale and D. took a lease of him. In an action by P. to recover the piano from D., *held*, that D. might effectually set up the title of F. in defense: *Palmtag v. Doutrick*, 59 Cal. 154; 43 Am. Rep. 245. Bonds and stocks were pledged as collateral, it being stipulated that in case the debt should be reduced the pledgor might withdraw a proportional part. *Held*, that after reduction of the debt, and before withdrawal, he could transfer his right: *Indianapolis Bank v. Root*, 107 Ind. 224. A party made a contract with the author of a copyrighted historical work by which he purchased the exclusive right to publish the same. He afterwards had the work stereotyped, and entered into a contract with a firm of booksellers by which he sold them a half-interest in the stereotype plates, subject to his contract with the author. This party and the booksellers further agreed that the latter were not to dispose of the books without the written consent of the former, and also that if said firm of booksellers was dissolved, or became incapable of performing their contract, he was to have the right to claim the plates upon tendering to the booksellers the amount paid him therefor. *Held*, that the party had

as much right to recover the plates from a third party with whom they had been pledged, upon making the stipulated tender, as he had from the booksellers themselves: *Agnew v. Johnson*, 22 Pa. St. 471; 62 Am. Dec. 303.

§ 1771. **Pledgee must Use Ordinary Care.**—In the keeping of the pledge, the pledgee is bound to exercise ordinary care and diligence, and—as in all cases of mutual-benefit bailments—is liable for ordinary negligence.¹ Thus if the pledge be stolen, the pledgee is not liable, unless the theft was the result of his negligence.² Leaving valuable goods in a pawnbroker's house during the night, without any person on the premises, is not a careful dealing with the goods by the pawnbroker.³ In a New York case, a creditor who held a policy of life insurance on his debtor's life was held guilty of negligence in not keeping up the payment of the premiums.⁴ If by the fault of a creditor holding collaterals guaranteed by the debtor the collaterals become worthless, the creditor must bear the loss.⁵ The pledgee of a chose in action is bound to use ordinary or reasonable care and diligence to secure its payment when due.⁶ Where collaterals are placed by a debtor in the hands of his creditor, any failure on the part of the creditor to take steps in the ordinary course of collection, whereby the collaterals are rendered valueless, will make the creditor responsible for the loss.⁷ Where a creditor takes notes of third parties as collateral security for a debt, agreeing to collect them and credit the amounts on the debt, and then neglects to collect them, and allows them to become outlawed, he must account to the debtor

¹ *Third Nat. Bank v. Boyd*, 44 Md. 47; 22 Am. Rep. 35; *Erie Bank v. Smith*, 3 Brewst. 9; *St. Losky v. Davidson*, 6 Cal. 643; *Girard Fire Ins. Co. v. Marr*, 46 Pa. St. 504; *Petty v. Overall*, 42 Ala. 145; 94 Am. Dec. 635; *Com. Bank of New Orleans v. Martin*, 1 La. Ann. 344; 45 Am. Dec. 87; *Scott v. Crews*, 2 S. C. 522; *Maury v. Coyle*, 34 Md. 235; *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. 362; *Fleming*, 678.

v. Northampton Nat. Bank, 62 How. Pr. 175.

² *Petty v. Overall*, 42 Ala. 145; 94 Am. Dec. 635.

³ *Healing v. Cattrell*, 6 Jur., N. S., 96, note.

⁴ *Soule v. Union Bank*, 45 Barb. 111.

⁵ *Douglass v. Mundine*, 57 Tex. 344.

⁶ *Whitin v. Paul*, 13 R. I. 40.

⁷ *Harper v. Second Bank*, 12 Lea, 678.

for their loss.¹ A pledgee will not be chargeable with the depreciation in value of collaterals, unless his course has been characterized by bad faith or faulty discretion, so that not to charge him would be unjust to the pledgor.² If the pledgee fails to return the pledge as agreed, or returns it in a bad order, a presumption arises which requires him at least to satisfactorily explain the reason of the loss or injury.³ The pledgee is liable to the pledgor for the negligence of his agents or servants in or about the pledge.⁴ But he is not liable for the negligence of a lawyer whom he employs to collect pledged securities.⁵

ILLUSTRATIONS. — A borrowed money of a bank, and gave as collateral security bonds, which were taken from the bank by robbers, and for the conversion of which A sued. The only evidence tending to establish negligence on the part of the bank in Northampton, Massachusetts, was that the watchman went away at four, A. M., three hours before daylight, the robbery being committed after he left. *Held*, that a verdict for defendant should be directed: *Fleming v. Northampton Bank*, 62 How. Pr. 177. Action by the receiver of a bank against M. to recover the amount of a loan. *Held*, that the bank was chargeable with negligence, because the trustees left the entire management of the bank to the president, without vigilance; and M. was entitled to counterclaim the value of certain collateral securities converted by the president: *Cutting v. Marlor*, 78 N. Y. 454.

§ 1772. **Special Contract may Enlarge or Restrict.** — The rules of law as to the rights and liability of pledgors and pledgees may be varied, restricted, or enlarged by special contract between the parties.⁶

¹ *Sample and Birge Mfg. Co. v. Detwiler*, 30 Kan. 386.

² *Wells v. Wells*, 53 Vt. 1.

³ *Schouler on Bailments*, 192; *Story on Bailments*, sec. 339; *Crocker v. Monroe*, 18 La. 553; 36 Am. Dec. 661.

⁴ *St. Losky v. Davidson*, 6 Cal. 643; *Androsoggin R. R. Co. v. Auburn Bank*, 48 Me. 335.

⁵ *Commercial Bank v. Martin*, 1 La. Ann. 344; 45 Am. Dec. 87.

⁶ See *Lee v. Baldwin*, 10 Ga. 208, where it was agreed that the pledgor should collect the negotiable securities pledged, and not the pledgee; *St. Losky v. Davidson*, 6 Cal. 644, where the agreement was that the goods pledged should be stored in a certain warehouse. An agent of the pledgee removed them to another place, where they were injured. It was held that the pledgee was absolutely liable without regard to negligence. In

ILLUSTRATIONS. — A pledged property to the United States to secure the return of B's alcohol to a bonded warehouse in a certain district. The United States permitted the alcohol to be returned to a warehouse in another district. *Held*, that the condition of A's obligation was satisfied, and his pledge discharged: *Boehm v. United States*, 20 Ct. of Cl. 231. A, by a contract in writing, pledged to B certain tobacco, reciting that it was A's "own property, and free from all encumbrance, and all of the crop" of a certain year. B borrowed money of C, and delivered the tobacco to him, and gave him an assignment of all his "right, title, and interest in and under the contract, together with all the property therein mentioned." *Held*, that there was no implied warranty of the title to the tobacco, or of

Drake v. White, 117 Mass. 10, a creditor received of a debtor a safe, and agreed in writing to deliver it to the debtor, "or its equivalent in money, on payment of a certain note." The debtor paid the note and demanded the safe, but it had been destroyed by fire without the creditor's fault. The latter was held liable. "This," said the court, "is a case of deposit of personal property by a debtor in the hands of a creditor as collateral security for the debt. If it presented merely the ordinary incidents of a pledge, it would be manifest that the action could not be maintained. The destruction of the property is conceded to have been accidental, without fault or neglect of duty on the part of the defendants. But the claim of the plaintiff is, that the transaction differs widely from an ordinary pledge, and he contends that by the terms of a written contract the defendants have taken upon themselves a special liability of a much more extensive character. If, in the common case of a pledge, the common-law contract were reduced to writing, it would contain, among other things, a stipulation that the pledgee should not be responsible for the loss of the property, unless some want of reasonable and ordinary care on his part were the cause of such loss. In the present case the parties have reduced their contract to writing, and have omitted to attach to the defendants' liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things: either to return the property specifically, or to pay for it in money.

There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so. It is not difficult to suppose a case in which the parties might find it convenient that the business of guarding against the risk of fire or other accident should be attended to by the depository. But however that may be, the proper interpretation of the contract is to be determined by the general rules of construction recognized by the law; and if the parties have improvidently made their contract more onerous than they expected, the difficulty cannot be removed by a violation of those rules. It is said that the written instrument declared upon is a receipt, and, as such, is open to explanation. It is true that it is a receipt, but it is also a promise clearly expressed: *Brown v. Cambridge*, 3 Allen, 474. We see no way to avoid the conclusion that the plaintiff's construction of that promise is correct. The difficulty with the defendants' case is, that, although their purpose was to take collateral security for a debt, the terms in which they have expressed themselves as to what they are to do with the pledge on the payment of the debt contain a positive and unequivocal promise either to return it or to pay an equivalent. The fact that one part of this alternative promise has become impossible of fulfillment does not relieve them from the other: *Chitty on Contracts*, 11th Am. ed., 1061; *Stevens v. Webb*, 7 Car. & P. 60; *State v. Worthington*, 7 Ohio, 171."

its quality, between B and C: *Northampton Bank v. Massachusetts Loan and Trust Co.*, 123 Mass. 330. The defendants, wheat dealers, purchased wheat and stored it in warehouses on the river front for sale to shippers. A bank, from time to time, made advances on the wheat, under a written contract that it should be secured by the delivery of the warehouse receipts therefor, with a power of sale in case of default; such receipts containing a clause that in case of "flood" the property was at the risk of the "owner." The advances were repaid from time to time, as the defendants disposed of the wheat with the consent of the bank; but while a portion of it was still in the warehouse, it was injured by a rise in the river, and while the defendants were assuming to care for it. The security for this reason proving insufficient, the bank brought suit to recover the balance due, and the defendants set up the loss by the injury to the wheat as a counterclaim. *Held*, that the transaction was essentially a pledge, and the wheat remained the property of the defendants; but that, notwithstanding this, as it appeared that it was the intention and understanding of the parties that the defendants should care for the wheat in case of flood, the plaintiff was not liable for the loss: *Bank of British Columbia v. Marshall*, 11 Fed. Rep. 19; 8 Saw. 29.

§ 1773. Duty of Pledgee to Collect Pledged Negotiable Paper. — The pledgee of a negotiable security has a right to collect the sum, and sue for it if necessary, in his own name.¹ It is likewise the duty of a pledgee of negotiable paper to demand payment and collect it when it falls due. He is required to use "due diligence" in doing so,² and if the collateral is lost or impaired by the negligence of the pledgee in this respect, he is liable.³ But a transfer of a

¹ *Jones v. Hawkins*, 17 Ind. 550; *Hilton v. Waring*, 7 Wis. 492; *Nelson v. Wellington*, 5 Bosw. 178; *Bowman v. Wood*, 15 Mass. 534; *Lobdell v. Merchants' Bank*, 33 Mich. 408; *Houser v. Houser*, 43 Ga. 415; *White v. Phelps*, 14 Minn. 27; 100 Am. Dec. 190.

² *Wakeman v. Gowdy*, 10 Bosw. 208; *Roberts v. Thompson*, 14 Ohio St. 1; 82 Am. Dec. 465; *May v. Sharp*, 49 Ala. 140; *Noland v. Clark*, 10 B. Mon. 239; *Cardin v. Jones*, 23 Ga. 175; *Reeves v. Plough*, 41 Ind. 204; *Burrows v. Bangs*, 34 Mich. 304; *Goodall v. Richardson*, 14 N. H. 567; *Word v.*

Morgan, 5 Sneed, 79; *Jones v. Hawkins*, 17 Ind. 550; *Lambertson v. Wisdom*, 12 Minn. 232; 90 Am. Dec. 301; *Lazier v. Nevin*, 3 W. Va. 622; *Whitten v. Wright*, 34 Mich. 92; *Russell v. Hester*, 10 Ala. 335; *Mullen v. Morris*, 2 Pa. St. 85; *Rice v. Benedict*, 19 Mich. 132; *Barrow v. Rhinelander*, 3 Johns. Ch. 614; *Miller v. Gettysburg Bank*, 8 Watts, 192; 34 Am. Dec. 449. See *ante*, § 1771.

³ *Id.*; *Hanna v. Holton*, 78 Pa. St. 334; 21 Am. Rep. 20; *Smith v. Miller*, 43 N. Y. 171; 3 Am. Rep. 690; *Wakeman v. Gowdy*, 10 Bosw. 208; *Whitten v. Wright*, 34 Mich. 92. But

negotiable note as collateral security, which merely authorizes the creditor to receive the proceeds of the claim when collected, and apply them to the payment of the debt, does not make it the duty of the pledgee to prosecute the note to collection.¹ The failure to present and protest a note taken as collateral security will not defeat recovery of the original debt, where the amount of the note was not lost through the negligence of the creditor.² A creditor who receives from his debtor the note of a third party as collateral security, and, without negligence on his part, fails to collect such note when due, and afterwards, in the absence of any demand by the debtor, retains possession of the note, will not be prevented by those facts from recovering the full amount of his demand against such debtor.³ After the debt is paid, there is no obligation on the pledgee to collect the security.⁴ The pledgee has no right to compromise with the maker of the note and take a less sum than it calls for; if he does, he will be liable to the pledgor for the balance.⁵ But if a note was without consideration between the maker and the pledgee, and was pledged by the latter, the pledgee can only recover on it for the amount of his debt.⁶

ILLUSTRATIONS.—R. gave to a trust company his note for two thousand dollars, and transferred as collateral certain indorsed notes therein specified, adding, "I hereby give said trust company authority to sell the same . . . at public or private sale." *Held*, that this did not authorize the company to surrender the collaterals to the maker thereof after their maturity, without any effort to collect them, for a sum less than was due thereon, but enough to pay the principal debt, and R. could recover for the whole: *Union Trust Co. v. Rigdon*, 93 Ill. 458.

the holder of a note as collateral is not charged with the duty of an indorsee: *Kennedy v. Rosier*, 71 Iowa, 671.

¹ *Miller v. Gettysburg Bank*, 8 Watts, 192; 34 Am. Dec. 449.

² *Westphal v. Ludlow*, 2 McCrary, 505.

³ *Marschuetz v. Wright*, 50 Wis. 175.

⁴ *Overlock v. Hills*, 8 Me. 383.

⁵ *Garlick v. James*, 12 Johns. 146; 7 Am. Dec. 294; *Depuy v. Clark*, 12 Ind. 427.

⁶ *Fisher v. Fisher*, 98 Mass. 303; *White v. Phelps*, 14 Minn. 27; 100 Am. Dec. 190; *Lobdell v. Merchants' Bank*, 33 Mich. 408; *Houser v. Houser*, 43 Ga. 415; *Mayo v. Mayo*, 28 Ill. 428; *Stoddard v. Kimball*, 6 Cush. 469; *Lawrence v. McCalmont*, 2 How. 426.

§ 1774. **Right of Pledgor to Redeem.** — The pledgor has a right to redeem at any time before the pledge has been lawfully disposed of, by sale or otherwise, according to the contract.¹ Notice to redeem a pledge by payment of the debt is defective unless it allows a reasonable time for redemption.² If a certain time is fixed for the payment of the debt, the default of the pledgor to pay it at that time does not pass the property to the pledgee.³ The pledgee may, after proper notice, sell it; but if he does not do so, he may be compelled at any time, on tender of the debt, to restore it; for the statute of limitations does not run against the pledge.⁴ In the old cases it is said that where no time was limited for the redemption of the pledge, the pledgor has his whole lifetime to redeem, unless notified to do so earlier.⁵ But the modern rule is that the pledgor must not delay too long. Regardless of the life or death of the parties,⁶ the law looks to the time which has elapsed; and a court of equity will refuse to allow a pledgor to redeem so long after the default that the matter would be considered to have been settled, and the rights of the parties adjusted.⁷ Where goods are pawned as security for a running account, it is not essential that the pawnor should tender the amount of account before filing a bill to redeem.⁸ While the pledge remains in the possession of the pledgee, mere delay on the part of the pledgor to claim a redemption of the pledge for a period shorter than the time prescribed by the statute of

¹ Story on Bailments, sec. 345; Schouler on Bailments, 224. A stipulation in the contract that the pledge shall be irredeemable is illegal and void: Story on Bailments, sec. 345; Lucketts v. Townsend, 3 Tex. 119; 49 Am. Dec. 723.

² Genet v. Howland, 45 Barb. 560; 30 How. Pr. 360.

³ Cortelyou v. Lansing, 2 Caines Cas. 200.

⁴ Kemp v. Westbrook, 1 Ves. 278.

⁵ See Story on Bailments, sec. 348.

⁶ The right to redeem survives to the personal representatives of the

pledgor: Cortelyou v. Lansing, 2 Caines Cas. 200; Story on Bailments, sec. 348. And the pawnor may redeem against the representatives of the pawnee: Story on Bailments, sec. 348. See Hunt v. Nevers, 15 Pick. 500; 26 Am. Dec. 616.

⁷ Story on Bailments, sec. 346; Schouler on Bailments, 224, 225; Waterman v. Brown, 31 Pa. St. 161; White Mountain R. R. Co. v. Bay State Iron Co., 50 N. H. 37; Whelan v. Kinsley, 26 Ohio St. 131; Hancock v. Franklin Ins. Co., 114 Mass. 155.

⁸ Beatty v. Sylvester, 3 Nev. 228.

limitations as a bar to an action on the debt for which the pledge was held will not suffice to raise a presumption against the right of the pledgor to redeem.¹ Pledgors of bonds secured by mortgages may redeem the bonds, although the pledgee has foreclosed the mortgages, if he still retains possession of the bonds.² When a party who has pawned articles under a contract to pay greater interest on the money borrowed than the law allows tenders to the pawnbroker the principal and lawful interest thereon, he is entitled to the possession of his property, although the statute establishing the rate of interest in such cases only provides a penalty for, and does not prohibit, the charging of more than lawful interest.³

ILLUSTRATIONS.— Bonds of a corporation, payable to the holder, were converted by an agent, and were pledged to a person who received them in good faith, and without notice, though for an insignificant amount. The pledgee caused them to be sold, and bought them in himself through a third person. *Held*, that the title of one claiming under the purchase was sufficiently made out after the lapse of years and the death of the person who made the purchase, although there was no evidence as to the actual manner of sale: *Martin v. Somerville Water Power Co.*, 27 How. Pr. 161; 5 Am. Law Reg. 400. A slave was pledged, "to be redeemed at any time by the pledgor paying the amount which may be due." *Held*, that the slave could only be redeemed by payment of what was due at the time of redemption: *Bigelow v. Young*, 30 Ga. 121. A pledgor produced a blank check, offering to fill it up for the amount due on the pledge, but the pledgee declined receiving it, saying, "Let it be done to-morrow," and nothing more was done at the time. *Held*, that this was not a sufficient tender: *Dunham v. Jackson*, 6 Wend. 22. The 39 & 40 Geo. III., c. 99, sec. 17, declares that goods which are pledged and not redeemed within a year after the day of pledging shall be forfeited, and may be sold by the pawnbroker. *Held*, that where a party pawned a watch, and after the year expired tendered the money lent, and interest, to the pawnbroker, and he refuses to deliver it up, the owner might maintain trover, not having forfeited his title to the goods by reason of section 17: *Walter v. Smith*, 1 Dowl. & R. 1; 5 Barn. & Ald. 439.

¹ *Whelan v. Kinsley*, 26 Ohio St. 131.

² *R. R. Co. v. Iron Co.*, 50 N. H. 57.

³ *Jackson v. Shawl*, 29 Cal. 267.

§ 1775. **Duty of Pledgee to Return Pledge.**—It is the duty of the pledgee, the debt being discharged, to return the pledge and its increase to the pledgor.¹ So, also, where he is tendered the amount of his debt.² If the pledgee refuses to restore the pledge, he is then a wrongdoer, and he holds the pledge at his own risk.³ He must restore the thing received. The pledgee has no right to sell the pledge, and return to the pledgor other articles of the same kind and value;⁴ but where the pledgor knows that the article pledged will go into a mass of the same kind of goods, then it seems the pledgee may deliver the amount called for from that mass.⁵ One who takes collaterals to secure the repayment of borrowed money

¹ Story on Bailments, sec. 339; Lawrence v. Maxwell, 53 N. Y. 19; Mayo v. Avery, 18 Cal. 309; Fisher v. Brown, 104 Mass. 259; 6 Am. Rep. 235; Merrifield v. Baker, 9 Allen, 29; Gibson v. Martin, 49 Vt. 474; Houton v. Holliday, 2 Murph. 111; 5 Am. Dec. 522; Stearns v. Marsh, 4 Denio, 227; 47 Am. Dec. 248; Bryson v. Rayner, 25 Md. 424; 90 Am. Dec. 69.

² Story on Bailments, sec. 341; McLean v. Walker, 10 Johns. 471; Lawrence v. Maxwell, 53 N. Y. 19; McCalla, 55 Ga. 53; Doak v. Bank, 6 Ired. 309; Geron v. Geron, 15 Ala. 558; 50 Am. Dec. 143. A mere offer to redeem without a tender is insufficient: Potter v. Thompson, 10 R. I. 1; or a partial tender: Kittera's Estate, 17 Pa. St. 416.

³ Story on Bailments, sec. 341; Loughbrough v. McNevin, 74 Cal. 250; 5 Am. St. Rep. 435.

⁴ Dykers v. Allen, 7 Hill, 497; 42 Am. Dec. 87.

⁵ Horton v. Morgan, 6 Duer, 61; Saltus v. Gerrin, 3 Bosw. 257. In Gilpin v. Howell, 5 Pa. St. 41, 45 Am. Dec. 720, it is said: "It is, in general, true, that where the pledge is distinctive in its character, and therefore capable of being recognized among other things of like nature, or where a mark is set upon it with a view to its discrimination, the pledgee is bound to redeliver the identical article pledged, and cannot substitute something of

like kind, unless so authorized by the contract. But I think there is a manifest difference, *ex necessitate*, where the thing pledged, from its very nature, is incapable, in itself, of identification, if once mingled with other things of the same kind. In such case, it is the duty of the pledgee to put a mark upon it, by which it may be distinguished; for, as is said in Nourse v. Prime, 4 Johns. Ch. 490, 8 Am. Dec. 606, if a person will suffer his property to go into a common mass without making some provision for its identification, he has no right to ask more than that the quantity he put in should always be there and ready for him. By a just fiction of law, that residuum shall be presumed to be the portion he put in. The good sense of these remarks, made in immediate reference to a pledge of shares of bank stock, recommends them to our adoption. They are repeated by Chancellor Kent, in the same case reported in 7 Johns. Ch. 69, and noticed with approbation by Nelson, C. J., in Allen v. Dykers, 3 Hill, 593. Speaking of Nourse v. Prime, he says: 'As it appeared the defendants always had on hand the requisite quantity of shares, the law will presume the shares so on hand, from time to time, were the shares deposited, because the parties have not reduced the shares to any more certainty.'

retains them at his peril, when they are demanded by the borrower on the return of the money. It is no ground for retaining them that a third person claims them and has sued the lender for them, if, in fact, the borrower owns them.¹ A stock-broker with whom securities have been pledged as collateral to a loan has no right so to rehypothecate them that they cannot be restored to the owner on payment of the loan, even though both parties understood that the broker would have to use them to obtain the loan.² The pledgee of shares of stock, in the absence of a special agreement to the contrary, is entitled to have the shares transferred to his own name on the books of the company; and where such transfer is made, he is not bound to retain the identical shares pledged, so long as he keeps on hand an equal number of similar shares to answer the pledgor's demand on repayment of the loan.³ Where suit is brought to recover a debt for which collateral security has been given, it is incumbent on plaintiff either to restore the same or to account satisfactorily for its non-production. He cannot escape this duty by showing that the collateral, subsequent to its deposit, has become worthless.⁴ A pledgee cannot set up, as against the pledgor, the title of a third person to the property.⁵ He is allowed, however, a reasonable time after the tender before making delivery.⁶ A pledgee is under obligation to return any increase of the thing pledged, as well as the thing itself. Hence where the case showed that defendant received money of plaintiff to secure him for becoming bail for another at plaintiff's request, and gave plaintiff his accountable receipt therefor, and defendant subsequently loaned the money, and received the interest for its use, it was held that he

¹ *Cass v. Higenbotam*, 100 N. Y. 248.

² *Oregon and Transcontinental Co. v. Hilmers*, 20 Fed. Rep. 717.

³ *Hubbell v. Drexel*, 11 Fed. Rep. 115; 21 Am. Law Reg., N. S., 452.

⁴ *Stuart v. Bigler*, 98 Pa. St. 80.

⁵ *Godfrey v. Pell*, 49 N. Y. Sup. Ct. 226.

⁶ *Dunham v. Jackson*, 6 Wend. 22; *McAlla v. Clark*, 55 Ga. 53; *Dewart v. Masser*, 40 Pa. St. 302.

was liable for the interest thus received, and that parol evidence was admissible to show the facts that created his liability.¹

Upon the refusal of the pledgor to redeliver the article, the pledgor may bring trover or replevin for its recovery; or where there are accounts to be settled, or discovery is desired, he may file a bill in equity for redemption.² If the pledgee convert the pledge, the pledgor may maintain trover or *assumpsit* against him, or when sued for the debt, may set off the value of the property converted.³ Where a pledgee has sold the pledge without right to do so, —e. g., where he sells without sufficient notice, —no tender of the debt is necessary before suit for the conversion. The pledgee having voluntarily put it out of his power to restore the pledge, a tender would be fruitless.⁴

ILLUSTRATIONS.—A pledgee of stocks mingled them with others of the same kind owned by himself, so that they could not be distinguished, and then, after giving notice to the pledgor, sold a number of shares equal to the number pledged. *Held*, that the pledgee was only bound to charge himself with the price received at this sale, and not with a higher price at which the same stock was afterwards sold: *Berlin v. Eddy*, 33 Mo. 426; *Nourse v. Prime*, 7 Johns. Ch. 69; 11 Am. Dec. 403. The plaintiff pledged to the defendants, as collateral security for a loan, a number of shares of the stock of a railroad company, the agreement between the parties providing that the defendants might sell such shares upon failure of the plaintiff to repay the loan according to the terms of the agreement, and providing that the defendants should not be obliged to return the identical certificate of stock delivered by the plaintiff. *Held*, that, notwithstanding such last-mentioned clause in the agreement, the defendants were liable for conversion, upon refusal to return the shares after repayment of the loan: *Hardy*

¹ *Gibson v. Martin*, 49 Vt. 474.

² *Bartlett v. Johnson*, 9 Allen, 530; *Conyngham's Appeal*, 57 Pa. St. 474; *Hasbrouck v. Vandervoort*, 4 Sand. 74; *Merrill v. Houghton*, 51 N. H. 61; *White Mountain R. R. Co. v. Bay State Iron Co.*, 50 N. H. 57; *Chapman v. Turner*, 1 Call, 280; 1 Am. Dec. 514; *Brown v. Runals*, 14 Wis. 693;

Flowers v. Sproule, 2 A. K. Marsh. 54.

³ *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248.

⁴ *Cortelyou v. Lansing*, 2 Caines Cas. 200; *Dykers v. Allen*, 7 Hill, 497; 42 Am. Dec. 87; *Wilson v. Little*, 2 N. Y. 443; 51 Am. Dec. 307; *Lewis v. Graham*, 4 Abb. Pr. 106.

v. *Jaudon*, 1 Robt. 261. A. and G. each owned shares of stock in a mining company, all the shares being of equal value. A. delivered a number of shares to G., to be held as collateral securities for money advanced by G. to pay assessments upon the stock of A., and to be sold by G. whenever he could obtain not less than five hundred dollars per share. G. transferred certain of A.'s shares for less than the price named, in fulfillment by G. of a contract for a sale of his own stock; and on settlement with A., G. transferred an equal number of his own shares to A., exchanging receipts with him in full of all demands. Subsequently A. sued G. for the amount of money received for the shares sold, alleging that the settlement had been procured by false representations on the part of G., and G. defended by showing that he transferred the shares in fulfillment of a contract for the sale of his own stock, and that he at all times had and held for A.'s use an equal number of shares of equal value, and that he had so replaced them. *Held*, that G. did not become responsible for the proceeds of the sale of the shares. The technical breach of trust presents a case of *damnum absque injuria*: *Atkins v. Gamble*, 42 Cal. 86; 10 Am. Rep. 282. On the 24th of July goods were pledged with a pawnbroker in the name of Mary Warne, and the duplicate was made out accordingly. She was, in fact, the wife of the plaintiff, but it did not appear that this fact was then known to the pawnbroker. A few days afterwards the same person applied to him for a copy of the duplicate and a form of declaration of the loss of it. On the 6th of August the plaintiff produced the duplicate to the pawnbroker and demanded the goods, tendering the money advanced on them and interest, but he refused to deliver them, on the ground of the declaration having been obtained. The plaintiff applied to a magistrate to compel him, and the pawnbroker then (on the 9th of August) learned that the party who pledged the goods was the plaintiff's wife. *Held*, that the judge was wrong in directing the jury that the detention of the goods was in point of law a conversion; and that he ought to have left it to them to say whether the pawnbroker had a *bona fide* doubt as to the title of the goods; and if so, whether a reasonable time for that doubt to be cleared up, by the party going before a magistrate and verifying the declaration, had elapsed on the 6th of August; and if it had, that the refusal then to deliver them to the plaintiff amounted to a conversion: *Vaughan v. Watt*, 6 Mees. & W. 492.

§ 1776. **Other Duties of Pledgor and Pledgee.**—The pawnor or pledgor impliedly warrants that he is the

owner of the thing pawned or pledged,¹ and that there are no secret defects in it.² He is estopped from afterwards asserting that he did not own it.³ One who has voluntarily made a pledge to secure the payment of an illegal demand against him is not afterwards entitled to reclaim the same without payment of the demand.⁴ He must reimburse the pledgee for all expenses and charges incurred in the preservation of the thing.⁵ A pawnbroker who sells a chattel as a forfeited pledge merely undertakes that the subject of the sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it.⁶ One to whom a pledgee wrongfully delivers the pledge cannot avail himself of the fact that the owner is indebted to the pledgee as a defense against the owner's action.⁷ A pledgee may recover what is due him, although he has been guilty of converting the property pledged. The pledgor's damages may be recouped or offset.⁸

It is the duty of the pledgee who realizes on the pledge to hold the balance after payment of the debt for the pledgor and to pay it over to him.⁹ So it is the duty of

¹ Story on Bailments, sec. 354; *Mairs v. Taylor*, 40 Pa. St. 446; *Goldstein v. Hort*, 30 Cal. 372.

² Story on Bailments, sec. 355.

³ *Goldstein v. Hort*, 30 Cal. 372.

⁴ *King v. Green*, 6 Allen, 139.

⁵ Story on Bailments, sec. 357; *Blake v. Paul*, 29 Leg. Int. 366.

⁶ *Morley v. Attenborough*, 3 Ex. 500; 13 Jur. 282; 18 L. J. Ex. 148.

⁷ *Felt v. Heye*, 23 How. Pr. 359.

⁸ *Levy v. Loeb*, 47 N. Y. Sup. Ct. 61; affirmed in 75 N. Y. 609.

⁹ In *Hunt v. Nevers*, 15 Pick. 500, 26 Am. Dec. 616, Shaw, C. J., says: "It is a general rule that where collateral security is received for a debt, with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary, and the law makes the application. If the proceeds equal or exceed the

amount of the debt, it is *de facto* paid; no action would lie for it; and proof of these facts would support the defense of payment. It is like the ordinary case of a banker or factor receiving securities of his principal, by indorsement or otherwise, on which he has a lien for his advances; when received, the proceeds operate as payment *pro tanto*. It follows as a necessary consequence that an amount equal to the existing debt only can be applied; the debt is then satisfied and discharged, and if there be a surplus, it is money had and received to the use of the indorser, the beneficial proprietor of the note. It is money which the defendant cannot hold *ex æquo et bono*, and therefore the law implies a promise to pay it over: *Randall v. Rich*, 11 Mass. 494. Another ground taken was, that the plaintiff was not entitled to recover in this action until a special demand proved. It is a familiar

the pledgee to render an account of the income from the thing, its profits, and so forth.¹ If the profits of the pledge while in the pledgee's hands have been sufficient to discharge the debt, the pledgor is entitled to receive back the pledge intact.² A pledgee who, in replevin for the pledge, recovers judgment for its value in money, which realizes him more than the amount of his demand, holds the balance in trust for the pledgor.³ A pledgee with power of sale in case of a refusal to account will be held accountable for the whole amount of goods pledged at the highest market price.⁴ Where a pledgee of goods authorizes the pledgor to sell them and pay over the price to him, and the pledgor accordingly sells the goods to a third person, who agrees to make payment to the pledgee, such purchaser is liable in an action by the pledgee for the whole price, and cannot set off a debt due him from the pledgor.⁵

ILLUSTRATIONS.—A pledgee of bonds innocently delivered them to the pledgor's vendee, on the pledgor's request, and received the price. *Held*, not to have warranted their genuineness: *Baker v. Arnot*, 5 Thomp. & C. 215; 2 Hun, 682; affirmed 67 N. Y. 448. A wrongfully pledged for his own debt stock left with him as bailee. The pledgee sold the same. *Held*, that A could not recover from the pledgee the difference between his debt and the amount realized from the stock: *Persch v. Consolidation Bank*, 13 Phila. 157. A

general rule, that on the common money counts, proving the money had and received to the plaintiff's use, and laid out and expended at the defendant's request, raises an implied promise to pay on demand, and as matter of form, the count closes with a *scpe requisitus*, but no proof of demand is necessary to support this averment, and the service of the writ is deemed a demand. This is a fiction of law, and may sometimes tend to hardship and injustice by subjecting a defendant to costs which he would have avoided by payment of the debt; but it is adopted as a useful, general, practical rule, not often liable to abuse, because creditors are so uni-

formly disposed to receive their dues from debtors willing to pay, and tending, on the whole, to promote justice by saving creditors the necessity of making a formal demand, to be proved by witnesses, which would be generally fruitless, often impossible, and still oftener, when made, a signal to debtors to avoid legal process. But whether a wise rule or not, it is settled by universal practice."

¹ Story on Bailments, sec. 343; *Hunsaker v. Sturgis*, 29 Cal. 142.

² *Geron v. Geron*, 15 Ala. 558; 50 Am. Dec. 143.

³ *Miles v. Walther*, 3 Mo. App. 96.

⁴ *Simes v. Zane*, 1 Phila. 501.

⁵ *Nottebohm v. Maas*, 3 Robt. 249.

pawnbroker had notice that the person pawning a ring with him was not the real owner, and that he had assigned the ticket to the real owner, and he subsequently gave up the pledge to the pawnor on an affidavit of loss of the ticket. *Held*, he was liable to the real owner for its value: *Duell v. Cudlipp*, 1 Hilt. 166.

§ 1777. **Pledge, how Extinguished.**—The pledge is extinguished,—

1. By the payment of the debt, or the discharge of the engagement for which it was given.¹ A tender of the debt after its maturity extinguishes the lien on personal property pledged to secure its payment, and the pledgor may recover the pledge, or its value, in any proper form of action, without keeping the tender good, or bringing the money into court; and the pledgee may have his action for the debt.² A pledge ceases to be operative when its object is effected, and the whole beneficial interest in the security pledged then becomes absolute in the equitable owner.³

2. By taking a higher or different security for the same debt.⁴ In the absence of any special agreement to such effect, the renewal of a note is not a payment in such sense as to discharge the creditor's claim on collateral security.⁵ The renewal of a note by the same parties is a mere change of evidence of indebtedness, and in no way affects a pledge made to secure it.⁶

3. If the possession is relinquished, the pledgee's rights are extinguished.⁷ A receipted bill of parcels of

¹ Story on Bailments, sec. 359; *Merrifield v. Baker*, 9 Allen, 29.

² *Mitchell v. Roberts*, 17 Fed. Rep. 776; *Loughborough v. McNevin*, 74 Cal. 250; 5 Am. St. Rep. 435. A tender having been refused without sufficient reason, the pledgee loses his right to retain the pledge as against another creditor of the pledgor who has, subsequent to the making of the pledge, acquired rights in the property, although the pledgor did not keep his tender good: *Norton v. Baxter*, Minn., 1889.

³ *Ward v. Ward*, 37 Mich. 253.

⁴ Story on Bailments, sec. 360.

⁵ *Collins v. Dawley*, 4 Col. 138; 34 Am. Rep. 72.

⁶ *Bank of America v. McNeil*, 10 Bush, 54.

⁷ *Kimball v. Hildreth*, 8 Allen, 167; *Beeman v. Lawton*, 37 Me. 543; *Russell v. Fillmore*, 15 Vt. 135; *Eastman v. Avery*, 23 Me. 248; *Bonsey v. Amee*, 8 Pick. 236; *Homes v. Crane*, 2 Pick. 607; *Look v. Comstock*, 15 Wend. 244; *Day v. Swift*, 48 Me. 368; *Shaw v. Wilshire*, 65 Me. 485; *Mills v. Stewart*,

chattels, purporting on its face to be as security for a debt, is a pledge, and not a mortgage; and if the pledgee, after receiving possession of the chattels, permits the pledgor to resume possession of them, and to hold them until his death, he cannot, by then taking possession of them, defeat the right of the administrator to maintain against him an action for their conversion.¹ But the possession is not necessarily relinquished by permitting the pledgor to use it. "Suppose that A keeps a livery-stable, and sells a horse, or pledges a horse, to B, and delivers the possession to B accordingly, may not B keep the horse at the same stable afterwards without losing his possession? From and after the delivery A acts in the character of livery-stable keeper merely, not in character of owner. Suppose that A, having so pledged and given possession of the horse, should go and live with B as a coachman, and B should send him with the horse to be shod on his account by the blacksmith, could it be maintained that B had waived or lost the possession of his pledge? Clearly not."² Therefore, if the thing is delivered back to the owner in a new character, as a special bailee or an agent, for example, the pledgee will still be entitled to it, both as against the owner and third persons.³ So if the thing is delivered back to the owner for a special purpose, as to be returned to the pledgee if not exchanged for another security, the pledgee does not relinquish possession of it so as to lose his lien upon it.⁴ And of course

5 Humph. 308; *Treadwell v. Davis*, 34 Cal. 601; 94 Am. Dec. 770; *Black v. Bogert*, 65 N. Y. 601; *Barrett v. Cole*, 4 Jones, 40; *Citizens' Nat. Bank v. Hooper*, 47 Md. 88; *Whitaker v. Sumner*, 20 Pick. 399. "To constitute a pledge, the pledgee must take possession; and to preserve it, he must retain possession": *Walker v. Staples*, 5 Allen, 34; *Collins v. Buck*, 63 Me. 459; *Fletcher v. Howard*, 2 Aiken, 115; 16 Am. Dec. 686.

¹ *Thompson v. Dolliver*, 132 Mass. 103.

² *Putnam, J., in Macomber v. Par-*

ker, 14 Pick. 509; *Reeves v. Capper*, 5 Bing. N. C. 136; *Ingalls v. Van Bokkelen*, 7 Cow. 670; *Jones v. Baldwin*, 12 Pick. 316.

³ *Clark v. Iselin*, 21 Wall. 360; *Hutton v. Arnett*, 51 Ill. 198; *Cooper v. Ray*, 47 Ill. 53; *White v. Platt*, 5 Denio, 269; *In re Rawson*, 2 Low. 519; *Thayer v. Dwight*, 104 Mass. 257.

⁴ *Hays v. Riddle*, 1 Sand. 248; *Way v. Davidson*, 12 Gray, 465; 74 Am. Dec. 604; *Wolcott v. Keith*, 7 Fost. 196. *Contra*, *Bodenhammer v. Newsom*, 5 Jones, 107.

where it is wrongfully divested, either by force or fraud, it will be no relinquishment.' The rule that a delivery of possession of the pledge by the pledgee back to the pledgor, with the pledgee's consent, terminates his title, unless delivered back for a temporary purpose, or to be held by the pledgor in a new character, was applied where a bank used to lend money to a broker, taking collateral security, which was allowed to be withdrawn next day on his individual check.² A pledgee for value may temporarily loan to the pledgor the property pledged for a special purpose, and recover in trover if the property be not returned to him.³

4. By a release or waiver of the security by the pledgee.⁴ If a pledgee attaches the goods pledged as the pledgor's property, he abandons the lien of his pledge.⁵

5. When the debt is barred by prescription or limitation.⁶

6. Where the thing pledged has been lost.⁷ But loss or depreciation in value of the thing pledged through negligence of the pledgee does not operate to extinguish *pro tanto* the debt secured.⁸

7. When a third person pledges his property as security for the payment of a debt or obligation of another, it stands in the position of a surety of a debtor, and any change in the contract of suretyship which will discharge a surety will release and discharge the property so held as collateral.⁹

ILLUSTRATIONS.—The pledgee of property (an omnibus) delivered back the possession to the owner for a temporary

¹ Roberts v. Wyatt, 2 Taunt. 268; all: Macomber v. Parker, 14 Pick. Way v. Davidson, 12 Gray, 465; 74 507.
Am. Dec. 604; Soule v. White, 14
Me. 436; Wolcott v. Keith, 2 Fost.
196; Bruley v. Rose, 57 Iowa, 651.

² Citizens' Nat. Bank of Baltimore v. Hooper, 47 Md. 88.

³ Hutton v. Arnett, 51 Ill. 198.

⁴ Homes v. Crane, 2 Pick. 607. But a waiver of a part is not a waiver of

⁵ Cit. Bank v. Dows, 68 Iowa, 460.

⁶ See Story on Bailments, sec. 362, as to this point, which does not appear one well settled in our law.

⁷ Story on Bailments, sec. 363.

⁸ Cooper v. Simpson, Minn., 1889.

⁹ Price v. Dime Sav. Bank, 124 Ill. 317; 7 Am. St. Rep. 367.

purpose only, and after the accomplishment thereof, the property was returned to him; and the pledgor subsequently, and while the property was in the possession of the pledgee, mortgaged it to a third person. *Held*, that the mortgage lien thus acquired was subordinate to the title of the pledgee: *Cooper v. Ray*, 47 Ill. 53. A master of a ship pledged his chronometer to the owners. They permitted him to keep it on the ship and use it for the purpose of navigation. *Held*, that they had not parted with the possession: *Reeves v. Capper*, 5 Bing. N. C. 136. Corporation stock, held as collateral to secure certain notes, was transferred by the holder to relatives to avoid liability as a stockholder, he taking back the certificates with a power of attorney to him to transfer. *Held*, that there was nothing in the transaction which amounted to a conversion of the stock, or such a misappropriation as would discharge a surety on the note: *Heath v. Griswold*, 18 Blatchf. 555. A pledgee was induced by fraud to release the property pledged, and to receive bills of exchange instead. *Held*, not to have elected to affirm the transaction, nor to have waived his right to reclaim the goods, because before obtaining information that would enable him to trace the goods he brought suit upon the bills: *Easton v. Hodges*, 18 Fed. Rep. 677. Part of a note was paid, for which there was collateral security, and a new note given for the balance. *Held*, in absence of agreement to the contrary, that the security still stood for the new note: *Dayton Bank v. Merchants' Bank*, 37 Ohio St. 208. R. pledged his pianos to F., but was allowed by F. to take care of and rent them. He let one to D., but took the lease in his own name. D., however, agreed with F. to hold the piano for him. R. gave to P., who had knowledge of F.'s rights, a bill of sale of the pianos, and an assignment of the lease. D. accepted a lease from P. In a suit by P. against D., *held*, that F. had not lost his lien, and that D. could set up F.'s title as a defense to the suit: *Palmtag v. Doutrick*, 59 Cal. 154; 43 Am. Rep. 245. D. & Co. deposited certain goods with the plaintiffs as security for an advance. They afterwards obtained possession of the goods by fraudulently representing to the plaintiffs that they had sold them to the defendants, and would hand over to the plaintiffs the money to be received in payment. D. & Co. obtained an advance from the defendants, and deposited the goods, with a power of sale, with them. *Held*, that, as the plaintiffs had parted with their special property in the goods to D. & Co., they could not recover them in an action from the defendants, who had obtained them *bona fide*, and for a good consideration: *Babcock v. Lawson*, L. R. 5 Q. B. D. 284; affirming L. R. 4 Q. B. D. 394.

PART III.—INNKEEPERS.

CHAPTER XC.

INNKEEPERS.

- § 1778. Innkeepers defined.
- § 1779. Boarding and lodging house keepers.
- § 1780. Who are "guests."
- § 1781. Innkeeper bound to receive public.
- § 1782. Innkeeper an insurer.
- § 1783. Extent of liability as to time, place, and quantity.
- § 1784. Who may bring action.
- § 1785. Innkeeper not liable.—Contributory negligence of guest.
- § 1786. Other cases.
- § 1787. Limitation of liability — By contract and notice.
- § 1788. By statute.

§ 1778. **Innkeepers Defined.**—An innkeeper is the keeper of a public house of entertainment.¹ The word "inn," as descriptive of a public house, is more familiar at the present day in the novel than in the newspaper. Of English origin, and adhered to yet in smaller towns and the country generally, it has been displaced in America to some extent by the word "tavern," and as applied to the more pretentious public houses of the cities, by that word of French origin, "hotel." An innkeeper, therefore, in this chapter, means the keeper of an inn, tavern, hotel, or other public place for the entertainment

¹ *Wintermute v. Clark*, 5 Sand. 247; *People v. Jones*, 54 Barb. 311; *Walling v. Potter*, 35 Conn. 183; *Kisten v. Hildebrand*, 9 B. Mon. 72; 48 Am. Dec. 416; *Mateer v. Brown*, 1 Cal. 221; 52 Am. Dec. 303; *Cromwell v. Stephens*, 2 Daly, 15. Innkeeper and boarding-house keeper distinguished in cases above, and in *Pollock v. Landis*, 36 Iowa, 651; *Smith v. Keyes*, 2 Thomp. & C. 650. See definitions in *In re Jones*, 3 Ch. Div. 457; *Smith v. Scott*, 2 Moore & S. 35; *Bonner v. Welborn*, 7 Ga. 296;

Com. v. Weatherbee, 101 Mass. 214; and of "tavern," in *State v. Chamblyss*, Cheves, 222; 34 Am. Dec. 593; *Rafferty v. New Brunswick Fire Insurance Co.*, 18 N. J. L. 480; 38 Am. Dec. 525; note to *Gray v. Com.* (9 Dana, 308), 35 Am. Dec. 137; *Overseers v. Warner*, 3 Hill, 150. A corporation may be an "innkeeper": *Dixon v. Birch*, L. R. 8 Ex. 135. A hotel-keeper is subject to the same liabilities as an innkeeper; *Jones v. Osborn*, 2 Chit. 454.

of strangers or visitors.¹ In an English case,² an inn was defined to be "a house where a traveler is furnished with everything which he has occasion for while on his way"; but since then the requirements of the public, the modes of traveling, and the necessities of individuals have changed somewhat, and the methods of keeping houses of entertainment have changed with them. Hence, at the present day, one is none the less an innkeeper because he does not provide wine, spirits, or malt liquors for his guests;³ or does not provide accommodation for his beast as well as for the man;⁴ or that he provides lodging only, and not meals.⁵ Nor does it matter that the patronage of the house comes there rarely, or only on certain periodical occasions.⁶ But one who entertains people only at some special gathering, as at a horse-race, or on infrequent and brief occasions for his private profit in his own house, is not an innkeeper.⁷ Farmers whose houses are situated along public roads of the country, who oc-

¹ *Taylor v. Monnot*, 4 Duer, 116; *Howth v. Franklin*, 20 Tex. 798; 73 Am. Dec. 218. In Florida, hotels are defined to be houses kept for the accommodation of twenty-five or more lodgers or boarders.

² *Thompson v. Lacy*, 3 Barr. & Ald. 286.

³ *Rhodes, J.*, in *Pinkerton v. Woodward*, 33 Cal. 596; 91 Am. Dec. 657.

⁴ *Id.*; *Thompson v. Lacy*, 3 Barn. & Ald. 283.

⁵ *Id.*; *Krohn v. Sweeney*, 2 Daly, 200; *Bernstein v. Sweeney*, 33 N. Y. Sup. Ct. 271; *Taylor v. Monnot*, 4 Duer, 16. The proprietor of a hotel conducted on the "European plan" is within the New York statute limiting the liability of innkeepers; *Bernstein v. Sweeney*, 33 N. Y. Sup. Ct. 271. The salaried manager of a hotel belonging to a company is not an innkeeper so as to be by law responsible for the goods and property of the guests, although the usual license under 1 Geo. IV., c. 61, has been granted to him personally: *Dixon v. Birch*, 42 L. J. Ex. 135; L. R. 8 Ex. 135; 21 Week. Rep. 443; 28 L. T., N. S., 360.

A sleeping-car proprietor is not an innkeeper: *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; 24 Am. Rep. 258; nor is a carrier of passengers by water: *Clark v. Burns*, 118 Mass. 275; 19 Am. Rep. 456.

⁶ *Kisten v. Hildebrand*, 9 B. Mon. 72; 48 Am. Dec. 416; *Clary v. Willey*, 49 Vt. 55. Mr. Schouler (*Bailments*, 250), citing the cases of *Southwood v. Myers*, 3 Bush, 681, *Bonner v. Welborn*, 7 Ga. 296, and *Parkhouse v. Forster*, 5 Mod. 427, which he states incline to the view that one who keeps open a public house merely for a short season of the year, at a watering-place, for instance, is not an innkeeper, says: "Any such statement, if not positively inaccurate, is misleading; for unless the manner of entertainment be of quite a limited and special description, one cannot well deny to a summer or winter hotel the capability of becoming in the fullest sense an inn for the time being."

⁷ *State v. Matthews*, 2 Dev. & B. 424; *Lyon v. Smith*, 1 Morris, 184; *Howth v. Franklin*, 20 Tex. 798; 73 Am. Dec. 218; *Kisten v. Hildebrand*, 9 B. Mon. 72; 48 Am. Dec. 416.

casionally, and even frequently, take in and accommodate travelers, and receive compensation therefor, are not innkeepers, nor are they liable as such.¹ By holding himself out as a general entertainer, one becomes an innkeeper. His acts, even in spite of his declarations, may fix this liability upon him.² He need not put up a sign that his house is an inn; if he in fact keeps one, it is sufficient.³ That an innkeeper has not taken out an innkeeper's license does not alter his liability to a guest.⁴ Where, in an action to recover property stolen while plaintiff was dining at defendant's restaurant, it appears that liquors were sold there, the court will presume the place to have been an inn, and defendant's liability that of an innkeeper, where by statute liquors could be sold lawfully only under a license to an innkeeper.⁵ One who provides food and drink alone, as the keeper of a restaurant or a saloon, is not an innkeeper.⁶

§ 1779. Boarding and Lodging House Keepers.—Boarding or lodging house keepers are not innkeepers. They differ in this, that while the innkeeper holds himself out as ready and is obliged to accommodate all who may come, the boarding or lodging house keeper takes whom he pleases, on what terms he pleases, and generally for a fixed time.⁷ So the former has a lien on his guest's goods for his pay, while the latter has not.⁸ Again, the

¹ *Howth v. Franklin*, 20 Tex. 798; 73 Am. Dec. 218.

² *Howth v. Franklin*, 20 Tex. 798; 73 Am. Dec. 218; *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657.

³ *Bac. Abr.*, Inns, B; *Dickerson v. Rogers*, 4 Humph. 179; 40 Am. Dec. 642.

⁴ *Dickerson v. Rogers*, 4 Humph. 179; 40 Am. Dec. 642. But *aliter* where the innkeeper sets up an innkeeper's rights: *Lord v. Jones*, 24 Me. 439; 41 Am. Dec. 391.

⁵ *Korn v. Schedler*, 11 Daly, 234.

⁶ *Carpenter v. Taylor*, 1 Hilt. 193; *Walling v. Potter*, 35 Conn. 183; *Doe v. Laming*, 4 Camp. 77; *R. v. Rymer*,

2 Q. B. Div. 136; even though he occasionally entertains a traveler, and provides him with lodging: *Kisten v. Hildebrand*, 9 B. Mon. 73; 48 Am. Dec. 416. In *Lewis v. Hitchcock*, 10 Fed. Rep. 4, 13 Rep. 279, it is said that a place called a "restaurant" may or may not be an inn.

⁷ *Williard v. Reinhardt*, 2 E. D. Smith, 148; *Cromwell v. Stephens*, 2 Daly, 15. The right to carry on business is not included in a mere right to lodge and be fed as a boarder: *Ambler v. Skinner*, 7 Robt. 561.

⁸ This is given, however, in some states by statute: *Story on Bailments*, sec. 475, note.

patrons of the inn are "travelers"; the boarders are permanent. The latter, who pursues the keeping of boarders or lodgers for a living, is again to be distinguished from the private housekeeper, who casually and under special circumstances takes an occasional boarder into his family.¹ A housekeeper who is not accustomed to take persons to board does not become a boarding-house keeper within the meaning of the New York hotel act of 1860, by reason of having received a guest in his house for an indefinite time, and with a general understanding that he was to be paid for the accommodations furnished.² One who is an innkeeper as to the general public may by a special arrangement with individuals who come to remain for some length of time become as to them a lodging or boarding house keeper.³ The liability of the boarding or lodging house keeper for the goods of boarders is, that he must take the same care of them as a prudent person would of his own.⁴ In a New York case the proprietor of a boarding and lodging house was held liable for loss of a guest's goods by theft committed by a stranger whom the housekeeper employed by the proprietor negligently permitted to visit the guest's room.⁵

§ 1780. Who are Guests.—To be a guest, and entitled to the privileges of one, the party must be, or have the

¹ Schouler on Bailments, 254; Cady v. McDowell, 1 Lans. 484.

² Cady v. McDowell, 1 Lans. 484.

³ Hall v. Pike, 100 Mass. 495; Pollock v. Landis, 36 Iowa, 651; Wiser v. Chesley, 53 Mo. 547; Cross v. Wilkins, 43 N. H. 332; Johnson v. Reynolds, 3 Kan. 257; Vance v. Throckmorton, 5 Bush, 41; 96 Am. Dec. 327; Lawrence v. Howard, 1 Utah, 142.

⁴ Dausey v. Richardson, 3 El. & B. 144; Wiser v. Chesley, 53 Mo. 547; Johnson v. Reynolds, 3 Kan. 257; Smith v. Read, 52 How. Pr. 14; 6 Daly, 33; Jeffords v. Crump, 5 Week. N. C. 10; Vance v. Throckmorton, 5 Bush, 51; 96 Am. Dec. 327. In Manning v. Wells, 9 Humph. 746, 51 Am. Dec. 688, the court say: "A pas-

senger or wayfaring man may be an entire stranger. He must put up and lodge at the inn to which his day's journey may bring him. It is, therefore, important that he should be protected by the most stringent rules of law enforcing the liability of the innkeeper. In such case, therefore, the law makes the innkeeper an insurer of the goods of his guest, except as to losses occasioned by the act of God or public enemies. But as a boarder does not need such protection, the law does not afford it. It is sufficient to give him a remedy when he shall prove the innkeeper has been guilty of culpable negligence."

⁵ Smith v. Read, 6 Daly, 33.

character of, a traveler.¹ But one, to be a guest, must put up at the inn for a lawful purpose. One who registers a prostitute as his wife, and occupies a chamber with her, is not a guest, and cannot recover money placed in the care of the clerk, which was lost because of his absconding.² The traveler or wayfarer is none the less a guest by making a special contract with the innkeeper for board by the week³ or month;⁴ nor does the length of time he remains alter his *status*, provided he retains his character as a traveler;⁵ nor the fact that he resides in the same

¹ Story on Bailments, sec. 477; Bennett v. Mellor, 5 Term Rep. 273; Norcross v. Norcross, 53 Me. 163; Lusk v. Belote, 22 Minn. 468; Manning v. Wells, 9 Humph. 746; 51 Am. Dec. 688; Neil v. Wilcox, 4 Jones, 146; Towson v. Havre de Grace Bank, 6 Har. & J. 47; 14 Am. Dec. 254. Slight circumstances have been held sufficient to constitute the party a guest: McDaniels v. Robinson, 26 Vt. 316; 62 Am. Dec. 574; Read v. Amidon, 41 Vt. 15; 98 Am. Dec. 560. In Schouler on Bailments, 256, it is said: "To lay it down, on the whole, who should be deemed a guest in the common-law sense is not easy; and here the facts in any case must guide the decision. Commonly, such a party is the temporary sojourner who puts up at the inn to receive in due course its customary lodging and entertainment; and so long as one keeps this transient character, he may well be so presumed. And yet the decisions show us that neither the length of one's stay, nor his place of permanent abode, nor the distance he may have traveled, nor his final destination, nor any special modification of the inn rates, nor the method of payment, can alone conclude the question. But all such circumstances enter as material into the proof, as likewise would the amount of accommodation supplied, and the comer's means of knowing what distinction his host observes between house boarders or lodgers and guests: Hall v. Pike, 100 Mass. 495, and cases *supra*. One who is only an innkeeper is presumed to lodge and entertain guests alone. But where an innkeeper is a victualer or bar-keeper besides,

or where he takes in both guests and boarders, the *status* of guest involves a careful consideration of all the circumstances: Hall v. Pike, 100 Mass. 495, and cases *supra*. Most will appreciate the distinction without being able to assign a governing test." The relation of innkeeper and guest may be created by the combined circumstances of delivery by the plaintiffs of their team to the hostler to be put up, laying aside their overcoats in the innkeeper's presence, calling for and taking dinner, and paying the bill on departure at night, though not calling for a room, and though stopping at the inn to attend trial of a suit brought against them by the innkeeper: Read v. Amidon, 41 Vt. 15; 98 Am. Dec. 560.

² Curtis v. Murphy, 63 Wis. 4; 53 Am. Rep. 242.

³ Berkshire Woolen Co. v. Proctor, 7 Cush. 417; Hall v. Pike, 100 Mass. 495; Norcross v. Norcross, 53 Me. 163; Jalie v. Cardinal, 35 Wis. 118; Smith v. Keyes, 2 N. Y. Sup. Ct. 650; Luna v. Dwinelle, 7 Alb. L. J. 44; Plum v. Jarnier, 3 Month. L. Bull. 36; Beale v. Posey, 72 Ala. 323; Shoecraft v. Bailey, 25 Iowa, 553; Ross v. Mellin, 36 Minn. 421.

⁴ Hancock v. Rand, 94 N. Y. 1; 46 Am. Rep. 112; Ross v. Mellin, 36 Minn. 421.

⁵ Story on Bailments, sec. 477; Norcross v. Norcross, 53 Me. 169; Allen v. Smith, 12 Com. B., N. S., 638; Lusk v. Belote, 22 Minn. 468; Hancock v. Rand, 94 N. Y. 1; 46 Am. Rep. 112; Jalie v. Cardinal, 35 Wis. 118; Vance v. Throckmorton, 5 Bush, 41; 96 Am. Dec. 327.

town.¹ "A person does not cease to be a guest by proposing to remain a given number of days, or by ascertaining the price that will be charged for his entertainment, or by paying in advance for a part or the whole of the entertainment, or paying for what he has occasion for as his wants are supplied."² But a person not a traveler, though he live at an inn, is not a guest; he is a boarder; as, for example, one who resides in the same place, and has no other home at the time,³ or one who is a permanent resident there,⁴—they are boarders, not guests. One who only obtains refreshments at the bar or restaurant is not a guest,⁵ nor one who attends a ball given on the premises,⁶ nor one who simply wishes to use the inn as a place of deposit for his goods for safe-keeping, and does not engage shelter or entertainment for himself.⁷ Merely taking dinner, without notice to the proprietor or clerk, does not make a guest of one who is visiting a friend at a hotel.⁸ But an innkeeper is liable to a guest for the loss of an overcoat stolen while the guest is there merely for the purpose of taking a meal in a restaurant run in connection with, though not independent of, the inn, at the invitation and expense of a companion.⁹

ILLUSTRATIONS.—A ball was given by a fire-company at the hotel of defendant, who furnished the necessary rooms, and was paid for their use by the company, at a fixed rate. The arrange-

¹ *Walling v. Potter*, 35 Conn. 183, the court saying: "If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest and entitled to all the rights and privileges of one. In short, any one away from home receiving accommodations of an inn as a traveler is a guest."

² *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657.

³ *Lusk v. Belote*, 22 Minn. 468.

⁴ *Manning v. Wells*, 9 Humph. 746; 51 Am. Dec. 688; *Neal v. Wilcox*, 4 Jones, 146; 67 Am. Dec. 267.

⁵ *R. v. Rymer*, 2 Q. B. Div. 136; *Fitch v. Casler*, 17 Hun, 126.

⁶ *Carter v. Hobbs*, 12 Mich. 52; 83 Am. Dec. 762; *Fitch v. Casler*, 17 Hun, 126.

⁷ *Arcade Hotel Co. v. Wyatt*, 44 Ohio St. 32; 58 Am. Rep. 785; *Gelley v. Clarke*, Cro. Jac. 188.

⁸ *Gastenhofer v. Clair*, 10 Daly, 265.

⁹ *Kopper v. Willis*, 9 Daly, 460.

ments were made and the ball managed exclusively by the company. The plaintiff, on going to the ball, delivered his overcoat, fur collar, and gloves to the clerk, at the office of the hotel, and registered his name, and remained at the ball during the greater part of the night, during which time he spent money for liquor and cigars at a saloon kept by the defendant in connection with the hotel. *Held*, that the defendant was not liable as innkeeper for the loss of the property: *Carter v. Hobbs*, 12 Mich. 52; 83 Am. Dec. 762. Plaintiff's wife and children, after living some years in St. Paul, took board at defendant's hotel in that city, and there plaintiff, who resided in another state, visited them, and during his visit, baggage of all was stolen. *Held*, that defendant was liable for what was brought in by plaintiff, but not for what was brought by the family: *Lusk v. Belote*, 22 Minn. 468. A, a guest of a hotel, invited B to dine with him. B went to the hotel, and not finding A, ordered and ate his dinner alone, no special permission being given him so to do. After he had finished his dinner A appeared, and both proceeded to another dining-room of the hotel, and while there B's coat, which he had left on a chair in the hall-way, was stolen. A paid for B's dinner. *Held*, that the landlord was not liable for the loss of the coat, B not being a guest of the house: *Gastenhof v. Clair*, 10 Daly, 265. One who kept lodgers on only half of the third floor of a building occupied by him, carried on a restaurant on the lower floor, under a liquor license from the board of excise of New York City, on an affidavit averring, under New York Laws, 1857, chapter 628, that he kept an inn, and that an inn was necessary in the place, etc. *Held*, that he was liable for the loss of the overcoat of K., who was not a lodger, nor a regular boarder, and who, before sitting down to dine, had hung it on one of the hooks intended therefor; and this, though a friend paid for K.'s dinner: *Kopper v. Willis*, 9 Daly, 460. By an arrangement between an innkeeper and her hostler, he had the profit of the stables, paying no rent, but providing hay, corn, etc., and supplying not only the guests in the inn, but residents in the town, whose horses he was allowed to take care of. D., who had no knowledge of this arrangement, arrived at the inn with his horse and gig, which were taken to the stable, and he became a guest. He subsequently left, saying that he should not be back till the following Monday, and requested that his horse should be attended to. He did not return for a fortnight, and in the mean time the hostler (for the purpose, as he said, of exercising the horse) drove it out, when it took freight at a locomotive steam-engine, and was injured. *Held*, that the relation of innkeeper and guest subsisted between the parties, and consequently the former was liable for the injury done to the horse: *Day v. Bather*,

2 Hurl. & C. 14; 9 Jur., N. S., 440; 32 L. J. Ex. 171; 11 Week. Rep. 575; 8 L. T., N. S., 205. Plaintiff arrived at Toronto from Ireland, and drove from the railway station to defendant's hotel, having a portmanteau with him. He asked for a room, saying he wanted only to change his dress and go to friends; had his things taken to it, and after occupying it for about an hour, went to his friends, with whom he remained. *Held*, that the plaintiff was not there as a guest: *Lynar v. Mossop*, 36 U. C. Q. B. 230. W., the keeper of a gambling-house, closed his night's business at two o'clock, A. M., having a sum of money upon his person, and not being ready to retire for the night, and not wishing to carry his money upon his person at that time of the night, visited an inn for the purpose of depositing his money for safe-keeping; found the inn in charge of a night-clerk; inquired if he could have lodgings for the night; was told that he could; stated that he did not desire to go to his room at that time, but wished to leave some money with the clerk, and would return in about half an hour. The clerk told him he would reserve a good room for him. He did not register his name. It was not upon any book of the inn. No room was assigned him. He left his package of money with the clerk, received a check for it, and departed. He returned in about three hours to have a room assigned him and retire for the balance of the morning. The clerk had absconded with the money. *Held*, W. was not a guest of the inn at the time he deposited his money with the clerk, and the innkeeper is not liable for its loss: *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32; 58 Am. Rep. 785. The plaintiff, who was a minor, went with his father with a horse and wagon to the defendant's inn, delivered the horse and wagon to the defendant's servant to be cared for, and they laid aside their outer garments in the room in which they entered, in the defendant's presence, and the father ordered and obtained dinner for himself and the plaintiff, and they remained at the inn until evening, when the bill for the entertainment of themselves and horse was paid, and they left. *Held*, that the relation of guest and innkeeper was thereby created: *Read v. Amidon*, 41 Vt. 15; 98 Am. Dec. 560.

§ 1781. **Innkeeper Bound to Receive Public.** — An innkeeper is bound to receive as guests all suitable persons who may apply.¹ So if he have stables, he must receive one's

¹ Story on Bailments, sec. 476; Mitchell, 1 Phila. 63. A refusal Schouler on Bailments, 287; Hawthorn v. Hammond, 1 Car. & K. 404; common law: 2 Kent's Com. 592; R. v. Ivens, 7 Car. & P. 213; Com. v. Ivens, 7 Car. & P. 213; Story on

horse and carriage for food and shelter.¹ But keepers of boarding and lodging houses and restaurants may choose their own customers, like any other kind of tradesmen.² It is no defense that the guest was traveling on Sunday, or at night after the innkeeper and family had gone to bed, or that the guest will not tell his name and abode;³ or that the guest is a minor, or married woman traveling alone.⁴ An innkeeper is not justified in refusing to receive a member of a militia company as a guest merely because other militiamen received as guests on the same occasion had misconducted themselves in the inn.⁵ He is not bound to receive a drunken or disorderly person; or one afflicted with a contagious disease;⁶ or a known thief;⁷ or a filthy person, disagreeable to other guests;⁸ or the guest's dogs.⁹ He is not bound to supply rooms for a person's trade,—as to show his goods,—but only lodging-rooms and lodging;¹⁰ or to receive a guest who will not pay in advance.¹¹

Bailments, sec. 470. It is a misdemeanor under New York Code, section 381. The common-law obligation of an innkeeper to furnish entertainment applies, though he has neglected to obtain a license: *Atwater v. Sawyer*, 76 Me. 539; 49 Am. Rep. 634. A tender of the price is not necessary as a rule: *R. v. Ivens*, 7 Car. & P. 213. But see *Fell v. Knight*, 8 Mees. & W. 276.

¹ *Schouler on Bailments*, 288; *Bac. Abr.*, tit. Inns and Innkeepers, C. An innkeeper, though licensed to let post-horses, is not liable to an action for refusing to supply them for a guest: *Dicas v. Hides*, 1 Stark. 247.

² *Schouler on Bailments*, 290; *R. v. Rymer*, 2 Q. B. Div. 136.

³ *R. v. Ivens*, 7 Car. & P. 213; *Howell v. Jackson*, 6 Car. & P. 725.

⁴ *Watson v. Cross*, 2 Duvall, 147.

⁵ *Atwater v. Sawyer*, 76 Me. 539; 49 Am. Rep. 634.

⁶ *Story on Contracts*, sec. 903; *Moriarty v. Brooks*, 6 Car. & P. 684; *Howell v. Jackson*, 6 Car. & P. 742; *R. v. Ivens*, 7 Car. & P. 213; *Thompson v. Lacy*, 3 Barn. & Ald. 287. He may not only refuse to receive such a person, but he may compel him to leave after being received: *Howell v. Jack-*

son, 6 Car. & P. 742; *Com. v. Mitchell*, 2 Pars. Cas. 431.

⁷ *Markham v. Brown*, 8 N. H. 523; 31 Am. Dec. 209.

⁸ *Id.*

⁹ *R. v. Rymer*, 2 Q. B. Div. 136.

¹⁰ *Burgess v. Clements*, 4 Maule & S. 306.

¹¹ 9 Coke, 87 b; *Bac. Abr.*, tit. Inns and Innkeepers, C; *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657. In *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209, the law as stated in this section is learnedly set forth by *Parker, J.*: "An innkeeper," says he, "holds out his house as a public place to which travelers may resort, and of course surrenders some of the rights which he would otherwise have over it. Holding it out as a place of accommodation for travelers, he cannot prohibit persons who come under that character, in a proper manner and at suitable times, from entering, so long as he has the means of accommodation for them. But he is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition. He is not obliged to receive one who is not able to pay for his entertainment: *Thomp-*

Although a traveler is entitled to reasonable accommodation in an inn, he is not entitled to select a particular

son *v. Lacy*, 3 Barn. & Ald. 283. And there are considerations of greater importance than this. He is indictable if he usually harbor thieves: 1 Hawk., c. 78, sec. 1; *P.Bac. Abr.*, tit. Inns, etc.; and he is answerable for the safe-keeping of the goods of his guests: *Story on Bailments*, 307; and is not bound to admit one whose notorious character as a thief furnishes good reason to suppose that he will purloin the goods of his guests or his own. So he is liable if his house is disorderly: 1 Hawk. 451; and cannot be held to wait until an affray is begun before he interpose, but may exclude common brawlers and any one who comes with intent to commit an assault or make an affray. So he may prohibit the entry of one whose misconduct in other particulars, or whose filthy condition, would subject his guests to annoyance. He has a right to prohibit common drunkards and idle persons from entering, and to require them, and others before mentioned, to depart, if they have already entered. And any person entering, not for a lawful purpose, but to do an unlawful act,—as to commit an assault upon one lawfully there,—must be deemed a trespasser in entering for such unlawful purpose. As he is bound to admit travelers, under certain limitations, he may likewise be held, under proper limitations, to admit those who have business with them as such. This may be considered as derived from the right of the traveler. It is conceded that he may be bound to permit the entry of persons who have been sent for by the guest. But we think the rule is not to be limited in all cases to this. There may be such connection between travelers and those engaged in their conveyance that the latter, although not specially sent for, may have a right to enter a common inn; or such that the landlord, if he give a general license to some of those whose business is connected with his guests in their characters as travelers, cannot lawfully exclude others pursuing the same business, and who enter for a similar object. There

seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted and another excluded, so long as each has the same connection with his guests,—the same lawful purpose,—comes in a like suitable condition, and with as proper a demeanor, any more than he has a right to admit one traveler and exclude another merely because it is his pleasure. If one comes to injure his house, or if his business operates directly as an injury, that may alter the case; but that has not been alleged here. And perhaps there may be cases in which he may have a right to exclude all but travelers and those who have been sent for by them. It is not necessary to settle that at this time. In the present case it appeared that stage-coaches brought their passengers to the plaintiff's inn from various quarters, and carried them away in different directions. It is understood that Hanover was not a place where the lines of stages or conveyances terminated, and where passengers were left to seek their own conveyance onward, as is often the case in the larger cities; but that the line of stages extended through the place in such manner that travelers might reasonably expect conveyances onward would be tendered for their use. The drivers of some of the coaches were accustomed to resort to the plaintiff's inn, and boarded there. Under these circumstances, we see no objection to the first part of the charge to the jury. The defendant had clearly a right to establish a line of stage-coaches, and to go to the plaintiff's inn with travelers, and he might of course lawfully enter it for the purpose of leaving their baggage and receiving his fare. And we are of opinion that, so long as others were permitted to do the same, the defendant had an equal and lawful right, notwithstanding any prohibition by the plaintiff to enter the plaintiff's inn for the purpose of tendering his coach for the use of travelers, and soliciting them to take passage with him, and

apartment, or to insist on occupying a bedroom for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose.¹ An innkeeper may also (perhaps) refuse to receive goods or chattels of the guest which appear offensive or improperly secured, or are of a kind which no one ought to make another answerable for their safety.² And it is a sufficient excuse that his house is full, and he has no accommodation for another guest.³

for that purpose to go into the common public rooms of the inn, where guests were usually placed to await the departure of the stages, although he was not requested by such guests, provided there was a reasonable expectation that passengers might be there, and he came at a suitable time, in a proper manner, demeaned himself peaceably, and remained no longer than was necessary, and was doing no injury to the plaintiff. But the jury should have been instructed that the defendant might forfeit this right by his misconduct, so that the plaintiff might require him to depart, and expel him; and if, by reason of several instances of misconduct, it appeared to be necessary for the protection of his guests or of himself, the plaintiff might prohibit the defendant from entering again until the ground of apprehension was removed. Thus if affrays or quarrels were caused through his fault, or he was noisy, disturbing the guests in the house, interfered with its due regulation, intruded into the private rooms, remained longer than was necessary after being requested to depart, or otherwise abused his right, as by improper importunity to guests to induce them to take passage with him, the plaintiff would have a right to reform that, and, if necessary, to forbid the defendant to enter, and treat him as a trespasser if he disregarded the prohibition. So if after a lawful entry of the defendant he committed an assault upon the plaintiff or any trespass upon his property, the plaintiff might treat him as having entered for the unlawful purpose, and

as a trespasser *ab initio*: Six Carpenters' Case, 8 Coke, Dub. ed., 291; Hopkins v. Hopkins, 10 Johns. 373; Adams v. Freeman, 12 Johns. 408; 7 Am. Dec. 327; Winterbourne v. Morgan, 11 East, 402; Aitkenhead v. Blades, 5 Taunt. 198. Perhaps a trespass upon the person or property of a guest might come within the same rule; but this is not clear, and need not now be settled. If others were guilty of an assault upon the defendant, or of misconduct towards him, that would not justify him in making an assault, except in self-defense, nor furnish an excuse for improper conduct on his part; but if he behaved himself with propriety, the misconduct of the drivers of other lines towards him would furnish no ground for his exclusion, unless it was at the time of a disturbance, and for the purpose of restoring quiet to the house."

¹ Fell v. Knight, 8 Mees. & W. 269; 5 Jur. 554.

² Schouler on Bailments, 258; citing Kellogg v. Sweeney, 1 Lans. 400; Myers v. Cottrill, 5 Biss. 465; R. v. Rymer, 2 Q. B. Div. 136; Needles v. Howard, 1 E. D. Smith, 54.

³ Broadwood v. Granara, 10 Ex. 423; 24 L. J. Ex. 1. Where the inn is full, and the guest says he will shift among the others, the landlord is not liable if he is robbed: White's Case, Dyer, 158. Rights of colored persons to be received at and entertained in inns, and the liabilities and duties of innkeepers towards them, explained at length in a charge to the grand jury: The Civil Rights Bill, 1 Hughes, 541.

§ 1782. **Innkeeper an Insurer.** — He is liable as an insurer.¹ "Like a common carrier, he is an insurer of the property, and nothing but the act of God or public enemies will excuse a loss."² Therefore, the innkeeper is

¹ Calye's Case, 8 Coke, 32; Mateer v. Brown, 1 Cal. 221; 52 Am. Dec. 303; Walsh v. Porterfield, 87 Pa. St. 376; Ramaley v. Leland, 43 N. Y. 539; Hallenbake v. Fish, 8 Wend. 547; 24 Am. Dec. 88; Neal v. Wilcox, 4 Jones, 146; 67 Am. Dec. 266; Pettigrew v. Barnum, 11 Md. 434; 69 Am. Dec. 212; Pinkerton v. Woodward, 33 Cal. 600; 91 Am. Dec. 657; Thickston v. Howard, 8 Blackf. 535; Sibley v. Aldrich, 33 N. H. 553; 66 Am. Dec. 745; Hulett v. Swift, 42 Barb. 249; 33 N. Y. 571; 88 Am. Dec. 405; Piper v. Manny, 21 Wend. 282; Grinnell v. Cook, 3 Hill, 485; 38 Am. Dec. 663; Mason v. Thompson, 9 Pick. 280; 20 Am. Dec. 471; Berkshire Woolen Co. v. Proctor, 7 Cush. 423; Richmond v. Smith, 8 Barn. & C. 9; Morgan v. Ravey, 6 Hurl. & N. 277; Day v. Bather, 2 Hurl. & C. 14; Shaw v. Berry, 31 Me. 478; 52 Am. Dec. 628; Norcross v. Norcross, 53 Me. 163; Shoecraft v. Bailey, 25 Iowa, 553; Manning v. Wells, 9 Humph. 746; 51 Am. Dec. 688; Washburn v. Jones, 14 Barb. 198; Weisenger v. Taylor, 1 Bush, 275; 89 Am. Dec. 626; Burrows v. Trieber, 21 Md. 320; 83 Am. Dec. 590; Sasseir v. Clark, 37 Ga. 242; Cashill v. Wright, 6 El. & B. 891; Oppenheim v. White Lion Hotel Co., L. R. 6 Com. P. 515; Fuller v. Coats, 18 Ohio St. 343; Williams v. Earle, 44 N. Y. 172; McDonald v. Edgerton, 5 Barb. 560; Cheesborough v. Taylor, 12 Abb. Pr. 227. A few cases, following the English case of Dawson v. Champney, 5 Q. B. 174, hold that the innkeeper may exonerate himself in case of loss by showing that he was not negligent; and others speak of him being liable only for negligence: See Newson v. Axon, 1 McCord, 509; 10 Am. Dec. 685; Towson v. Havre de Grace Bank, 6 Har. & J. 47; 14 Am. Dec. 254; Laird v. Eichold, 10 Ind. 212; 71 Am. Dec. 323; Baker v. Dessauer, 49 Ind. 31; reversing Dessauer v. Baker, 1 Wils. 431; Howth v. Franklin, 20 Tex. 798; 73 Am. Dec. 218; Vance v. Throckmorton, 5 Bush, 41; 76 Am. Dec. 327; Johnson v. Richard-

son, 17 Ill. 302; 63 Am. Dec. 369; Kisten v. Hildebrand, 9 B. Mon. 72; 48 Am. Dec. 416; Merrit v. Claghorn, 23 Vt. 177; Howe Machine Co. v. Pease, 49 Vt. 477; Metcalf v. Hess, 14 Ill. 129; McDaniels v. Robinson, 26 Vt. 316; 62 Am. Dec. 574; Cutler v. Biney, 30 Mich. 259; 18 Am. Rep. 127; But Dawson v. Champney has been severely criticised both in England and America, and is not the law: See Morgan v. Ravey, 6 Hurl. & N. 277; Mateer v. Brown, 1 Cal. 221; 52 Am. Dec. 303.

² Grinnell v. Cook, 3 Hill, 487; 38 Am. Dec. 663. In Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405, the reasons for this exceptional liability are stated with great clearness. Said the court: "An innkeeper is responsible for the safe-keeping of property committed to his custody by a guest. He is an insurer against loss, unless caused by the negligence or fraud of the guest, or by the act of God or the public enemy. This liability is recognized in the common law as existing by the ancient custom of the realm, and the judges in Calye's Case treated the recitals in the special writ for its enforcement as controlling evidence of the nature and extent of the obligation imposed by law on the innkeeper: 8 Coke, 32; 1 Smith's Lead. Cas., Hare and Wallace's ed., 194, 307. This custom, like that in the kindred case of the common carrier, had its origin in considerations of public policy. It was essential to the interests of the realm that every facility should be furnished for secure and convenient intercourse between different portions of the kingdom. The safeguards, of which the law gave assurance to the wayfarer, were akin to those which invested each English home with the legal security of a castle. The traveler was peculiarly exposed to depredation and fraud; he was compelled to repose confidence in a host who was subject to constant temptation, and favored with peculiar opportunities if he chose to betray his trust. The innkeeper was

liable for a loss of a guest's goods caused by a fire,¹ or by theft or burglary.²

at liberty to fix his own compensation and enforce summary payment; his lien then, as now, fastened upon the goods of his guest from the time they came to his custody. The care of the property was usually committed to servants, over whom the guest had no control, and who had no interest in its preservation unless their employer was held responsible for its safety. In case of depredation by collusion, or of injury or destruction by neglect, the stranger would of necessity be at every possible disadvantage; he would be without the means either of proving guilt or detecting it. The witnesses to whom he must resort for information, if not accessaries to the injury, would ordinarily be in the interest of the innkeeper. The sufferer would be deprived, by the very wrong of which he complained, of the means of remaining to ascertain and enforce his rights, and redress would be wellnigh hopeless but for the rule of law casting the loss on the party intrusted with the custody of the property, and paid for keeping it safely. The considerations of public policy in which the rule had its origin forbid any relaxation of its rigor. The number of travelers was few when this custom was established for their protection. The growth of commerce and increased facilities of communication have so multiplied the class for whose security it was designed that its abrogation would be the removal of a safeguard against fraud, in which almost every citizen has an immediate interest. The rule is in the highest degree remedial. No public interest would be promoted by changing the legal effect of the implied contract between the host and the guest, and relieving the former from his common-law liability. Innkeepers, like carriers and other insurers, at times find their contracts burdensome; but in the profits they derive from the public, and the privileges accorded to them by the law, they find an ample and liberal compensation. The vocation would be still more profitable if coupled with new immunities; but we are not at liberty to discard the settled rules of the common law,

founded on reasons which still operate in all their original force. Open robbery and violence, it is true, are less frequent as civilization advances; but the devices of fraud multiply with the increase of intelligence, and the temptations which spring from opportunity keep pace with the growth and diffusion of wealth. The great body of those engaged in this, as in other vocations, are men of character and worth; but the calling is open to all, and the existing rule of protection should therefore be steadily maintained. It extends to every case, and secures the highest vigilance on the part of the innkeeper by making him responsible for the property of his guest. The traveler is entitled to claim entire security for his goods as against the landlord, who fixes his own measure of compensation, and holds the property in pledge for the payment of his charges against the owner. In cases of loss, either the innkeeper or the guest must be the sufferer; and the common law furnishes the solution of the question on which of them it should properly fall. In the case of *Cross v. Andrews* the rule was tersely stated by the court: 'The defendant, if he will keep an inn, ought, at his peril, to keep safely his guest's goods': *Cro. Eliz.* 622. He must guard them against the incendiary, the burglar, and the thief; and he is equally bound to respond for their loss, whether caused by his own negligence, or by the depredations of knaves and marauders, within or without the curtilage."

¹ *Hulett v. Swift*, 33 N. Y. 570; 88 Am. Dec. 405; *Ingallsbee v. Wood*, 33 N. Y. 577; 88 Am. Dec. 577. *Contra*, *Merrit v. Claghorn*, 23 Vt. 177; *Cutler v. Bonney*, 30 Mich. 259; 18 Am. Rep. 127; *Vance v. Throckmorton*, 5 Bush, 41; 96 Am. Dec. 327; cases holding the innkeeper not an insurer.

² *Clute v. Wiggins*, 14 Johns. 175; 7 Am. Dec. 449; *Hancock v. Rand*, 94 N. Y. 1; 46 Am. Rep. 112; *Houser v. Tully*, 62 Pa. St. 92; 1 Am. Rep. 390; *Walsh v. Porterfield*, 87 Pa. St. 376; *Dunbier v. Day*, 12 Neb. 596; 41 Am. Rep. 772; *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657. As to

An innkeeper in Kentucky was held liable for money of a guest stolen from the safe by a discharged clerk, who had retained the key after his discharge. The innkeeper made no change in the lock of the safe, although at the time of the deposit the guest was told that valuable packages would not be secure in the safe, as it had been robbed a few weeks before, and that the proprietor would not be responsible for anything of value put in the safe.¹ An innkeeper is bound for the safe-keeping of the valise and box of a peddler, his guest, though he was not notified of the nature and value of their contents, and the peddler became so intoxicated at the hotel as to be unable to take proper care of them.² The liability of an innkeeper for losses by theft is not affected by merely posting in the room of a guest a notice declaring his liability to be limited by the non-observance of certain directions.³ It is the duty of a hotel-keeper to take reasonable care of the persons of his guests, so that they are not injured by reason of a want of such care on his part whilst they are in the hotel as his guests.⁴ So he is liable for the acts of his servants or domestics which occasion the loss or injury of his guest's goods,⁵ or for any one who may be officiating in his place during his absence.⁶ So he is

robbery, the law seems to be unsettled: See Schouler on Bailments, 264. But the innkeeper is probably liable here also: *Mateer v. Brown*, 1 Cal. 221; 52 Am. Dec. 303; *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657.

¹ *Woodward v. Birch*, 4 Bush, 510.

² *Rubenstein v. Cruikshanks*, 54 Mich. 199; 52 Am. Rep. 806.

³ *Bolwell v. Bragg*, 29 Iowa, 232.

⁴ *Sandys v. Florence*, 47 L. J. C. P. D. 598.

⁵ *Day v. Bather*, 2 Hurl. & C. 14; *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657; *Gile v. Libby*, 36 Barb. 70; *Weisenger v. Taylor*, 1 Bush, 275; 89 Am. Dec. 626; *Rockwell v. Proctor*, 39 Ga. 105; *Chamberlain v. Masterson*, 26 Ala. 371; *Smith v. Read*, 52 How. Pr. 14; Story on Bailments, sec. 470. But the servant cannot enlarge the lia-

bility of an innkeeper. "Innkeepers are not liable as such for goods deposited with them by any but guests of their inns. While an individual proprietor of an inn may incur a liability as bailee for the safe-keeping of goods which he has voluntarily undertaken to keep for others than guests, it is not within the course of employment of a mere clerk of such innkeeper to receive on deposit the goods of any except guests of the inn, and if he does so, it is a transaction between him and the owner, and no liability for the loss of such goods attaches to the innkeeper": *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32; 58 Am. Rep. 785; and see *Coykendall v. Eaton*, 40 How. Pr. 266.

⁶ *Rockwell v. Proctor*, 39 Ga. 105; *Houser v. Tully*, 62 Pa. St. 92; 1 Am. Rep. 390.

liable for an assault on the person of a guest by a servant while in the performance of his duties as such,¹ or by another guest in his presence.² A loss or damage being proved, the burden is on the innkeeper to show a valid excuse.³ An innkeeper is liable for the communication to a guest of a contagious disease by one whom he knowingly permits to remain in his house.⁴ One who stops at a hotel and contracts small-pox from a guest there ill with it, of whose presence and condition the new-comer has no knowledge, may maintain an action against the hotel-keeper; and this, even though plaintiff heard rumors to the effect that there was small-pox in the house.⁵

ILLUSTRATIONS.—A horse is delivered by a guest to an innkeeper in the evening. The next morning it is found dead. The burden is on the innkeeper to prove that the horse died a natural death: *Hill v. Owen*, 5 Blackf. 323; 35 Am. Dec. 124. A guest's horse in the innkeeper's stable is injured by a horse of another guest. The innkeeper is liable: *Sibley v. Aldrich*, 33 N. H. 553; 66 Am. Dec. 745. T. went to the inn of H., purchased liquor, etc., and gave money for safe-keeping to one in the bar-room, as to whom there was evidence that he was bar-keeper. The money was lost. The court instructed the jury that if T. was a guest, and gave his money to the bar-keeper, or to one who, if not in fact bar-keeper, was acting in a capacity from which an authority to receive the money on the credit of the house might be inferred, he could recover, if the money was intrusted to him on the credit of the inn; but that if T. was not a guest, or intrusted the money on the individual credit of the bar-keeper, he could not recover. *Held*, that this charge was correct: *Houser v. Tully*, 62 Pa. St. 92; 1 Am. Rep. 390. The plaintiff, after stopping some days at defendant's hotel, surrendered his room, left his valise, took a

¹ *Wade v. Thayer*, 40 Cal. 578.

² Where one who goes into a liquor-saloon or tavern and gets drunk there, and another drunken man sets fire to his clothing and burns him in full view of the saloon-keeper, he has a right of action against the saloon-keeper: *Rommel v. Schambacher*, 120 Pa. St. 579; 6 Am. St. Rep. 732.

³ *Piper v. Manny*, 21 Wend. 282; *Schouler on Bailments*, 271, 272; *Epps v. Hinds*, 27 Miss. 657; 61 Am.

Dec. 528; *Wiser v. Chesley*, 53 Mo. 547; *Newson v. Axon*, 1 McCord, 509; 10 Am. Dec. 685; *Laird v. Eichold*, 10 Ind. 212; 71 Am. Dec. 323; *Hill v. Owen*, 5 Blackf. 323; 35 Am. Dec. 124; *McDaniels v. Robinson*, 26 Vt. 316; 62 Am. Dec. 574.

⁴ *Gilbert v. Hoffman*, 66 Iowa, 205; 55 Am. Rep. 263.

⁵ *Gilbert v. Hoffman*, 66 Iowa, 205; 55 Am. Rep. 263.

check for it, and was gone eight days without paying his bill. On returning, he registered his name, took a room, and called for his valise. A valise, not belonging to him, which had been left in exchange for his, was brought with the duplicate of his check on it. *Held*, that whether considered as an ordinary bailment, or as property in defendant's hands upon which they had a lien, they were bound to exercise due care and diligence; that they must show how it was lost; and that the circumstances of changing the check was evidence of negligence: *Murray v. Clarke*, 2 Daly, 102.

§ 1783. **Extent of Liability as to Time, Place, and Quantity.**—The liability of the innkeeper commences when the goods are placed in his charge at the inn, unless he voluntarily assumes to take them sooner; as where he furnishes transportation from a railroad station to his hotel for guests and their baggage;¹ or where a porter of the hotel takes them in charge at the station.² To make the innkeeper liable, the goods need not be placed in his special keeping; it is sufficient that they are in the inn or its curtilage.³ Nor need they be in the inn if they are put where the innkeeper or his servants direct them to be put.⁴ He is liable for the loss of a parcel left in the lobby

¹ *Dickinson v. Winchester*, 4 Cush. 114; 50 Am. Dec. 760.

² *Sasseen v. Clark*, 37 Ga. 242.

³ *Bennett v. Mellor*, 5 Term Rep. 275; *Packard v. Northcraft*, 2 Met. (Ky.) 439; *Norcross v. Norcross*, 53 Me. 163; *Burrows v. Trieber*, 21 Md. 320; 83 Am. Dec. 590; *McDonald v. Edgerton*, 5 Barb. 560; *Epps v. Hinds*, 27 Miss. 657; 61 Am. Dec. 528; *Centhore v. Ryder*, 1 Edm. Sel. Cas. 273; as horses in the stable: *Clute v. Wiggins*, 14 Johns. 175; 7 Am. Dec. 448. But see *Albin v. Presby*, 8 N. H. 408, 29 Am. Dec. 679, where the guest's horse and wagon were placed by him in an open shed near the inn. The innkeeper was held not liable for their loss.

⁴ In *Piper v. Manny*, 21 Wend. 282, the guest's carriage, containing his goods, was left in the highway by the defendant's direction. He was held liable. "The only question," said the court, "in this case is, whether the

goods were received into the care and keeping of the innkeeper within the meaning of the terms of his common-law liability; that is, *infra hospitium*. If they were, the question of negligence of the defendant or his servants has nothing to do with this case: 5 Term Rep. 275, *Buller, J.* The goods need not be within the building strictly denominated the inn, it being well settled that the barns and stables come within the definition; *Calve's Case*, 8 Coke, 63; *Clute v. Wiggins*, 14 Johns. 175; 7 Am. Dec. 448; *Mason v. Thompson*, 9 Pick. 280. In *Clute v. Wiggins*, 14 Johns. 175, 7 Am. Dec. 448, the load of grain was put into the wagon-house; and in *Mason v. Thompson*, 9 Pick. 280, the chaise and harness under an open shed, as in the present case, except the yard was inclosed with a fence. So it has been held that a horse of the guest put into a pasture-lot, if without his special direction, is *infra hospitium*

or hall of the inn.¹ An innkeeper, it has been held in a recent case, is not liable as such for the loss by theft of the clothes and other property of a guest which were at the time in a bathing-house belonging to the innkeeper, but separate from the inn.²

within the meaning of the original writ, which Lord Coke says is the foundation of the common-law liability: *Calye's Case*. The place, therefore, where the goods are deposited is not the test: it is whether they are in the custody of the innkeeper, or at the risk of the guest. This must necessarily depend upon the particular circumstances of each case. *Prima facie* the innkeeper is liable, and the *onus* lies on him to show the contrary: 5 Term Rep. 273; 4 Maule & S. 306; 8 Barn. & C. 9; and he cannot discharge himself from this common-law liability without the concurrence of the guest: *Id.*; 7 Car. & P. 213; *Calye's Case*; 3 Bac. Abr. 664. Testing the case before us upon these principles, it appears to me there cannot be a doubt of the defendant's liability. The load was left in the place directed by the defendant's servant, after an assurance it would be as safe there as if under lock and key, and this made on an intimation that the goods were to be exposed. The traveler is not obliged to give special instructions in this respect; on the contrary, if the innkeeper wishes to exonerate himself, unless the goods are deposited in a particular place, or kept in a special manner, he must say so: *Calye's Case*; 4 Maule & S. 306; 8 Barn. & C. 9. The last case is very strong on this point. There it was the custom to take the luggage of travelers to their bedrooms, unless contrary orders were given. One package, containing silks of various kinds, was taken by direction of the guest to the commercial-room. On the next day he took it out to exhibit his goods to different customers; some were sold, and the package was taken back to the commercial-room, from which it was afterwards stolen. It was insisted that by the special direction given, which tended to expose the goods in a greater degree than if the usual practice had been observed,

the guest had exonerated the innkeeper, within the case of *Burgess v. Clement*, 4 Maule & S. 306. But the court answered this by saying that if it had been intended by the defendant not to be responsible unless the goods were placed in the bedroom or other place of security, he should have said so."

¹ *Candy v. Spencer*, 3 Fost. & F. 306.

² *Minor v. Staples*, 71 Me. 316; 36 Am. Rep. 318. In this case — one of first impression — the court say: "The question is, whether one who keeps an inn, and also keeps a bath-house separate from his inn, is chargeable as innkeeper for property stolen from the bath-house. We think he is not. It seems to us that the keeping of the inn and the keeping of the bath-house are separate and distinct employments, and involve separate and distinct duties and liabilities. One may be an innkeeper without being a bath-house keeper, or he may be a bath-house keeper without being an innkeeper; or the same person may engage in both employments; just as a livery-stable keeper may also be a common carrier of passengers; but we do not think his doing so will make him responsible in the one capacity for liabilities incurred in the other. We are not now speaking of bath-rooms attached to or kept within hotels, but of separate buildings, erected upon the sea-shore, and used, not as bath-rooms, but as places in which those who bathe in the sea change their garments, and leave their clothes and other valuables while so bathing. It seems to us that such an establishment is as distinct from an inn as a wharf or a boat-house would be; and that an innkeeper, as such, can no more be made responsible for property stolen from such a bath-house than he could be for property stolen from a wharf or a boat-house, if he happened to be the keeper of the latter as well as the former."

The innkeeper is liable for his property left at the inn while the guest is temporarily absent;¹ and until the relation of innkeeper and guest has actually terminated,² as where he departs for good, leaving his baggage to be called for afterwards, the innkeeper's liability continues for a reasonable time.³ And in every case but one the guest has a reasonable time after he leaves to remove his

¹ *McDonald v. Edgerton*, 5 Barb. 560; *Grinnell v. Cook*, 3 Hill, 400; 38 Am. Dec. 663; *Baker v. Day*, 2 Hurl. & C. 14. In *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574, the court said: "This case, on the evidence put in by the plaintiff, seems to present, in the first instance, the relation of guest in the strictest sense. And we do not think it necessary to continue that relation that the plaintiff should have continued his dwelling, for the time even, within the inn. The relation of guest was clearly created by putting the horse at the inn, and it was undeniably extended to all the plaintiff's goods left at the inn by his taking a room, and taking some of his meals at the inn, and lodging there a portion of the time. This matter seems to be perfectly settled by the custom in the cities. It is there considered that taking a room is the decisive act to create the relation. That being done, the guest is charged as such for his meals and lodging, whether he take them at the inn or with his friends, as any one may know who has had experience in such matters. And this seems to us well enough. One in so extensive a city as New York might find it convenient to have a room for his parcels and to take his dinner at a down-town hotel, while he might choose to have his lodging and most of his personal apparel and baggage at an up-town house. And it would certainly be unreasonable if one chose to be at this expense that he should not have the same security for his goods left at the one hotel as the other. Or if one took lodgings at a hotel, and should subsequently find it more comfortable to lodge with a friend, and for any reason should not choose at once to give up his room, and break up his connection with his hotel, it

would certainly sound very strange that he should not have the same security for his goods as if he made the hotel his constant abiding-place for the time. He would certainly be bound ordinarily to pay till he gave up his room, and in all the books pay, or the right to charge, is made the criterion of the innkeeper's liability."

² *Seymour v. Cook*, 53 Barb. 451; *Adams v. Clem*, 41 Ga. 65; 5 Am. Rep. 524; *Murray v. Clarke*, 2 Daly, 102.

³ *Adams v. Clem*, 41 Ga. 65; 5 Am. Rep. 524. In this case the guest, on leaving, stated that she would send for her trunk in a few minutes. The person whom the guest ordered to bring it did not do so, and four days afterwards she sent her son for it, when it could not be found. The innkeeper was held liable. "An innkeeper," said Brown, C. J., "is bound to extraordinary diligence in preserving the property of his guests intrusted to his care, where they have complied with all reasonable rules of the inn. This is admitted by the plaintiff in error. But he insists that his liability as an innkeeper ceased when his guest departed, leaving her trunk in his care, and that from that time he was a bailee without compensation, and was only liable for gross negligence. We think in such case that the innkeeper with whom the baggage of his guest is left with his consent, though he gets no additional compensation for taking care of it, is still liable for it, as innkeeper, for a reasonable time, to be estimated according to the circumstances of the case, after which he would be only a bailee without hire, and liable as such. And we are not prepared to say that the time was unreasonable which intervened in this case before the guest sent back for her baggage."

baggage.¹ So if a servant of a hotel or inn take charge of the baggage to deliver it to the guest at the train, the innkeeper's liability continues until it is so delivered.² But where the things are by the guest's direction conveyed beyond the inn, the innkeeper's extraordinary liability does not attach.³ Where the keeper of an inn is in the habit of receiving packages for the accommodation of guests, and takes in charge goods which do not come under the denomination of "baggage," the innkeeper becomes liable as such for their safety. The custody of the goods is accessory to the contract of the parties.⁴ If a guest, with the landlord's knowledge, after paying his bill and departing, leaves money or valuables with the clerk of the hotel, to be kept without compensation until called for, and the clerk embezzles the same, the landlord, having no reason to suspect the clerk's fidelity, is a mere gratuitous bailee, and is not liable for the loss.⁵ Where the guest left the hotel without paying his bill, leaving his valise in charge of the clerk, but returning within forty-eight hours, it was held that the innkeeper was lia-

¹ Seymour v. Cook, 53 Barb. 451; Wharton on Negligence, sec. 687; Giles v. Fauntleroy, 13 Md. 126; Bendetson v. French, 46 N. Y. 266; Miller v. Peeples, 60 Miss. 819; 45 Am. Rep. 423. The one case in which the rule does not apply is where a guest is ordered to leave the inn for not paying his board, and departs leaving his baggage. Here the innkeeper stands as a bailee without reward as to it: Lawrence v. Howard, 1 Utah, 142.

² Sassen v. Clark, 37 Ga. 242.

³ In Hawley v. Smith, 25 Wend. 642, the plaintiff, who was stopping at an inn with a flock of sheep, directed the innkeeper to put them to pasture. He did so, and some of them were killed by eating poisonous plants. It was held (no negligence on his part being shown) that the innkeeper was not liable. Said the court: "I am of opinion this case falls within an exception laid down in Calye's Case, 8 Coke, 63,

to the general rule in respect to the liability of an innkeeper which has been followed ever since. It was there resolved that if the guest deliver his horse to the hostler, and request that he be put to pasture, which is accordingly done, and the horse is stolen, the inn-holder is not responsible, not being in the common-law sense of the term *infra hospitium*. He is not to be regarded as an insurer for goods without the inn; that is, for goods not within the curtilage: 8 Coke, 32; 2 Kent's Com. 592; Story on Bailments, 312; 21 Wend. 284. The sheep were put to pasture under the direction of the guest, which fact should have been regarded by the learned judge as bringing the case within the above exception."

⁴ Needles v. Howard, 1 E. D. Smith, 54.

⁵ Whitmore v. Haroldson, 2 Lea, 312; see O'Brien v. Vaill, 22 Fla. 627.

ble for want of ordinary care, and the loss of the valise raised a presumption of negligence against him.¹

The innkeeper's responsibility is not limited to such property as the guest brings with him at the time he first comes to the inn; it extends to all such as he places there while he is a guest.² A traveler who gives his horse to an innkeeper to be fed and cared for is a guest so as to attach to the innkeeper the common-law liability, though he do not take up lodging or receive entertainment himself at the inn.³ An animal is a kind of property from which the innkeeper, by feeding it, may continue to make profit; and therefore it is held that if a guest at an inn go away without the intention of returning as a guest, and leave behind him his horse, the innkeeper continues liable as such as to the horse.⁴ But as to other kinds of property,—dead property, as the books term it,—the innkeeper's liability does not continue after the guest goes away, except under the circumstances mentioned above.⁵ An innkeeper receiving cattle, driven on the road, to keep overnight, is responsible as such for the safety of the place provided for them.⁶ The liability of the innkeeper is not restricted to such things and sums of money as are necessary and designed for the ordinary comfort or expenses of the guest, but it extends to all his movable goods and chattels which he may bring to the inn.⁷

¹ *Murray v. Marshall*, 9 Col. 482; 59 Am. Rep. 152.

² *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 658.

³ *Yorke v. Grenagh*, 2 Ld. Raym. 866; *Mason v. Thompson*, 9 Pick. 280; 20 Am. Dec. 471; *McDaniels v. Robinson*, 26 Vt. 316; 62 Am. Dec. 574; *Peet v. McGraw*, 25 Wend. 653; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; 14 Am. Dec. 254. This rule is criticised in *Grinnell v. Cook*, 3 Hill, 491; 38 Am. Dec. 663; *Ingallsbee v. Wood*, 33 N. Y. 541; 36 Barb. 452; *Healey v. Gray*, 68 Me. 489; 28 Am. Rep. 80.

⁴ *McDaniels v. Robinson*, 28 Vt. 387; 67 Am. Dec. 720.

⁵ *McDaniels v. Robinson*, 28 Vt. 387; 67 Am. Dec. 720; 26 Vt. 316; 62 Am. Dec. 574.

⁶ *Hilton v. Adams*, 71 Me. 19.

⁷ *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Armistead v. Wilde*, 17 Q. B. 261; *Kent v. Shuckard*, 2 Barn. & Adol. 803; *Epps v. Hinds*, 27 Miss. 658; 61 Am. Dec. 528; *Kellogg v. Sweeney*, 1 Lans. 397; *Wilkins v. Earle*, 44 N. Y. 172; 4 Am. Rep. 665; *Snider v. Geiss*, 1 Yeates, 34; *Taylor v. Moonot*, 4 Duer, 116; *Needles v. Howard*, 1 E. D. Smith, 54; *Van Wycks v. Howard*, 12 How. Pr. 147; *Hilton v. Adams*, 71 Me. 19; *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am.

"Not only the guest's animals and private equipage may thus claim protection, his wearing apparel and personal jewelry, his baggage and traveling necessities, but, indeed, money and valuables to an unlimited amount."¹ But the keeper of a hotel is not liable to pay for the washing of the linen of his guests at his house.²

ILLUSTRATIONS. — A guest at an inn paid his bill, and had his name stricken from the register, purposely to relieve himself of his liability as guest during a short absence, intending to return at night. He left his valise in his room with a friend, and during his absence it was stolen. *Held*, that the innkeeper was not liable: *Müller v. Peeples*, 60 Miss. 819; 45 Am. Rep. 423. A, on a fair day, coming to an inn kept by B, with a horse and gig, ordered the horse to be put into the stable, but gave no special direction as to the gig. The horse was put into the stable, and the gig was placed with other carriages in the public highway near the house, where it was the practice of B to put carriages on fair days. The gig was stolen. *Held*, that B was answerable for the loss: *Jones v. Tyler*, 3 Nev. & M. 576; 1 Ad. & E. 522. An innkeeper is held liable for an injury sustained by plaintiff's horse, after plaintiff had paid his bill and his servant had commenced harnessing the team to leave, on the ground that the relation of innkeeper and guest had not yet terminated: *Seymour v. Cook*, 53 Barb. 451; 35 How. Pr. 180. A guest at a hotel left a valise in the office without calling attention thereto, and the clerk, not knowing who the owner was, took it into a room where baggage was kept. *Held*, that the landlord was a naked depositary, liable only for gross neglect: *Stewart v. Head*, 70 Ga. 449. A guest paid his bill, and was thereby entitled to the use of his room for the entire day. He left his trunk there, with twenty-five cents for portorage, the clerk agreeing to send the trunk at four o'clock to a steamer. *Held*, that the innkeeper's liability continued until the trunk was delivered on board the boat, and that the consideration for this agreement was the increased custom expected from this convenience for travelers: *Giles v. Fauntleroy*, 13 Md. 126. A traveler, after turning his trunk over to a transfer company at the depot to be taken to

Dec. 658; *Smith v. Wilson*, 36 Minn. 334. Some courts (against the weight of authority) have refused to enforce the extraordinary liability of an innkeeper beyond his necessary "baggage" and such money and goods as are requisite for the journey: *Pettigrew v. Barnum*, 11 Md. 434; 69 Am. Dec. 213; *Giles v. Fauntleroy*, 13 Md.

Md. 126; *Treiber v. Burrows*, 27 Md. 130; *Maltby v. Chapman*, 25 Md. 310; *Sassen v. Clark*, 37 Ga. 242; *Simon v. Miller*, 7 La. Ann. 360; *Profflet v. Hall*, 14 La. Ann. 524; *Myers v. Cottrill*, 5 Biss. 465; *Neal v. Wilcox*, 4 Jones, 146; 67 Am. Dec. 266.

¹ Schouler on Bailments, 257.

² *Callard v. White*, 1 Stark. 171.

a hotel, went to the hotel, and requested the innkeeper to send the trunk to his room on its arrival. According to the custom between the hotel-keeper and the transfer company, the latter delivered the trunk on a platform in front of the hotel, where the hotel-keeper usually received the baggage of his guests. *Held*, that such delivery placed the trunk within the inn and rendered the keeper liable for its loss: *Maloney v. Bacon*, 33 Mo. App. 501.

§ 1784. **Who may Bring Action.**—A father may sue for money of his minor child lost or stolen at the inn;¹ a master, principal, or corporation for money belonging to them in the possession of their servant or agent, and lost or stolen at the inn;² so may a bailor.³ In order to constitute one a guest at a hotel, it is not necessary that he should be there in person; it is sufficient if his property is there in charge of his wife, agent, servant, or some other member of his family. But the property must be there under such circumstances that the law will presume the possession to be in him, and not in the bailee in charge of it.⁴ Two partners, only one of whom is a guest at the inn, can maintain an action against an innkeeper as such for loss of goods which are the property of the firm.⁵ An action against an innkeeper to recover the value of personal property left in his charge by a guest, and subsequently stolen, is founded, not on tort, but on contract.⁶

ILLUSTRATIONS.—A trunk containing gloves and forty dollars in money belonging to a man, and jewelry belonging to his wife, was intrusted to an innkeeper whose guests they were, and while in his custody was broken open and the contents were stolen. In traveling the husband took and held the checks for the trunk. *Held*, that he could recover for the gloves and

¹ *Epps v. Hinds*, 27 Miss. 657; 61 Am. Dec. 528; *Dickinson v. Winchester*, 4 Cush. 114; 50 Am. Dec. 760. See *Lusk v. Belote*, 22 Minn. 468.

² *Mason v. Thompson*, 9 Pick. 280; 20 Am. Dec. 471; *Berkshire Woolen Mill Co. v. Proctor*, 7 Cush. 417; *Kellogg v. Sweeney*, 1 Lans. 397; *Towson*

v. Havre de Grace Bank, 6 Har. & J. 47; 14 Am. Dec. 254.

³ *Kellogg v. Sweeney*, 1 Lans. 397; *Schouler on Bailments*, 271.

⁴ *Coykendall v. Eaton*, 55 Barb. 188; 37 How. Pr. 438.

⁵ *Needles v. Howard*, 1 E. D. Smith, 54.

⁶ *Rockwell v. Proctor*, 39 Ga. 105.

money, but not for the jewelry: *Noble v. Milliken*, 74 Me. 225; 43 Am. Rep. 581.

§ 1785. **Innkeeper not Liable—Contributory Negligence of Guest.**—The innkeeper is not liable if “the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.”¹ A guest who brings chattels to an inn peculiarly liable to waste or escape should so notify the innkeeper.² It is not contributory negligence to keep one’s money and valuables by him, instead of depositing them in the inn safe;³ nor to neglect to lock one’s door, though furnished with a key;⁴ nor to be intoxicated, and thereby not hear a thief

¹ *Cashill v. Wright*, 6 El. & B. 891, per Erle, J.; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 Com. P. 515; *Classen v. Leopold*, 2 Sweeny, 205; *Purvis v. Coleman*, 21 N. Y. 111; *Jalie v. Cardinal*, 35 Wis. 118; *Kelsey v. Berry*, 42 Ill. 469; *Fuller v. Coats*, 18 Ohio St. 343; *Chamberlain v. Masterson*, 26 Ala. 371; *Elcox v. Hill*, 98 U. S. 218; *Hadley v. Upshaw*, 27 Tex. 547; 86 Am. Dec. 654; *Fowler v. Dorlon*, 24 Barb. 384; *Johnson v. Richardson*, 17 Ill. 302; 63 Am. Dec. 369; *Profflet v. Hall*, 14 La. Ann. 524; *Burgess v. Clements*, 4 Maule & S. 306; *Armistead v. Wilde*, 17 Q. B. 261; *Burrows v. Trieber*, 21 Md. 320; 83 Am. Dec. 590; *Read v. Amidon*, 41 Vt. 15; 98 Am. Dec. 560.

² *Healey v. Gray*, 68 Me. 489; 23 Am. Rep. 80.

³ *Jalie v. Cardinal*, 35 Wis. 118; *Weisenger v. Taylor*, 1 Bush, 275; 89 Am. Dec. 627; *Berkshire Woolen Mill Co. v. Proctor*, 7 Cush. 417; *Johnson v. Richardson*, 17 Ill. 302; 63 Am. Dec. 369; *Schouler on Bailments*, 275; *Calye’s Case*, 8 Coke, 32; *Pope v. Hall*, 14 La. Ann. 324; *Smith v. Wilson*, 36 Minn. 334. *Contra*, *Purvis v. Coleman*, 21 N. Y. 111; but here the sum of money was very large, and the guest had been expressly requested to deposit it in the hotel safe; also the New York statute, *post*, was in force.

⁴ *Calye’s Case*, 8 Coke, 32; *Mitchell v. Woods*, 16 L. T., N. S., 671; *Classen v. Leopold*, 2 Sweeny, 705; *Batterson v. Vogel*, 10 Mo. App. 235; *Buddenburg v. Benner*, 1 Hilt. 84; *Filipowski v. Merryweather*, 2 Fost. & F. 285; *Spring v. Hager*, 145 Mass. 186. It was held error to direct the jury that it is a guest’s duty to lock his door and close his window: *Bohler v. Owens*, 60 Ga. 185. But it may be evidence of negligence: *Jalie v. Cardinal*, 35 Wis. 118; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 Com. P. 515; *Burgess v. Clements*, 4 Maule & S. 310; *Spice v. Bacon*, 36 L. T., N. S., 896. By statute in Pennsylvania (Pa. Stats., Inns, 19) and Delaware (Del., V., 14, 417), an innkeeper is not liable for goods stolen from a room left unlocked or unbolted where he posts a notice requiring such locking, etc. In *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 754, it was said: “Was the plaintiff negligent in putting his clothes and watch on the lounge? or in leaving his money in the pocket-book with his clothes? or in not bolting the door, if he did not, in the absence of any notice of a regulation that he must? We cannot see that, whilst it may have been carelessness to some extent, anything of this sort, in the absence of notice of some rule or regulation,

who gets into his (the guest's) room at night;¹ nor not to inform the innkeeper that there is no lock on the door of his room;² nor to consent to share a room with a stranger.³ It is contributory negligence to carelessly expose before strangers a box of valuables in a public room and leave it there.⁴

ILLUSTRATIONS.—The plaintiff, a guest at the defendant's inn, had some five hundred dollars in money and a gold watch and chain stolen from his room at night. He did not lock or bolt his door. No notice to deposit such articles with the innkeeper was given, in conformity with the statute, and no notice or regulation about fastening doors was shown. *Held*, that the plaintiff was not necessarily negligent: *Murchison v. Sergeant*, 69 Ga. 206; 47 Am. Rep. 754. A guest at a hotel handed to the clerk his pocket-book for safe-keeping, containing \$136, which was, on the same day, stolen from the desk in the office.

is such negligence as will relieve the landlord of that gross negligence of which the law presumes him guilty. The entire room is safe for the guest, if he comply with the rules of the inn. The deposit of anything in it is a deposit with the landlord, — a delivery to him; unless, therefore, notified that he must not leave it in the room, it is not negligence to do so."

¹ *Walsh v. Porterfield*, 87 Pa. St. 376. In *Rubenstein v. Cruikshanks*, 54 Mich. 199, 52 Am. Rep. 806, it was ruled that it was no defense that the guest was drunk. "The fact," said the court, "that the plaintiff got intoxicated at the bar of the landlord should, if anything, cause him to be held to a stricter liability."

² *Lanier v. Youngblood*, 73 Ala. 587.

³ *Olson v. Crossman*, 31 Minn. 222.

⁴ *Armistead v. Wilde*, 17 Q. B. 261.

In *Herbert v. Markwell*, Q. B. Div. 1881, the action was against an innkeeper for loss of jewelry from rooms of the plaintiffs, husband and wife, his guests, by robbery at night. The defense was that the plaintiffs were negligent, — 1. In not bolting the door, and in leaving the key on the outside; 2. Because the wife wore, the same evening, conspicuously, at dinner, in the hotel, some of the jewelry which was stolen; and last, because the articles themselves, instead of being deposited

in some safe place, were left lying carelessly about the room. The jury found for the defendant. This was affirmed. The court said: "Assuming, then, that the door was not bolted in fact, was that *per se* evidence of negligence by the plaintiff? The cases which had been cited (*Oppenheim v. White Lion Hotel Co.*, L. R. 6 Com. P. 515, and *Spice v. Bacon*, 36 L. T., N. S., 896) showed that such an omission on the part of a guest was not by itself negligence, but that it was an element to be considered with other facts which might be proved, and which, taken together, might amount to negligence. Here there were other facts, of the slenderest nature no doubt, but still not such as should be excluded from the opinion of the jury; for instance, leaving the key in the lock outside, which was a temptation to thieves, and the wearing by the wife of her jewelry in a public room a few hours before. For these reasons he thought the rule should be discharged. Probably, if he had been on the jury, he should have found the other way; but what the court had to decide now was, not whether the verdict was against the weight of evidence, but whether there was any evidence in law to support it. He could not say there was not, and the rule therefore must be discharged."

Held, that the guest was not guilty of negligence in not informing the clerk that there was money in the pocket-book, and that the landlord was liable for its loss: *Shoecraft v. Bailey*, 25 Iowa, 553. An innkeeper, as his guest was about to go to bed, remarked to him that he had better take his valise to his room, to which he replied it was not necessary; that his valise would be safe in the bar-room, where it was allowed to remain; and on the next morning it was gone, and could not be found. *Held*, that the keeper was liable for its loss: *Packard v. Northcraft*, 2 Met. (Ky.) 439. A guest at an inn went to bed, leaving a bag containing about twenty-seven pounds in his trousers' pocket. He left his trousers on the floor at the side of his bed farthest from the door. There was a key in the lock of the door, but he only shut the door, and did not lock it. He had previously pulled the bag containing the money out of his pocket in the commercial-room for the purpose of paying somebody some money. In the course of the night somebody entered his bedroom through the door and stole the bag of money. *Held*, that there was evidence of negligence on his part, which occasioned the loss in such a way that it would not have happened had he used the care that a prudent man might reasonably be expected to have taken under the circumstances: *Oppenheim v. White Lion Hotel Co.*, 25 L. T., N. S., 93; 40 L. J. Com. P. 93; L. R. 6 Com. P. 515.

§ 1786. **Other Cases.**—The innkeeper is not liable where money, valuables, or other property of the guest are not put in the care of the innkeeper, but are intrusted to a servant or friend of the guest for safe-keeping;¹ or after the innkeeper has notified him to put them in a certain safe place, and the guest still keeps them under his own care.² An innkeeper is not liable for the loss of baggage carried away by one whom the owner has permitted to exercise acts of ownership over it without interference or informing the landlord of the true ownership.³ The innkeeper is not liable for property brought to the inn, not for shelter, but to prosecute a trade or occupation there.⁴

¹ *Sneider v. Gliss*, 1 Yeates, 34; *Vance v. Throckmorton*, 5 Bush, 41; *Houser v. Tully*, 62 Pa. St. 92; 1 Am. Rep. 390; *Albin v. Presby*, 8 N. H. 408; 29 Am. Dec. 679. *96 Am. Dec. 327*; *Packard v. Northcraft*, 2 Met. (Ky.) 439.

³ *Kelsey v. Berry*, 42 Ill. 469.

² *Purvis v. Coleman*, 21 N. Y. 111; ⁴ *Burgess v. Clements*, 4 Maule & S. 306; *Myers v. Cottrill*, 5 Biss. 465; *Fuller v. Coats*, 18 Ohio St. 343;

§ 1787. **Limitation of Liability—By Contract and Notice.**—The innkeeper may restrict his liability by special contract, provided it does not seek to cover his neglect; for such would be contrary to public policy.¹ So, subject to this qualification, the innkeeper may establish rules to which the guest must conform;² as, for example, that money and valuables shall be deposited in a safe,³ or that hats, coats, and umbrellas of guests while at meals shall be put in a certain place.⁴ But all rules of this kind must be reasonable.⁵ And such rules will be of no effect unless made known to the guest, and expressly or impliedly assented to by him.⁶ Merely posting the notice in a guest's room,⁷ or on the register in which he enters his name,⁸ would not be sufficient.

ILLUSTRATIONS.—A guest at a hotel entered his name on a register under a printed heading, as follows: "Money, jewels, and other valuable packages, it is agreed, shall be placed in the safe in the office, otherwise the proprietor shall not be responsible for any loss," and there was no proof that this notice was seen or assented to by the guest. *Held*, that it was not his contract: *Bernstein v. Sweeney*, 33 N. Y. Sup. Ct. 271.

Mowers v. Fethers, 61 N. Y. 34; 19 Am. Rep. 244. In *Mowers v. Fethers*, the defendant was held not an innkeeper as to the plaintiff's stallion, which he kept there for two weeks in each season to stand for mares. In *Myers v. Cottrill*, *Drummond, C. J.*, said: "If a person going into a hotel as a guest takes to his room, not ordinary baggage, not those articles which generally accompany a traveler, but valuable merchandise, such as watches and jewelry, and keeps them there for show and sale, and from time to time invites parties into his room to inspect and purchase, unless there is some special circumstance in the case showing that the innkeeper assumes the responsibility as of ordinary baggage as to such merchandise, the special obligations imposed by the common law do not exist, and the guest, as to these goods, becomes their vendor, and uses his room for the sale of merchandise, and really changes the ordinary relations between innkeeper and guest."

¹ Schouler on Bailments, 279; see *Lawson on Contracts of Carriers*, c. 2.

² *Van Wyck v. Howard*, 12 How. Pr. 147; *Wilson v. Halpin*, 30 How. Pr. 124.

³ *Purvis v. Coleman*, 21 N. Y. 111; *Spencer's Case*, *Dyer*, 266.

⁴ *Fuller v. Coats*, 18 Ohio St. 343. An innkeeper is not liable for the loss of articles—as of an overcoat and contents of its pockets—deposited by a guest in a place other than that designated therefor by a rule of the inn, which is reasonable, known to the guest, and not specially waived: *Id.*

⁵ *Pollock, C. B.*, in *Morgan v. Ravey*, 6 Hurl. & N. 265; *Schouler on Bailments*, 291.

⁶ *Purvis v. Coleman*, 21 N. Y. 111; *Fuller v. Coats*, 18 Ohio St. 343; *Read v. Amidon*, 41 Vt. 15; 98 Am. Dec. 560.

⁷ *Morgan v. Ravey*, 6 Hurl. & N. 265; *Bodwell v. Bragg*, 29 Iowa, 232.

⁸ *Bernstein v. Sweeney*, 33 N. Y. Sup. Ct. 271; *Milford v. Wesley*, 1 Wils. (Ind.) 119.

§ 1788. **Limitation of Liability — By Statute.** — By statute in a number of the states, an innkeeper's extraordinary liability has been restricted, and he is permitted to relieve himself from the common-law liability for money or valuables lost or stolen, by posting a notice that he keeps a place for their deposit. If the guest neglects after such notice to deposit the things as required, the innkeeper is not liable for their loss. Such statutes are in force in Alabama, California, Delaware, Dakota, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, and Wisconsin.¹ The effect of these statutes, then, is, that if the guest does not comply with the notice he must bear the loss himself.² By a New York statute,³ innkeepers are relieved from loss of property by fire, when it appeared that the fire was the work of an incendiary, and occurred without their fault or negligence. But the burden is on the innkeeper to show that the fire was an incendiary one, and that he was without fault.⁴ In Missouri⁵ and Wisconsin,⁶ the innkeeper is not liable for a loss by fire not produced by him or any of his servants. The negligence intended in the words "without the fault or negligence of such innkeeper," in limiting the liabilities of innkeepers for loss by fire of the property of guests, is that which precedes, induces, or facilitates the fire, and not negligence afterwards.⁷ It is held in New York, construing both the New York and the New Jersey statutes, which specify "money, jewels, or ornaments" as the valuables to be deposited, that if the innkeeper posts the

¹ Stimson's Statute Law, 523. In New York, a hotel-keeper, in the absence of negligence, or when the articles are not within the guest's room, is not liable beyond five hundred dollars: N. Y. Stats. 1883, c. 227.

² *Elcox v. Hill*, 98 U. S. 218; Wil-

kins v. Earle, 44 N. Y. 172; 4 Am. Rep. 655.

³ N. Y. Act of 1866, c. 638.

⁴ *Faucett v. Nichols*, 64 N. Y. 377.

⁵ Rev. Stats. 1879, sec. 5786.

⁶ Rev. Stats., sec. 1726.

⁷ *Faucett v. Nichols*, 4 Thomp. & C.

597.

statutory notice in the rooms of his guests as required, it is the duty of the guest at once, or as soon as he is able, to deposit such of these articles as he may have with him; and if he omits to do so, and they are lost or stolen, the innkeeper is not responsible.¹ The innkeeper is, however, liable as at common law for the loss of such valuables before the guest has had an opportunity of depositing them, and after he has received the deposit back and it is packed in his trunk awaiting his departure from the hotel.² Whatever the innkeeper receives and puts in his safe, he is liable for; the largeness of the amount does not alter his responsibility under the statutes.³ The omission to post up the notice is cured, it is held in New York, by giving the guest express notice by word of mouth;⁴ and to simply offer a package without disclosing its contents is not sufficient to bind the innkeeper.⁵ Where innkeepers are required by a statute to post copies thereof in bedrooms, in order to limit their liability for the personal effects of their guests, it is no defense to a suit that a guest had a copy of the statute upon the register, no copy having been posted in his bedroom.⁶ Notice to deposit

¹ *Hyatt v. Taylor*, 42 N. Y. 258; *Rosenfleuter v. Roessle*, 54 N. Y. 262; overruling *Gile v. Libby*, 36 Barb. 70. In *Ramaley v. Leland*, 43 N. Y. 540, 3 Am. Rep. 728, it was held that a person's watch was not within the statute. But this must be considered overruled by *Rosenfleuter v. Roessle*, 54 N. Y. 262. But *Bernstein v. Sweeney*, 33 N. Y. Sup. Ct. 271, *Maltby v. Chapman*, 25 Md. 310, *Milford v. Wesley*, 1 Wils. (Ind.) 119, *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 754, and *Krohn v. Sweeney*, 2 Daly, 200, favor a more reasonable rule, viz., that the statute does not extend to everything in the way of money and jewelry the court may have, but only what is beyond his ordinary necessities from day to day. Where no negligence is shown, an innkeeper is not liable under Massachusetts' Public Statutes, chapter 102, section 12, for loss of goods

belonging to a guest, who is a drummer, contained in a trunk, and for sale, unless there was a special agreement or deposit for safe-keeping: *Becker v. Haynes*, 29 Fed. Rep. 441.

² *Bendetson v. French*, 46 N. Y. 270.

³ *Wilkins v. Earle*, 44 N. Y. 172; 4 Am. Rep. 655; *Kellogg v. Sweeney*, 46 N. Y. 291; 17 Am. Rep. 333.

⁴ *Purvis v. Coleman*, 21 N. Y. 111. The authority of this decision is doubtful. All the judges did not concur, and the judgment may be maintained on another ground, viz., the negligence of the guest in keeping so large a sum in his room. See *Lanier v. Youngblood*, 73 Ala. 587; *Batterson v. Vogel*, 8 Mo. App. 24; *Spice v. Bacon*, L. R. 2 Q. B. Div. 463.

⁵ *Bendetson v. French*, 46 N. Y. 270.

⁶ *Batterson v. Vogel*, 8 Mo. App. 24.

valuables, simply printed at the head of the register, or given orally to the guest, is not such as is required by the Minnesota statutes, as to posting notices.¹ In Alabama he must post the notice on the door of each guest-chamber.²

ILLUSTRATIONS.—A traveler was put into a room in a hotel with a fellow-lodger, contrary to his remonstrances expressed to the servant, and his watch, money, etc., were stolen under circumstances rendering it extremely probable that the fellow-lodger took them. *Held*, that the innkeeper would not be protected by the failure of the loser to lock and bolt his door, since such precaution could not probably have prevented the loss: *Gile v. Libby*, 36 Barb. 70. A notice was posted by an innkeeper in his inn: "Deposit your money and valuables in the safe at the office." A guest did accordingly so deposit a large amount of gold-dust and coin, which was received and placed in the safe without objection. The clerk was knocked down and the safe robbed, the lock not being turned. *Held*, that the innkeeper was liable to the full amount of the deposit, judgment payable in gold: *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657. A guest at a hotel in New York gave a package containing twenty thousand dollars to the clerk to be deposited in the safe. The package was sealed and the name of the guest was written in pencil, but not the amount or contents. Notices posted in the hotel required that valuable packages deposited should be "properly labeled." The guest being asked what the package contained, replied, "Money." It was then received by the clerk, and put by him in the safe, from which it was stolen. *Held*, that the innkeeper was liable: *Wilkins v. Earle*, 44 N. Y. 172; 4 Am. Rep. 655. Under Alabama Code, 1876, section 1549, exempting an innkeeper for loss of articles not deposited with him, on condition that he "must keep posted on his door and other public places in his house . . . written or printed notices to his guests" that they are so to deposit, *held*, that posting notice on a single door was not sufficient: *Beale v. Posey*, 72 Ala. 323. A statute provides that inn-holders are not liable for losses sustained by their guests, "except for wearing apparel, articles worn or carried upon the person, to a reasonable amount, personal baggage, and money necessary for traveling expenses and personal use." *Held*, that a gold watch, pair of gold bracelets, a gold thimble, three gold rings, and a gold neck-pin taken for the owner's personal use are within the exception: *Noble v. Milliken*, 77 Me. 359. A statute provides that no innkeeper

shall be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise in his possession. *Held*, that knowledge on the innkeeper's part does not make him liable when the written notice has not been given, even though he has given the guest a room for the special purpose of displaying his samples: *Fisher v. Kelsey*, 16 Fed. Rep. 71; 121 U. S. 383.

PART IV.—COMMON CARRIERS.

CHAPTER XCI.

CARRIERS OF GOODS.

- § 1789. Common carrier defined—Test—Private carrier.
- § 1790. Subject to public regulation and control.
- § 1791. Carriage must be for hire.
- § 1792. Who are common carriers.
- § 1793. Status of carriers of animals.
- § 1794. Status of carriers of passengers.
- § 1795. Status of sleeping-car companies.
- § 1796. Status of telegraph companies.
- § 1797. Carrier bound to carry for all—Action for refusal—Mandamus—Discriminations.
- § 1798. Exceptions—Payment in advance refused.
- § 1799. Nature of goods and place of destination outside carrier's business or route.
- § 1800. Goods tendered away from office or after business hours.
- § 1801. Goods exposed to violence.
- § 1802. Suspicious packages.
- § 1803. Property not properly packed.
- § 1804. Goods beyond his facilities.
- § 1805. Delivery to carrier—Delivery to agent.
- § 1806. Owner retaining control of goods.
- § 1807. Delivery must be for immediate carriage.
- § 1808. Place of delivery.
- § 1809. Common carrier an insurer.
- § 1810. Exceptions—Act of God.
- § 1811. Public enemies—Mobs—Strikes.
- § 1812. Wear and tear and deterioration of goods—Animals.
- § 1813. Act of the law.
- § 1814. Stoppage in transitu.
- § 1815. Act or neglect of owner.
- § 1816. Fraud of owner.
- § 1817. Effect of delay—Loss by act of God after delay.
- § 1818. Effect of delay on contracts limiting liability.
- § 1819. Loss after deviation.
- § 1820. Effect of deviation on contracts limiting liability.
- § 1821. Duty of carrier as to stowage of goods.
- § 1822. Duty of carrier to follow shipper's instructions.
- § 1823. Agreements to deliver within specified time.

- § 1824. Duty of carrier as to care of goods during transit.
- § 1825. Presumption of negligence from failure to deliver safely.
- § 1826. Delivery by carrier — Personal delivery, when required.
- § 1827. Delivery by carriers by water.
- § 1828. Delivery by railroads.
- § 1829. Delivery by express companies.
- § 1830. Delivery to wrong person.
- § 1831. Where consignee cannot be found, or does not receive, carrier holds goods as warehouseman.
- § 1832. Duty of carrier to notify consignor.
- § 1833. Right of consignee to inspect goods before delivery.
- § 1834. Carrier's right of action for injury or taking of goods by third person.
- § 1835. Right of carrier to sell goods.
- § 1836. Right of carrier to freight — Goods must be delivered.
- § 1837. Who liable for freight.
- § 1838. Who may sue.

§ 1789. Common Carriers Defined — Test — Private Carrier. — A common carrier is one who undertakes for hire to transport the goods of such as choose to employ him from place to place.¹ As to the test by which to decide whether a person undertaking a carriage does so as a common carrier, several views have been entertained. In England, according to the latest case, "the test is whether he holds out either expressly or by a course of conduct that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried."² And this is the test adopted in a large majority of the American cases.³

¹ *Dwight v. Brewster*, 1 Pick. 50; 11 Am. Dec. 133; *The Niagara v. Cordes*, 21 How. 7; *Gisbourn v. Hurst*, 1 Salk. 249; *McClures v. Hammond*, 1 Bay, 99; 1 Am. Dec. 598; *Craig v. Childress*, Peck, 270; 14 Am. Dec. 751; *Robertson v. Kennedy*, 2 Dana, 430; 26 Am. Dec. 466; *Doty v. Strong*, 1 Pinn. 313; 40 Am. Dec. 773; *Fish v. Chapman*, 2 Ga. 349; 46 Am. Dec. 393; *Verner v. Switzer*, 32 Pa. St. 208. Mr. Hutchinson's definition is more elaborate: "A common or public carrier is one who undertakes as a business, for hire or reward, to carry from one place to another the goods of all persons who may apply for such carriage, provided the goods be of the kind

which he professes to carry, and the person so applying will agree to have them carried upon the lawful terms prescribed by the carrier; and who, if he refuses to carry such goods for those who are willing to comply with his terms, becomes liable to an action by the aggrieved party for such refusal": *Hutchinson on Carriers*, sec. 47. But this is a statement of a few of the carrier's rights and liabilities, rather than a definition.

² *Nugent v. Smith*, L. R. 1 C. P. D. 19, 423.

³ *Fish v. Clarke*, 2 Lans. 176; 49 N. Y. 122; *Allen v. Sackrider*, 37 N. Y. 341; *Dwight v. Brewster*, 1 Pick. 50; 11 Am. Dec. 133; *Citizens' Bank v. Nan-*

A private carrier is one who, without being engaged in such business as a public employment, undertakes to

tucket Steamboat Co., 2 Story, 17; Satterlee v. Groat, 1 Wend. 272; Chevallier v. Straham, 2 Tex. 115; 47 Am. Dec. 639; Samms v. Stewart, 20 Ohio 69; 55 Am. Dec. 445; Steele v. Mc-Tyer, 31 Ala. 667; 70 Am. Dec. 516; Mershon v. Habensock, 22 N. J. L. 372. In Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, the court said: "'Common carriers,' said Chancellor Kent, 'undertake generally and for all people indifferently to convey goods and deliver them at a place appointed for hire, and with or without a special agreement as to price': 2 Kent's Com. 598. 'It is not,' says Mr. Justice Story, 'every person who undertakes to carry goods for hire that is deemed a common carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of an ordinary bailee for hire; that is to say, the responsibility of ordinary diligence. To bring a person under the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*': Story on Bailments, sec. 495. A common carrier is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey, or is not in the habit of conveying: Jackson v. Rogers, 2 Show. 327; Riley v. Horne, 5 Bing. 217; Lane v. Cotton, 1 Ld. Raym. 646; Edwards v. Sherratt, 1 East, 604; Batson v. Donovan, 1 Barn. & Ald. 32; 2 Kent's Com. 598; Elsee v. Gatward, 5 Term Rep. 143; Dwight v. Brewster, 1 Pick. 50; 11 Am. Dec. 133; Jencks v. Coleman, 2 Sum. 221; Story on Bailments, secs. 322, 323; Patton v. Magrath, Dud. (S. C.), 159; 31 Am. Dec. 552. It will be seen hereafter, we hold that, according to the common law as of force in this country in 1776, a common carrier cannot vary or limit his liability

by notice or special acceptance, and shall advert to this subject again. For the present, we state the proposition broadly, that he is in the nature of an insurer of the goods intrusted to his care, and is responsible for every injury sustained by them, occasioned by any means whatever, except only the act of God and the king's enemies: 1 Inst. 89; Dale v. Hall, 1 Wils. 281; Covington v. Willan, Gow. 115; Davis v. Garrett, 6 Bing. 716; 2 Kent's Com. 597; Coggs v. Bernard, 2 Ld. Raym. 918; Forward v. Pittard, 1 Term Rep. 27; Trent Nav. Co. v. Wood, 3 Esp. 127; Riley v. Horne, 5 Bing. 217. It is from these definitions, and from the two propositions stated, that we are to determine what constitutes a person a common carrier. I infer, then, that the business of carrying must be habitual, and not casual. An occasional undertaking to carry goods will not make a person a common carrier; if it did, then it is hard to determine who, in a planting and commercial community like ours, is not one; there are few planters in our own state owning a wagon and team who do not occasionally contract to carry goods. It would be contrary to reason, and excessively burdensome,—nay, enormously oppressive,—to subject a man to the responsibilities of a common carrier, who might once a year or oftener, at long intervals, contract to haul goods from one point in the state to another. Such a rule would be exceedingly inconvenient to the whole community, for, if established, it might become difficult in certain districts of our state to procure transportation. The undertaking must be general, and for all people indifferently. The undertaking may be evidenced by the carrier's own notice, or practically by a series of acts, by his known habitual continuance in this line of business. He must thus assume to be the servant of the public; he must undertake for all people. A special undertaking for one man does not make a wagoner or anybody else a common carrier. I am very well aware of the importance of holding wagoners in this country to a

deliver goods in a particular case for hire or reward;¹ as one who keeps a ferry for his own use, and for the convenience of customers to his mill, but who charges no ferriage;² or one who contracts to cut a lot of timber, and transport it to a place where it is to be delivered and used;³ or one who owns a sloop, and is specially employed by another to make two trips to carry grain.⁴ A few cases, on the contrary, hold that a person may assume all the responsibilities of a common carrier whose contract may be confined to a particular instance, and for a particular person, and who only occasionally, and not as a business, accepts the goods of others for transportation for hire.⁵

A common carrier is a common carrier only as to such kinds of goods as he undertakes to carry for hire.⁶ But the carrier may by usage and custom hold himself out as undertaking to carry other things than goods.⁷ Thus by usage a carrier may be held liable as a carrier of

rigid accountability; they are from necessity greatly trusted, valuable interests are committed to them, and they are not always of the most careful, sober, and responsible class of our citizens. Still the necessity of an inflexible adherence to general rules we cannot and wish not to escape from. To guard this point, therefore, we say that he who follows wagoning for a livelihood, or he who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place, whether for a year, a season, or less time, is a common carrier, and subject to all his liabilities. One of the obligations of a common carrier, as we have seen, is to carry the goods of any person offering to pay his hire; with certain specific limitations, this is the rule. If he refuse to carry, he is liable to be sued, and to respond in damages to the person aggrieved, and this is, perhaps, the safest test of his character.

¹ *Pennewill v. Cullen*, 5 Harr. (Del.) 238.

² *Self v. Dunn*, 42 Ga. 528; 5 Am. Rep. 544.

³ *Pike v. Nash*, 3 Abb. App. 610.

⁴ *Allen v. Sackrider*, 37 N. Y. 341.

⁵ *Gordon v. Hutchinson*, 1 Watts & S. 285; 37 Am. Dec. 464; *Moss v. Bettis*, 4 Heisk. 661; 13 Am. Rep. 1; *Powers v. Davenport*, 7 Blackf. 497; 43 Am. Dec. 100; *Chouteaux v. Leech*, 18 Pa. St. 224; 57 Am. Dec. 602. Whether the defendant was at the time a common carrier or only a warehouseman is a question for the jury: *North Mo. R. R. Co. v. Akers*, 4 Kan. 388; 96 Am. Dec. 183.

⁶ *Knox v. Rives*, 14 Ala. 249; 48 Am. Dec. 97; *Powell v. Mills*, 30 Miss. 231; 64 Am. Dec. 158; *Tunnell v. Pettijohn*, 2 Harr. (Del.) 48; *Lake Shore etc. R. R. Co. v. Perkins*, 25 Mich. 329; 12 Am. Rep. 275. A clause in the charter of a railroad company requiring them to transport "all merchandise and property" does not oblige them to become common carriers of money: *Kuter v. R. R. Co.*, 1 Biss. 35.

⁷ *Lawson on Usages and Customs*, sec. 78; *Hutchinson on Carriers*, sec. 77.

money,¹ or of cash letters,² or as an agent to sell, and return the proceeds.³

§ 1790. **Subject to Public Regulation and Control.** — His duties are public duties, and he is hence subject to regulation and control by the legislature.⁴ The obligation of a common carrier does not arise out of contract, but it is declared by law, and his responsibilities are fixed by considerations of public policy.⁵

§ 1791. **Carriage must be for Hire.** — The carriage must be for hire, and not gratuitous.⁶ One who keeps a ferry, not for public accommodation, but for the customers of his mill, and charges no ferriage, is not a common carrier.⁷ But where corn was shipped by a railroad company which agreed to return the empty bags free,⁸ and where a carrier undertook to transport goods and sell them, and bring the money arising from the sale back with him without charge,⁹ it was held that neither the carriage of the empty bags nor the return of the money could be considered as gratuitous. To render a common carrier liable as such, a particular agreement for hire is not necessary, as he may have a *quantum meruit* when no such agreement is made.¹⁰ The fact that a carrier did not intend to charge for the transportation of a certain chattel, but meant to carry it gratuitously, if not communicated

¹ *Kemp v. Coughtry*, 11 Johns. 109; *Cincinnati etc. Mail Co. v. Boal*, 15 Ind. 345; *Sheldon v. Robinson*, 7 N. H. 157; *Emery v. Hersey*, 4 Greenl. 407; 16 Am. Dec. 268; *Harrington v. McShane*, 2 Watts, 443; 27 Am. Dec. 321; *Merwin v. Butler*, 17 Conn. 138; *Hosea v. McCrory*, 12 Ala. 349; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Dwight v. Brewster*, 1 Pick. 50; 11 Am. Dec. 133; *Hutchinson on Carriers*, sec. 40; *Allen v. Sewall*, 2 Wend. 317; *Sewall v. Allen*, 6 Wend. 335; *Van Santvoord v. St. John*, 6 Hill, 158; *Kirtland v. Montgomery*, 1 Swan, 452.

² *Hosea v. McCrory*, 12 Ala. 349.

³ *Lawson on Usages and Customs*, sec. 78.

⁴ *Peik v. R. R. Co.*, 94 U. S. 164. *Chicago etc. R. R. Co. v. Ackley*, 94 U. S. 179; *Winona etc. R. R. Co. v. Blake*, 94 U. S. 180.

⁵ *Thurman v. Wells*, 18 Barb. 500.

⁶ *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16.

⁷ *Self v. Dunn*, 42 Ga. 528; 5 Am. Rep. 544; *Littlejohn v. Jones*, 2 McMull. 366; 39 Am. Dec. 132.

⁸ *Pierce v. R. R. Co.*, 23 Wis. 387.

⁹ *Harrington v. McShane*, 2 Watts, 443; 27 Am. Dec. 321.

¹⁰ *Allen v. Sewall*, 2 Wend. 327.

to the owner, does not render the bailment a gratuitous one.¹ The carrier's charges must be reasonable.² The charge of a railroad company for transporting packed parcels by rail, of the full sum which would be payable in the aggregate if they were not packed, and were charged for severally, cannot be rightfully imposed upon the public generally, nor upon express carriers or other middlemen.³ Where a carrier offers to carry goods at a certain rate, though less than tariff rate, which offer the shipper accepts, the carrier is bound thereby.⁴

ILLUSTRATIONS. — A common carrier received a package for transportation, agreeing to carry it for a stipulated sum prepaid, without inquiry into its value, or notice of a limited liability on account of value, and without misrepresentation, deceit, or artifice on the part of the shipper. Discovering that the package was of greater value than he had supposed, he refused to deliver it to the consignee without additional compensation, which the consignee paid. *Held*, that the latter might maintain an action to recover it back: *Baldwin v. Steam. Co.*, 74 N. Y. 125; 30 Am. Rep. 277.

§ 1792. Who are Common Carriers. — The following are held to be common carriers, and subject to all their liabilities: Canal-boats;⁵ express-men and express companies, or transportation companies forwarding goods from place to place for hire, either in their own conveyances, or in conveyances owned and managed by others;⁶

¹ *Gray v. Packet Co.*, 64 Mo. 47.

² In *Holford v. Adams*, 2 Duer, 471, four hundred dollars for conveying a package of bonds valued at forty thousand dollars from New Orleans to New York was held extortionate.

³ *Chamblos v. R. R. Co.* 4 Brewst. 563.

⁴ *Atchison and Nebraska R. R. Co. v. Miller*, 16 Neb. 661.

⁵ *Harrington v. Lyles*, 2 Nott & McC. 88; *Williams v. Branson*, 1 Murph. 417; 4 Am. Dec. 562; *Spencer v. Daggett*, 2 Vt. 92; *Fuller v. Bradley*, 25 Pa. St. 120; *De Mott v. Laraway*, 14 Wend. 225; 28 Am. Dec. 523; *Parsons v. Hardy*, 14 Wend. 215; 28

Am. Dec. 521. A company owning and operating a canal is not bound as a common carrier or insurer for the safely navigable state of the canal, but only for the exercise of reasonable care: *Penn. Canal Co. v. Burd*, 90 Pa. St. 281; 35 Am. Rep. 659. A canal company is not liable as a common carrier for timber lost from rafts transported by it by theft, sinking, or otherwise: *Watts v. Canal Co.*, 64 Ga. 88; 37 Am. Rep. 53.

⁶ *Christenson v. American Express Co.*, 15 Minn. 270; 2 Am. Rep. 122; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189; *Sherman v. Wells*, 28 Barb. 403; *Baldwin v. American Ex-*

ferry-men, as to the baggage of passengers, and such goods and chattels as they make it a business to trans-

press Co., 23 Ill. 197; 74 Am. Dec. 190; *Read v. Spaulding*, 5 Bosw. 395; *Haslam v. Adams Express Co.*, 6 Bosw. 235; *Sweet v. Barney*, 23 N. Y. 335; *Verner v. Sweitzer*, 32 Pa. St. 208; *Southern Express Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *Richards v. Westcott*, 2 Bosw. 589; *Stadhecker v. Combs*, 1 Rich. 193; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Gulliver v. Adams Express Co.*, 38 Ill. 503; *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 115; *U. S. Express v. Buchanan*, 28 Ohio St. 144; *Hayes v. Wells*, 23 Cal. 185; 83 Am. Dec. 89; *Am. Express Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691; *Merchants' Dispatch Trans. Co. v. Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847. *Contra*, the early case of *Roberts v. Turner*, 12 Johns. 232; 7 Am. Dec. 311; and see *Hooper v. Wells*, 27 Cal. 11; 85 Am. Dec. 211. An agreement "to forward" goods to a place designated for an agreed freight is not a contract for forwarding, but for carrying: *Krender v. Woolcott*, 1 Hilt. 223. In *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68, the court say: "It is urged in behalf of the defendants that they ought not to be held to the strict liability of common carrier, for the reason that the contract of carriage is essentially modified by the peculiar mode in which defendants undertake the performance of the service. The main ground on which this argument rests is, that persons exercising the employment of express carriers or messengers over railroads and by steamboats cannot, from the very nature of the case, exercise any care or control over the means of transportation which they are obliged to adopt; that the carriages and boats in which the merchandise intrusted to them is placed, and the agents or servants by whom they are managed, are not selected by them, nor subject to their direction or supervision; and that the rules of the common law regulating the duties and liabilities of common carriers having been adapted to a different mode of conducting business by which the car-

rier was enabled to select his own servants and vehicles, and to exercise a personal care and oversight of them, are wholly inapplicable to a contract of carriage by which it is understood between the parties that the service is to be performed, in part at least, by means of agencies over which the carrier can exercise no management or control whatever. But this argument, though specious, is unsound. Its fallacy consists in the assumption that at common law, in the absence of any express stipulation, the contract with an owner or consignor of goods delivered to a carrier for transportation necessarily implies that they are to be carried by the party with whom the contract is made, or by servants or agents under his immediate direction and control. But such is not the undertaking of the carrier. The essence of the contract is, that the goods are to be carried to their destination, unless the fulfillment of this undertaking is prevented by the act of God or the public enemy. This, indeed, is the whole contract, whether the goods are carried by land or water, by the carrier himself or by agents employed by him. The contract does not imply a personal trust which can be executed only by the contracting party himself, or under his supervision by agents and means of transportation directly and absolutely within his control. Long before the discovery of steam-power, a carrier who undertook to convey merchandise from one point to another was authorized to perform the service through agents exercising an independent employment, which they carried on by the use of their own vehicles, and under the exclusive care of their own servants. It certainly never was supposed that a person who agreed to carry goods from one place to another by means of wagons or stages could escape liability for the safe carriage of the property over any part of the designated route by showing that loss happened at a time when the goods were placed by him in vehicles which he did not own, or which

port;¹ hackmen and cab-drivers;² horse-railroads;³ omnibus lines and proprietors;⁴ carriers of goods by water, whether the transportation be from port to port within the same country, or beyond the sea,⁵ these including sailing-ships or steam-vessels engaged in the coasting

were under the charge of agents whom he did not select or control. The truth is, that the particular mode or agency by which the service is to be performed does not enter into the contract of carriage with the owner or consignor."

¹ *Sanders v. Young*, 1 Head, 219; 73 Am. Dec. 175; *Cohen v. Hume*, 1 McCord, 439; *Pomeroy v. Donaldson*, 5 Mo. 36; *Albright v. Penn*, 14 Tex. 290; *Claypool v. McAllister*, 20 Ill. 504; *Fisher v. Clisbee*, 12 Ill. 344; *Wilson v. Hamilton*, 4 Ohio St. 722; *Harvey v. Rose*, 26 Ark. 3; 7 Am. Rep. 595; *Powell v. Mills*, 37 Miss. 691; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Self v. Dunn*, 42 Ga. 528; 5 Am. Rep. 544; *Cook v. Gourdine*, 2 Nott & McC. 19; *Whitmore v. Bowman*, 4 G. Greene, 148; *Babcock v. Herbert*, 3 Ala. 392; 37 Am. Dec. 695; *Miller v. Pendleton*, 8 Gray, 547; *Smith v. Seward*, 3 Pa. St. 342; *Griffith v. Cave*, 22 Cal. 535; 83 Am. Dec. 82; *May v. Hanson*, 5 Cal. 360; 63 Am. Dec. 135; *Littlejohn v. Jones*, 2 McMull. 365; 39 Am. Dec. 132; *White v. Winnisimmet Co.*, 7 Cush. 155, the court saying: "To a certain extent, persons keeping and maintaining a ferry are common carriers, and subject to the liabilities attaching to common carriers. It would be so if a bale of goods or an article of merchandise was delivered by the owner to the agent of a ferry company to be carried from one place to another for hire. Upon receiving such goods for transportation, the ferry company stipulate to carry them safely, and subject themselves to strict liability for the safe carriage and delivery of such goods, being only exempted for losses occasioned by those acts which are denominated 'acts of God or of a public enemy.' The principle above stated would embrace the case of a horse and wagon

received by a ferry-man, to be transported by him on a ferry-boat, the ferry-man accepting the exclusive custody of the same for such purpose, and the owner having, for the time being, surrendered the possession to the ferry-man. But if the traveler uses the ferry-boat as he would a toll-bridge, personally driving his horse upon the boat, selecting his position on the same, and himself remaining on the boat, neither putting his horse into the care and custody of the ferry-man nor signifying to him or his servants any wish or purpose to do so, and the only possession and custody by the ferry-man of the horse and vehicle to which he is attached is that which necessarily results from the traveler's driving his horse and wagon, or other vehicle, on board the boat, and paying the ordinary toll for a passage, — in such case the ferry company would not be chargeable with the full liabilities of common carriers of merchandise."

² *Bonce v. R. R. Co.*, 53 Iowa, 278; 36 Am. Rep. 221.

³ *Levy v. R. R. Co.*, 11 Allen, 300; 87 Am. Dec. 713. In an action against a street-railroad company to recover damages for the loss of a box of merchandise delivered to it to be carried for hire on the front platform of one of its cars, evidence that other persons had paid money to its conductors, with the knowledge of its superintendent, for the carriage of merchandise, is admissible to show the defendant to be a common carrier of goods: *Levy v. R. R. Co.*, 11 Allen, 300; 87 Am. Dec. 713.

⁴ *Parmelee v. McNulty*, 19 Ill. 556; *Parmelee v. Lowitz*, 74 Ill. 116; 24 Am. Rep. 276; *Dibble v. Brown*, 12 Ga. 217; 56 Am. Dec. 460.

⁵ *Elliott v. Rossell*, 10 Johns. 1; 6 Am. Dec. 306.

trade, or upon the lakes or navigable rivers;¹ railroads;² stage-coach proprietors;³ and teamsters and wagoners.⁴

Steamboat-men employed in the business of towing are not common carriers;⁵ nor is a log-driving and booming company.⁶ A common carrier who is also a contractor with the government for carrying the mails is not liable as a common carrier to the sender of a letter by mail for its loss.⁷ In Colorado, a corporation transporting for hire water owned by the public is a common carrier.⁸

§ 1793. Status of Carriers of Animals.—In most of the states, carriers of animals are held to be common carriers, and insurers as of other kinds of merchandise,

¹ *Hutchinson on Carriers*, sec. 65, 66; *Williams v. Branson*, 1 *Murph.* 417; 4 *Am. Dec.* 562; *Gilmore v. Carman*, 1 *Smedes & M.* 279; 40 *Am. Dec.* 96; *Swindler v. Hilliard*, 2 *Rich.* 286; 45 *Am. Dec.* 632.

² *Story on Bailments*, 496; *Southwestern R. R. Co. v. Webb*, 48 *Ala.* 585; *Norway Plains Co. v. R. R. Co.*, 1 *Gray*, 263; 61 *Am. Dec.* 423; *Chicago etc. R. R. Co. v. Thompson*, 19 *Ill.* 578; *Fuller v. R. R. Co.*, 21 *Conn.* 570; *Jones v. R. R. Co.*, 27 *Vt.* 399; 65 *Am. Dec.* 206; *Rogers Loc. Works v. R. R. Co.*, 20 *N. J. Eq.* 379; *Selma etc. R. R. Co. v. Butts*, 43 *Ala.* 385; 94 *Am. Dec.* 694. A railroad company is not liable as a common carrier, but as a mere bailee for hire, where the agent of the company is guilty of negligence in failing to deliver a piece of machinery consigned to him for shipment with other pieces of machinery: *Foard v. R. R. Co.*, 8 *Jones*, 235; 78 *Am. Dec.* 277. And a railroad company receiving freight before the road is completed, and when it is only running construction trains, is liable as a common carrier therefor: *Little Rock etc. R. R. Co. v. Glidewell*, 39 *Ark.* 487.

³ *Hollister v. Nowlen*, 19 *Wend.* 234; 32 *Am. Dec.* 455; *Cole v. Goodwin*, 19 *Wend.* 251; 32 *Am. Dec.* 470; *Clark v. Faxton*, 26 *Wend.* 153; *Powell v. Myers*, 26 *Wend.* 591; *Camden etc. Transp. Co. v. Belknap*, 21 *Wend.* 354; *Jones v. Voorhees*, 10 *Ohio*, 145;

Dwight v. Brewster, 1 *Pick.* 50; 11 *Am. Dec.* 133; *Bean v. Sturtevant*, 8 *N. H.* 146; 28 *Am. Dec.* 389; *Beckman v. Shouse*, 5 *Rawle*, 179; 28 *Am. Dec.* 653.

⁴ *Gordon v. Hutchinson*, 1 *Watts & S.* 285; 37 *Am. Dec.* 464; *Robertson v. Kennedy*, 2 *Dana*, 430; 26 *Am. Dec.* 466; *Chevallier v. Straham*, 2 *Tex.* 115; 47 *Am. Dec.* 639; *Philleo v. Sanford*, 17 *Tex.* 227; 67 *Am. Dec.* 654.

⁵ *Caton v. Rumney*, 13 *Wend.* 387; *Alexander v. Greene*, 3 *Hill*, 9; *Wells v. Steam Nav. Co.*, 2 *N. Y.* 204; *Leonard v. Hendrickson*, 18 *Pa. St.* 40; 55 *Am. Dec.* 587; *Varble v. Bigley*, 14 *Bush*, 698; 29 *Am. Rep.* 435; *Brown v. Clegg*, 63 *Pa. St.* 51; 3 *Am. Rep.* 522; *Hays v. Millar*, 77 *Pa. St.* 238; 18 *Am. Rep.* 445; *Arctic etc. Insurance Co. v. Austin*, 54 *Barb.* 559; *Transatlantic Line v. Hope*, 95 *U. S.* 297. *Contra*, *Smith v. Pierce*, 1 *La.* 349; *Adams v. New Orleans Towboat Co.*, 11 *La.* 46; *Walston v. Myers*, 5 *Jones*, 174; *Bussey v. Miss. Valley Trans. Co.*, 24 *La. Ann.* 165; 13 *Am. Rep.* 120; *White v. The Mary Ann*, 6 *Cal.* 462; 65 *Am. Dec.* 523; *Clapp v. Stanton*, 20 *La. Ann.* 495; 96 *Am. Dec.* 417.

⁶ *Mann v. White River Log etc. Co.*, 46 *Mich.* 38; 41 *Am. Rep.* 141.

⁷ *Central R. & B. Co. v. Lampley*, 76 *Ala.* 357; 52 *Am. Rep.* 334.

⁸ *Wheeler v. North Col. Irrigation Co.*, 10 *Col.* 582; 3 *Am. St. Rep.* 603.

subject to the modification that they are not to be held liable for damages or losses growing out of the inherent vices or propensities of the animals carried.¹ In a few states carriers of animals are not looked upon as common carriers.² But even where they are not held to the liabilities of common carriers they are still required to exercise proper care. In Ohio and Kentucky a railroad company acting as a carrier of live-stock cannot contract for exemption from responsibility for loss arising by its own neglect of duties incident to such employment.³ A special contract devolving on the owner the personal care of the cattle, with the risk of their escaping or being

¹ *Kimball v. R. R. Co.*, 26 Vt. 247; 62 Am. Dec. 567; *Agnew v. The Contra Costa*, 27 Cal. 425; 87 Am. Dec. 87; *Atchison etc. R. R. Co. v. Washburn*, 5 Neb. 117; *Kansas etc. R. R. Co. v. Reynolds*, 8 Kan. 623; *Kansas etc. R. R. Co. v. Nicholls*, 9 Kan. 235; 12 Am. Rep. 494; *Ritz v. R. R. Co.*, 3 Phila. 82; *Cragin v. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559; *Penn v. R. R. Co.*, 49 N. Y. 204; 10 Am. Rep. 355; *Mynard v. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28; 7 Hun, 399; *German v. R. R. Co.*, 38 Iowa, 127; *McCoy v. R. R. Co.*, 44 Iowa, 424; *Wilson v. Hamilton*, 4 Ohio St. 722; *Welsh v. R. R. Co.*, 10 Ohio St. 65; 75 Am. Dec. 490; *St. Louis etc. R. R. Co. v. Dorman*, 72 Ill. 504; *South Alabama etc. R. R. Co. v. Henlein*, 52 Ala. 606; *Rixford v. Smith*, 52 N. H. 355; 13 Am. Rep. 42; *Clarke v. R. R. Co.*, 14 N. Y. 570; 67 Am. Dec. 205; *Ohio etc. R. R. Co. v. Dunbar*, 20 Ill. 623; 71 Am. Dec. 291; *Smith v. R. R. Co.*, 12 Allen, 531; 90 Am. Dec. 166; *Evans v. R. R. Co.*, 111 Mass. 142; 15 Am. Rep. 20; *Conger v. R. R. Co.*, 6 Duer, 375; *Harris v. R. R. Co.*, 20 N. Y. 232; *Powell v. R. R. Co.*, 32 Pa. St. 414; 75 Am. Dec. 564; *East Tennessee etc. R. R. Co. v. Whittle*, 27 Ga. 535; 73 Am. Dec. 741; *Bamberg v. R. R. Co.*, 9 S. C. 61; 30 Am. Dec. 13; *Evans v. R. R. Co.*, 111 Mass. 15 Am. Rep. 19; *Indianapolis etc. R. R. Co. v. Jurey*, 8 Ill. App. 160; *Chicago etc. R. R.*

Co. v. Hannon, 12 Ill. App. 54; *Illinois Central R. R. Co. v. Bretsford*, 13 Ill. App. 251; *Missouri Pacific R. Co. v. Harris*, 67 Tex. 166; *Mason v. R. R. Co.*, 25 Mo. App. 473; *Lindsley v. R. R. Co.*, 36 Minn. 539; 1 Am. St. Rep. 692; *Ayres v. R. R. Co.*, 71 Wis. 372; 5 Am. St. Rep. 226. The carrier is responsible for any injury which can be prevented by foresight, vigilance, and care, although arising from the conduct of the animals: *Clarke v. R. R. Co.*, 14 N. Y. 570; 67 Am. Dec. 205.

² *Louisville etc. R. R. Co. v. Hedger*, 9 Bush, 645; 15 Am. Rep. 740; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Lake Shore R. R. Co. v. Perkins*, 25 Mich. 329; 12 Am. Rep. 275; *Michigan etc. R. R. Co. v. McDonough*, 21 Mich. 165; 4 Am. Rep. 466; *Baker v. R. R. Co.*, 10 Lea, 304; *Pitre v. Offutt*, 21 La. Ann. 679; 99 Am. Dec. 749. But the carrier must provide safe cars: *Peters v. R. R. Co.*, 16 La. Ann. 222; 79 Am. Dec. 578. So in England: *McManus v. R. R. Co.*, 2 Hurl. & N. 693; *Kendall v. R. R. Co.*, 7 Ex. 373. It is lawful for a common carrier to transport cattle on Sunday: *Philadelphia etc. R. R. Co. v. Lehman*, 56 Md. 209; 40 Am. Rep. 415.

³ *Welsh v. R. R. Co.*, 10 Ohio St. 65; 75 Am. Dec. 490; *Adams Express Co. v. Nock*, 2 Duvall, 562; *Louisville etc. R. R. Co. v. Hedger*, 9 Bush, 645; 15 Am. Rep. 740.

injured through their own restiveness or viciousness, does not exonerate the company from responsibility for damages resulting from a failure to provide a safe car for their transportation.¹ In Michigan, where carriers of animals are not regarded as common carriers, unless they have specially agreed to be liable as such, a contract for the carriage of live-stock exempting the carrier for losses "in loading, unloading, conveyance, and otherwise, whether arising from negligence or otherwise," does not exempt him from a loss caused by defective cars.² In Wisconsin a carrier of live-stock is not a common carrier to the full extent, and may exempt himself from liability for damage to them during transportation from any cause.³ If water is scarce on the line of a railroad, so that it cannot be provided for the purpose of applying to live hogs shipped in its cars, when necessary, the company ought to inform shippers of the fact before they ship; and if such information is withheld, and hogs are shipped, and die on the route for want of water, the company will be liable.⁴ A railroad undertaking to carry live animals for hire is bound to provide cars of sufficient strength to prevent the animals from breaking through the same; and will be responsible for a loss occurring through failure to do so, although the animals were unruly and vicious; but not for an injury to the animals occurring simply from their own viciousness or unruliness while being carried in a proper car.⁵ A shipper of live-stock cannot demand of the railroad company more than suitable, safe, and sufficient cars, motive power, and appliances,—cannot demand the use of the "safest and best approved motive power, with the best appliances in use."⁶ If a railroad company receives for carriage a car

¹ Rhodes v. R. R. Co., 9 Bush, 688.

² Hawkins v. R. R. Co., 17 Mich. 57; 97 Am. Dec. 179; Great Western R. R. Co. v. Hawkins, 18 Mich. 427.

³ Betts v. Farmers' Loan etc. Co., 21 Wis. 80; 91 Am. Dec. 460.

⁴ Toledo etc. R. R. Co. v. Thompson, 71 Ill. 434.

⁵ Smith v. R. R. Co., 12 Allen, 531; 90 Am. Dec. 166.

⁶ Illinois Cent. R. R. Co. v. Haynes, 63 Miss. 485.

overloaded with hogs without objection, and by reason of delay the hogs "pile up" and are injured, the company is liable.¹ A common carrier's liability does not attach to a railroad company contracting to move a menagerie in the latter's own cars controlled by its own agents, and, though operated by railroad employees, run upon a time schedule to suit the menagerie.² A railroad company which does not assume the transportation of dogs, but permits its baggage-masters to take charge of them as a matter of accommodation, and for a fee retained by the baggage-master, is not liable as a common carrier if the dogs come to harm.³

§ 1794. **Status of Carriers of Passengers.** — A carrier of passengers is not strictly a common carrier, nor subject to his extreme liabilities.⁴

§ 1795. **Status of Sleeping-car Companies.** — It has been ruled that a sleeping-car company is not for all purposes a common carrier.⁵ Nevertheless, it is bound to supply all proper persons with berths who apply for them, and it has room for them, and is liable to an action for excluding a passenger from a berth.⁶ A sleeping-car

¹ *Kinnick v. R. R. Co.*, 69 Iowa, 665.

² *Coup v. R. R. Co.*, 56 Mich. 111; 56 Am. Rep. 374.

³ *Honeyman v. R. R. Co.*, 13 Or. 352; 57 Am. Rep. 20.

⁴ See *post*, Chapter XCIV.

⁵ *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; 24 Am. Rep. 258; *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. 500.

⁶ *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222; 46 Am. Rep. 688. In this case the court gave an exhaustive summary of the *status* of sleeping-car companies, saying: "Like an ordinary railway company engaged in the transportation of freight and passengers, this company transacts its entire business, so far as it relates to this case, over the various railways in

this and other states. Like railway companies, it exercises special privileges and franchises granted it by the state, and its business is transacted almost exclusively with the traveling public. Its cars on the various lines of road are extensively advertised all over the country, setting forth, in fitting terms, the accommodations and comforts they afford, rates of charges, etc., and the public are earnestly invited to avail themselves of the advantages and comforts they thus offer. In what respect, then, does this company differ in its relation to the public, so far as the present inquiry is concerned, from an ordinary railway company? No difference has been pointed out by counsel, and we are confident none can be. Why, then, should not the same principles be held to

company is responsible for a want of care in guarding a passenger's valuables, even where he carries them with

apply to it that apply to common carriers, and others in like employments, in so far as their relation to the public is the same? To say there is no precedent for it, we have just seen is not a sufficient answer. Indeed, it has ever been the boast of the common law that by reason of its elasticity, it adjusts and molds itself to meet the constant changes in the affairs of life, and that it never hesitates to apply old rules to new cases when it is clear they come within the reasons or principles of such rules. The business of this company in running its elegant and commodious sleepers over various lines of railway has become one of the great industries and enterprises of the country, contributing perhaps as much, or more, than any one thing to the convenience and comfort of the traveling public. Indeed, the running of these sleepers has become a business and social necessity. Such being the case, can it be maintained that the law imposes no obligations or restrictions on this company in the discharge of its duties to the public? Or more accurately put, is it true this company owes no duties to the public except such as are due from one mere private person to another? Can it be possible that the common carrier, the ferryman, the innkeeper, and even the blacksmith on the roadside, are all, by reason of the public character of their business, by mere force of law, placed under special obligations and duties to the public which they are bound to observe in the exercise of their respective callings, while at the same time this company is entirely relieved from the observance of all such duties and obligations which are not expressly contracted for? We think not. To so hold would be to unjustly discriminate between parties similarly situated, and make the law inconsistent with itself, to the great detriment of the public. If, then, this company owes any duties to the community by reason of its relation to the public, as we hold it does, manifestly one of them is, that it shall

treat all persons whose patronage it has solicited with fairness, and without unjust discrimination. When, therefore, a passenger, who, under the rules of the company, is entitled to a berth upon payment of the usual fare, and to whom no personal objection attaches, enters the company's sleeping-car at a proper time for the purpose of procuring accommodations, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it, provided it has a vacant one at its disposal. To require this of the company is merely exacting of it that which is clearly dictated by the plainest principles of justice and fair dealing. To construe the law otherwise might lead to great abuses and the grossest injustice, detrimental alike to public and private interests. Suppose, for instance, a party who, by reason of advanced age or feeble health, is unable to travel after night except in a sleeper, having an important business engagement at a distant point on a specified day, with a choice of several routes, after having examined the advertisements relating to them makes his selection of the one that has through-sleepers, and accordingly arranges his time of departure so as to reach his destination by traveling day and night. At the appointed time for leaving he provides himself with a first-class ticket over the road, and enters the sleeper, where he finds plenty of vacant berths, and asks the conductor to assign him one, tendering the customary price therefor, but the conductor, from some private pique, or from mere wantonness, refuses to let him have one, and by reason of such refusal he is unable to meet his business engagement, whereby he is subjected to great pecuniary loss. Can it be said there is no remedy in such case? Certainly it can, if the law does not, under the circumstances supposed, impose upon the company the duty of furnishing berths when it has them for disposal. But as we have already seen, such is not the law."

him.¹ It has been held liable for theft of a passenger's valuables, where both the conductor and porter of the sleeping-car were asleep for several hours at the rear end of the car, leaving the front door unlocked, and a brakeman of the train sitting at the other end.² Also where the conductor of the car quitted the train at a distance of eighty-four miles from its destination, and permitted it to go on with the porter only in attendance, who was engaged chiefly in blacking boots in a room at the end of the car.³ Where a passenger upon a railroad delivered his baggage into the charge of the conductor or porter of a sleeping-car, and it was lost, the carrier was not permitted to defend on the ground that the car was owned and the servants employed by a third party, and not by the defendant, because it did not appear that the passenger was aware of these facts.⁴ The sleeping-car company is liable only for the passenger's personal effects; not for money which he is carrying to pay debts in the city to which he is bound.⁵ A passenger who, without notice to the persons in charge of the sleeping-car in

¹ *Tracy v. Pullman Palace Car Co.*, 67 How. Pr. 154; *Scaling v. Pullman Palace Car Co.*, 24 Mo. App. 29; *Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267; 56 Am. Rep. 852, note; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; 5 Am. St. Rep. 31. In *Blum v. Southern Pullman Palace Car Co.*, 1 Flip. 500, Brown, J., says: "It is undoubtedly the law that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of loss; as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by defendant that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of

anything. The invitation to make use of the bed carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care upon his own part is impossible. There is all the delivery which the circumstances of the case admit. I think it should keep a watch during the night; see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants."

² *Blum v. Palace Car Co.*, 1 Flip. 500.

³ *Diehl v. Woodruff*, 10 Cent. L. J. 66; *Woodruff v. Diehl*, 84 Ind. 474; 43 Am. Rep. 102.

⁴ *Kinsley v. R. R. Co.*, 125 Mass. 54; 28 Am. Rep. 200. Or that the passenger's ticket contained a notice that wearing apparel was at the passenger's risk: *Louisville etc. R. R. Co. v. Katzenberger*, 16 Lea, 380; 57 Am. Rep. 232.

⁵ *Illinois Cent. R. R. Co. v. Handy*, 63 Miss. 609; 56 Am. Rep. 846.

which he travels, leaves in his berth, in an exposed position, a large sum of money, which could be easily carried on his person, is guilty of negligence such as to preclude his recovery against the company for the loss, beyond the amount of such reasonable sum as is required for the purposes of his journey; and this, even though the porter of the car steals the money.¹ The sleeping-car company is not liable for a satchel left by a passenger on the window-sill while he is absent in the station at lunch;² nor is a sleeping-car company liable as common carrier for an injury to a stranger, who, upon entering one of its cars to ask the privilege of washing his hands, is wantonly and without provocation assaulted and beaten by the porter of the car.³

ILLUSTRATIONS. — A passenger who had purchased a ticket for a berth lost it, and gave evidence to the conductor that he had done so, and refused to pay over again. The conductor expelled him, without violence, from the car, and he was compelled to ride in a common car. *Held*, that he could recover the price he paid for his ticket, and a reasonable compensation for his trouble and inconvenience; but that he could not recover exemplary damages: *Pullman etc. Co. v. Reed*, 75 Ill. 125; 20 Am. Rep. 232. Plaintiff purchased of a sleeping-car company at Indianapolis a ticket purporting to entitle him to accommodations in a designated sleeping-car, in a berth to be pointed out by the conductor, thence to New York City. A certain berth was accordingly assigned him, and designated on the ticket, but at Pittsburg the car was detached, and a different and less safe and comfortable berth was offered him in another car, which he declined. *Held*, that he was entitled to a continuous passage in the same car and berth, or in one equally safe, comfortable, and convenient, and that it was no defense that the defendant simply rented the cars to the railroad companies for the use of passengers: *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153; 32 Am. Rep. 57. A passenger purchased from a railroad company a ticket over its line, and at the same time, from a palace-car company, a ticket entitling him to a berth in one of its sleeping-cars, constituting a part of the train.

¹ *Root v. New York Central Sleeping Car Co.*, 28 Mo. App. 199.

² *Whitney v. Pullman Co.*, 143 Mass. 243.

³ *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87; 8 Am. St. Rep. 512.

In the course of transportation he was injured by the falling of a berth in the sleeping-car in which he was at the time riding. *Held*, that the palace-car company, its conductor, and porter were the servants of the railroad company, and that the negligence of either of them was that of the railroad: *Pennsylvania Co. v. Roy*, 102 U. S. 451. A passenger left a sleeping-car for a few minutes to telegraph, and when he returned to the car found that his valise had been stolen during his absence. *Held*, that the sleeping-car company was liable: *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120. A took passage on a sleeping-car, and handed his overcoat, in the pocket of which was five hundred dollars, to the porter, who hung it up in the berth. The train ran off the track, and caught fire. When A recovered his coat the money was gone. *Held*, that the railroad company was not liable: *Hillis v. R. R. Co.*, 72 Iowa, 228.

§ 1796. **Status of Telegraph Companies.**—The *status* of a telegraph company in the United States is scarcely that of a common carrier.¹

§ 1797. **Carrier Bound to Carry—Action for Refusal—Mandamus—Discrimination.**—The carrier is bound to carry. With the exceptions stated in the succeeding sections, if the carrier is tendered goods, and refuses to carry them, he is liable to an action by the party so tendering.² A railroad is bound to receive the freight-cars of other railroads for transportation, and is subject to the liability of a common carrier in respect to them.³ But it is not obliged to furnish express facilities to an express company beyond such facilities as it must furnish to shippers generally. Nor, having contracted to furnish an express company with special facilities, is it required to extend the same facilities to other express companies.⁴ It is not excused from receiving and transporting cattle by reason

¹ *Post*, Chapter XCVI.

² Story on Bailments, sec. 508; Doty v. Strong, 1 Pinn. 313; 40 Am. Dec. 773; Maybin v. R. R. Co., 8 Rich. 240; 64 Am. Dec. 753; Wheeler v. R. R. Co., 31 Cal. 46; 89 Am. Dec. 147; Ayres v. R. R. Co., 71 Wis. 372.

³ Peoria etc. R. R. Co. v. R. R. Co.,

109 Ill. 135; 50 Am. Rep. 605; Chicago etc. R. R. Co. v. R. R. Co., 34 Fed. Rep. 481.

⁴ St. Louis etc. R. R. Co. v. Southern Express Co., 117 U. S. 1. But see Sanford v. R. R. Co., 24 Pa. St. 378; 64 Am. Dec. 667.

of a statute prohibiting such transportation which is unconstitutional, although not so declared at the time of such refusal.¹ And the courts are coming round to the proper and necessary view that, in addition to the remedy by action, the carrier who refuses without legal excuse to carry for a particular individual may be compelled to do his duty by a writ of *mandamus*.² *Mandamus* will lie at the suit of the people, brought by the attorney-general, to compel a railroad to carry freight and passengers, the excuse of the corporation being that its freight-handlers would not work except for increased wages, but no acts of violence or riot or intimidation having occurred. It is no defense that the state has sustained no injury, and that individuals injured might resort to private remedies.³ But a *mandamus* will not issue to compel an express company to carry fragile goods—as glass-ware—subject to all the common-law liabilities of a common carrier.⁴ A statute giving a penalty for “extortion or unjust discrimination” on the part of railroads as carriers cannot be construed to embrace the case of a failure or refusal to furnish cars or transportation.⁵ A shipper’s order calling for a specific number of cars for a specified day will not, unaccepted by the carriers, constitute a contract binding on either.⁶

The carrier must carry for all alike, and cannot show preferences to certain employers not extended to others.⁷

¹ Chicago etc. R. R. Co. v. Erickson, 91 Ill. 613; 33 Am. Rep. 70.

² Chicago etc. R. R. Co. v. People, 56 Ill. 365; 8 Am. Rep. 690; People v. R. R. Co., 55 Ill. 95; 8 Am. Rep. 631. *Contra*, People v. R. R. Co., 12 Cent. L. J. 108.

³ People v. R. R. Co., 28 Hun, 543.

⁴ People v. Babcock, 16 Hun, 313.

⁵ Bond v. R. R. Co., 67 Iowa, 712.

⁶ Missouri Pacific R. R. Co. v. R. R. Co., 31 Fed. Rep. 864.

⁷ New England Ex. Co. v. R. R. Co., 57 Me. 188; 2 Am. Rep. 31; McDuffee v. R. R. Co., 52 N. H. 430; 13 Am. Rep.

72; Sanford v. R. R. Co., 24 Pa. St. 378; 64 Am. Dec. 667; Messenger v. R. R. Co., 36 N. J. L. 407; 13 Am. Rep. 457; 37 N. J. L. 531; 18 Am. Rep. 755; Cumberland Valley R. R. Co.’s Appeal, 62 Pa. St. 230. *Contra*, Johnson v. R. R. Co., 16 Fla. 623; 26 Am. Rep. 731; Ex parte Benson, 18 S. C. 38; 44 Am. Rep. 564. In McDuffee v. R. R. Co., 52 N. H. 430, 13 Am. Rep. 72, the court say: “A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind

He has no right to discriminate, in forwarding freight, between two classes of shippers, by deliberately delaying

of property, and not of another; but as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all. His service would not be public if, out of the persons and things in his line of business, he could arbitrarily select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment and the rights which the public acquired when he volunteered in the public service of common carrier transportation. With such a power, he would be a carrier,—a special, private carrier, but not a common, public one. From the public service—which he entered of his own accord—he may retire, ceasing to be a common carrier, with or without the public consent, according to the law applicable to his case; but as long as he remains in the service he must perform the duties appertaining to it. The remedies for neglect or violation of duty in the civil service of the state are not the same as in the military service; but the public rights of having the duties of each performed are much the same, and in the department now under consideration ample remedies are not wanting. The right to the transportation service of a common carrier is a common as well as a public right, belonging to every individual as well as to the state. A right of conveyance unreasonably and injuriously preferred, and exclusive, and made so by a special contract of the common carrier, is not the common, public right, but a violation of it. And when an individual is specially injured by such a violation of the common right which he is entitled to enjoy, he may have redress in an action at common law. The common carrier has no cause to complain of his legal responsibility. It was for him to consider as well the duty as the profit of being a public servant before embarking in that business. The profit could not be considered without taking the duty into account; for the

rightful profit is the balance of compensation left after paying the expenses of performing the duty. And he knew beforehand, or ought to have known, that if no profit should accrue the performance of the duty would be none the less obligatory until he should be discharged from the public service: *Taylor v. R. R. Co.*, 48 N. H. 304, 317. The chances of profit and loss are his risks, being necessary incidents of his adventure, and for him to judge of before devoting his time, labor, care, skill, and capital to the service of the county. Profitable or unprofitable, his condition is that of one held to service, having, by his own act, of his own free-will, submitted himself to that condition, and not having liberated himself, nor been released from it. A common carrier cannot directly exercise unreasonable discrimination as to whom and what he will carry. On what legal ground can he exercise such discrimination indirectly? He cannot, without good reason, while carrying A, unconditionally refuse to carry B. On what legal ground can he, without good reason, while providing agreeable terms, facilities, and accommodations for the conveyance of A and his goods, provide such disagreeable ones for B that he is practically compelled to stay at home with his goods, deprived of his share of the common right of transportation? What legal principle guaranteeing the common right against direct attack sanctions its destruction by a circuitous invasion? As no one can infringe the common right of travel and commercial intercourse over a public highway, on land or water, by making the way absolutely impassable, or rendering its passage unreasonably unpleasant, unhealthy, or unprofitable, so a common carrier cannot infringe the common right of common carriage, either by unreasonably refusing to carry one or all, for one or for all, or by imposing unreasonably unequal terms, facilities, or accommodations which would practically amount to an embargo upon the travel or traffic of some disfavored individual. And as all common carriers combined cannot, directly or

or stopping the property of one class in order to give preference to that of another.¹ A railroad has no right

indirectly, destroy or interrupt the common right by stopping their branch of the public service while they remain in that service, so neither all of them together, nor one alone, can, directly or indirectly, deprive any individual of his lawful enjoyment of the common right. Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoyment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities, or accommodations. That is not, in the ordinary legal sense, a public highway in which one man is unreasonably privileged to use a convenient path, and another is unreasonably restricted to the gutter; and that is not a public service of common carriage in which one enjoys an unreasonable preference or advantage, and another suffers an unreasonable prejudice or disadvantage. A denial of the entire right of service by a refusal to carry differs, if at all, in degree only, and the amount of damage done, and not in the essential legal character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities, or accommodations. Whether the denial is general, by refusing to furnish any transportation whatever, or special, by refusing to carry one person or his goods; whether it is direct, by expressly refusing to carry, or indirect, by imposing such unreasonable terms, facilities, or accommodations as render carriage undesirable; whether unreasonableness of terms, facilities, or accommodations operate as a total or a partial denial of the right; and whether the unreasonableness is in the intrinsic, individual nature of the terms, facilities, or accommodations, or in their discriminating, collective, and comparative character, — the right denied is one and the same common right, which would not be a right if it could be rightly denied, and would not be common in the legal sense if it could be legally subjected

to unreasonable discrimination, and parceled out among men in unreasonably superior and inferior grades at the behest of the servant from whom the service is due. The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practiced by a carrier held to the common service is insubordination and mutiny, for which he is liable to the extent of the damage inflicted, in an action of case at common law. The question of reasonableness of price may be something more than the question of actual cost and value of service. If the actual value of certain transportation of one hundred barrels of flour, affording a reasonable profit to the carrier, is one hundred dollars; if, all the circumstances that ought to be considered being taken into account, that sum is the price which ought to be charged for that particular service; and if the carrier charges everybody that price for that service, — there is no encroachment on the common right. But if for that service the carrier charges one flour merchant one hundred dollars, and another fifty dollars, the common right is as manifestly violated as if the latter were charged one hundred dollars, and the former two hundred dollars. What kind of a common right of carriage would that be which the carrier could so administer as to unreasonably, capriciously, and despotically enrich one man and ruin another? If the service or price is unreasonable and injurious, the unreasonableness is equally actionable, whether it is in inequality, or in some other particular. A service or price that would otherwise be reasonable may be made unreasonable by an unreasonable discrimination, because such a discrimination is a violation of the common right. There might be cases where persons complaining of such a violation would have no cause of action, because they would not be injured. There might be cases where

¹ *Keeney v. R. R. Co.*, 59 Barb. 104.

to store freight received for transportation, on the ground that it has not facilities to forward it, and in the mean time receive and forward new and subsequent freight.¹ If its servants, by reason of bribes or other improper motives, give preference to one person over another in receiving freight, the company may be held liable for damages for the injury sustained thereby. But because the company, from pressing necessity, takes grain from wagons or boats, while grain is standing in its private warehouse for shipment, if done in good faith, will not impose a liability.² If one, to procure the transportation of goods by railroad, pays illegal rates under protest, he may recover them, even although by arrangement the payments were made monthly.³ Under the interstate commerce act, there must be no discrimination in rates, charges, and facilities in favor of one connecting line or against another; but equal rates and facilities for trade and travel, for equal service, and from all points, must be given to both.⁴ A railroad is not bound to carry large and small quantities of the same kind of merchandise between the same points at the same price.⁵ It is not bound to transport perishable property, to the exclusion of other general freight not perishable.⁶ Where two kinds of property—one perishable, and the other not—are delivered to a carrier at the same time, by different owners, for transportation, if the carrier cannot carry all the property, he may give preference to the perishable

the discrimination would be injurious; in such cases it would be actionable. There might be cases where the remedy by civil suit for damages at common law would be practically ineffectual on account of the difficulty of proving large damages, or the incompetence of a multiplicity of such suits to abate a continued grievance, or for other reasons. In such cases there would be a plain and adequate remedy, where there ought to be one, by the reinforcing operation of an injunction, or by indictment, information, or

other common, familiar, and appropriate course of law."

¹ *Great West. R. R. Co. v. Burns*, 60 Ill. 284.

² *Galena etc. R. R. Co. v. Rae*, 18 Ill. 488; 68 Am. Dec. 574.

³ *Peters v. R. R. Co.*, 42 Ohio St. 275; 51 Am. Rep. 814.

⁴ *Cutting v. R. R. & Nav. Co.*, 30 Fed. Rep. 663.

⁵ *Concord etc. R. R. Co. v. Forsaith*, 59 N. H. 122; 47 Am. Rep. 181.

⁶ *Dixon v. R. R. Co.*, 64 Iowa, 531; 52 Am. Rep. 460.

property over that which is not perishable; and if either must wait, it should be the latter.¹ A railroad is not liable for refusing to delay a train until four car-loads of hogs could be loaded, the same being in a private yard until the arrival of the train on time, and not having been delivered to any authorized agent of the company; and this, notwithstanding the train took cars of stock at a later station, where the locomotive was required to assist in loading them.²

ILLUSTRATIONS. — The proprietor of a steamship line between New York and Cuba charged the plaintiff a higher rate of freight for transporting goods than he charged other shippers, because the plaintiff would not agree to employ that line exclusively. *Held*, that the discrimination was unlawful, and that the proper remedy was by injunction to prevent such discrimination: *De Menacho v. Ward*, 23 Blatchf. 502; 27 Fed. Rep. 529. A statute requires the company to carry freight from its depots and way-stations in the order in which the same should be received. *Held*, not to be violated by delaying the transportation of live-stock awaiting shipment at a way-station, and ready when the train passed, but which, owing to an unavoidable exigency, could not have been taken without an extra engine sent on at night for that purpose: *Michigan etc. R. R. Co. v. McDonough*, 21 Mich. 165; 4 Am. Rep. 466. The defendants contracted with an express company to give the latter a certain share in the baggage and mail car attached to passenger trains for the carriage of their goods, and agreed not to let any similar space in any car attached to passenger trains to any other persons or express carriers during the continuance of the contract. Plaintiffs, another express company, offered packages to be transported on defendants' passenger trains, which the defendants refused to receive or transport. *Held*, that defendants were liable to plaintiffs for such refusal: *New England Ex. Co. v. R. R. Co.*, 57 Me. 188; 2 Am. Rep. 31. A railroad owning a dock refused to receive coal on its cars on said dock from a canal-boat lying thereat unless the master of the canal-boat would employ shovelers designated by the company, at a price fixed by the company, which was intended to be, and generally was, the ordinary market price, to shovel the coal on board of the canal-boat into tubs belonging to the company, which tubs were then to be hoisted by means of a derrick on the dock, so that the

¹ *Marshall v. R. R. Co.*, 45 Barb. 502.

² *Frazier v. R. R. Co.*, 48 Iowa 571.

coal could be dumped into such cars. The canal-boat paid ten cents per ton to the company for the use of the tubs and machinery. *Held*, that the requirement of the company was not reasonable, and could not be enforced: *318 1-2 Tons of Coal*, 14 Blatchf. 453. Plaintiff was accustomed to ship coal by defendants' railroad for transportation beyond their line upon the Delaware River. Defendants had also allowed plaintiff, for a certain consideration, to use their wharf at the river terminus of the railroad; but subsequently, there not being room for all the shippers, they denied plaintiff the wharf facilities, while they allowed others to use the wharf. *Held*, that although transportation by defendants, common carriers, was necessarily open to the public without discrimination, yet wharfage was within the discretion of defendants, and a mandatory injunction would not lie compelling them to allow wharfage facilities to plaintiff as well as others: *Audenried v. R. R. Co.*, 68 Pa. St. 370; 8 Am. Rep. 195. A statute provides against unjust discrimination between individual shippers as well as between places. *Held*, that a contract whereby a shipper is to pay regular rates, and to be paid back a part of the amount as a rebate, is void: *Indianapolis etc. R. R. Co. v. Ervin*, 118 Ill. 250. A contract was entered into by which a railroad company agrees to charge a rate of not less than \$2.40 per ton to all persons shipping less than one hundred thousand tons of coal per annum over its road, and to make a rate of \$1.60 per ton to all shippers shipping one hundred thousand tons or over. *Held*, void; the discrimination being so gross as to be contrary to public policy: *Burlington etc. R. R. Co. v. Fuel Co.*, 31 Fed. Rep. 652.

§ 1798. Exceptions—Payment of Charges in Advance Refused.—The carrier may demand payment for his services in advance.¹ Hence he may refuse to carry goods until his charges are paid.² Although goods have been taken into the possession of a carrier, if the freight is not paid as stipulated, he may refuse to carry them.³ In omitting to demand the charges in advance, a railroad company becomes bound to transport the freight according to its custom, and slight evidence of a willingness to pay will be sufficient to support an action for damages caused by refusal to receive such freight.⁴

¹ Hutchinson on Carriers, sec. 116.

³ Stewart v. Bremer, 63 Pa. St. 268.

² Id.; Fitch v. Newberry, 1 Doug. (Mich.) 1; 40 Am. Dec. 33.

⁴ Galena etc. R. R. Co. v. Rae, 18 Ill. 488; 68 Am. Dec. 574.

§ 1799. Nature of Goods and Place of Destination outside Carrier's Business.—He may refuse to carry goods of a different kind from those which he professes to carry, and he may refuse to carry to a different place than that to which he is accustomed to carry.¹ An express company is not liable for a package of treasury notes left at their office to be carried to a place to which it is not a common carrier.²

§ 1800. Goods Tendered away from Office or after Business Hours.—He may refuse to carry goods tendered to him at a place not his usual business place, or outside of business hours.³ A railroad is not liable for failure to transport goods or furnish cars therefor unless the goods are offered at a regular depot, or other usual or designated place for receiving freight.⁴

§ 1801. Goods Exposed to Violence.—He may refuse goods which are exposed to destruction by a mob or other outbreak.⁵

§ 1802. Suspicious Packages.—He may refuse suspicious packages whose contents the shipper refuses to disclose.⁶

§ 1803. Property not Properly Packed.—He may refuse property not properly packed.⁷ An express company is not bound to receive money for transportation unless

¹ An express-man holds himself out as a carrier of light articles from A to B. He can refuse to carry a large boiler, a quantity of pig-iron, or the like, from A to B, or a small parcel from A to C: *Pitlock v. Wells, Fargo, & Co.*, 109 Mass. 452.

² *Pitlock v. Wells, Fargo, & Co.*, 109 Mass. 452.

³ *Pickford v. R. R. Co.*, 12 Mees. & W. 776; *Cronkite v. Wells*, 32 N. Y. 247.

⁴ *Louisville etc. R. R. Co. v. Flanagan*, 113 Ind. 488; 3 Am. St. Rep. 674.

⁵ *Edwards v. Sheffat*, 1 East, 604; *Hutchinson on Carriers*, sec. 115; *Story on Bailments*, sec. 508; *Porcher v. R. R. Co.*, 14 Rich. 181. And see *Pearson v. Duane*, 4 Wall. 605.

⁶ *Dinsmore v. R. R. Co.*, 3 Fed. Rep. 593; *Nitro-glycerine Case*, 15 Wall. 524; *Riley v. Home*, 5 Bing. 217; *Brass v. R. R. Co.*, 6 El. & B. 485; *Crouch v. R. R. Co.*, 14 Com. B. 291.

⁷ *Union Ex. Co. v. Graham*, 26 Ohio St. 195.

it is properly secured and addressed.¹ But a shipper delivering goods to a carrier is not required to cover them so as to protect them from rain, wind, or fire.²

§ 1804. Goods beyond his Facilities.—He may refuse goods beyond the facilities he possesses for transporting them.³ Where, by reason of unusual pressure of business, the rolling stock of a railroad is inadequate for the transportation of freight, the company may decline to receive it, without incurring any liability; but where the freight is received and shipped, the railroad must forward it without delay, or answer for damages caused thereby.⁴ The measure of obligation and sufficiency of accommodation of a common carrier to furnish transportation must be determined by the amount of freight ordinarily carried on any given line of road. This duty of the carrier is not peculiar to any season of the year, or any special emergency which may arise in the course of business; thus if by reason of a sudden or unusual demand for stock or produce in the market, or from any other cause, there should be a sudden and unexpected influx of business, the obligation to carry will be fully met by shipping the freight in the order and priority of time in which it is offered.⁵

§ 1805. Delivery to Carrier — Delivery to Agent.—The responsibility of the carrier commences with the delivery of the goods to and acceptance by him.⁶ A

¹ *Fitzgerald v. Adams Ex. Co.*, 24 Ind. 447; 87 Am. Dec. 341. He is not bound to count the money in a package tendered, and his refusal raises no presumption against him: *Id.*

² *Klauber v. Am. Ex. Co.*, 21 Wis. 21; 91 Am. Dec. 452.

³ It is his duty to provide facilities for the amount of goods which he has reason to believe will be offered. But he is not bound to anticipate or provide for an extraordinary or unusual influx of freight: *Riley v. Home*, 5 Bing. 217; *Lovett v. Hobbs*, Show.

127; *Galena etc. R. R. Co. v. Rae*, 18 Ill. 488; 68 Am. Dec. 574.

⁴ *Faulkner v. R. R. Co.*, 51 Mo. 311.

⁵ *Ballentine v. R. R. Co.*, 40 Mo. 491; 93 Am. Dec. 315.

⁶ *Grosvenor v. R. R. Co.*, 39 N. Y. 34; *Brand v. Dale*, 8 Car. & P. 207; *Maybin v. R. R. Co.*, 7 Rich. 240; 64 Am. Dec. 753; *Fitchburg etc. R. R. Co. v. Hanna*, 6 Gray, 536; 66 Am. Dec. 427; *O'Banion v. Ex. Co.*, 51 Ala. 481; Ill. Cent. R. R. Co. v. *Smyser*, 38 Ill. 354; 87 Am. Dec. 301. If anything remains to be done to the goods by the con-

statutory provision that the transportation of goods by a common carrier shall be considered as commenced from the time the bill of lading is signed does not preclude the liability from commencing before, viz., from the time of the delivery of the goods.¹ If a carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a common carrier begins then.² Where cotton was loaded upon a car provided by the railroad for that purpose with its express consent, and while standing on a side-track of the company the cotton took fire and was injured thereby, the company was held liable, though there was no receipt or bill of lading given for the property.³ Where goods are placed in a car of a railroad with their assent, the loaded car being under the exclusive control of the company, the goods thereby pass into the possession of the company as effectually as if delivered into the company's warehouse.⁴ It is not essential to the liability of an express company that they should have given a receipt for the property delivered to them; and the fact that it came to their possession as carriers may be shown by other testimony.⁵

Leaving goods on a dock, without notice to the carrier or his servants, is not a good delivery;⁶ nor merely leaving goods on a carrier's premises;⁷ nor putting goods in a carrier's vehicle without his knowledge;⁸ nor signing a bill of lading.⁹ The delivery may be shown to have

signor, after their delivery, before they are in a condition for transportation, the liability as a common carrier does not commence, and the carrier's liability remains that of a warehouseman only: *Judson v. Western R. R. Co.*, 4 Allen, 520; 81 Am. Dec. 718; *R. R. Co. v. Barrett*, 36 Ohio St. 452.

¹ *East Line and Red River R. R. Co. v. Hall*, 64 Tex. 615.

² *Clarke v. Needles*, 25 Pa. St. 338.

³ *Illinois etc. R. R. Co. v. Smyser*, 38 Ill. 354; 87 Am. Dec. 301.

⁴ *Illinois etc. R. R. Co. v. Smyser*, 38 Ill. 354; 87 Am. Dec. 301.

⁵ *Gulliver v. Adams Ex. Co.*, 38 Ill. 503.

⁶ *Packard v. Getman*, 6 Cow. 757; 16 Am. Dec. 475; *Merriam v. Hartford R. R. Co.*, 20 Conn. 354; 52 Am. Dec. 344.

⁷ *Buckman v. Levi*, 3 Camp. 414.

⁸ *Leigh v. Smith*, 1 Car. & P. 638.

⁹ *Illinois Cent. R. R. Co. v. Smyser*, 28 Ill. 354; 87 Am. Dec. 301.

been made in accordance with a well-established usage known to the carrier, and will then bind him.¹ A delivery to a person who has become accustomed, with the consent of the carrier, to receive, is always sufficient to bind him.² Delivery to the driver of a stage-coach, not at the company's office, is not a good delivery, but it may be made so if such was the usage of the company, recognized by it.³ A delivery on the private wharf of a carrier, although without any notice to him or his servants, will bind him, if such has been his customary mode of receiving goods.⁴ But the delivery must have been in strict accordance with the usage. Thus a usage to deliver goods to the mate of a ship will not make good a mere leaving them on the wharf near the ship.⁵ A usage that a passenger by boat delivers his trunk to the boat by placing it on board will not include the delivery of a trunk in that way by one not a passenger.⁶ But where a complete

¹ Lawson's Usages and Customs, sec. 79; Hutchinson on Carriers, secs. 84, 87; Ford v. Mitchell, 21 Ind. 54; Leigh v. Smith, 1 Car. & P. 638; Blanchard v. Isaacs, 3 Barb. 388; Merriam v. R. R. Co., 20 Conn. 354; 52 Am. Dec. 344; Converse v. Norwich etc. Trans. Co., 33 Conn. 166; Green v. R. R. Co., 38 Iowa, 100; 40 Iowa, 410; Wright v. Caldwell, 3 Mich. 51; Packard v. Getman, 6 Cow. 759; O'Bannon v. Southern Exp. Co., 51 Ala. 481; Illinois Cent. R. R. Co. v. Smyser, 38 Ill. 354; 87 Am. Dec. 301; Freeman v. Newton, 3 E. D. Smith, 246; Hickox v. R. R. Co., 31 Conn. 281; 83 Am. Dec. 143; Cobban v. Donne, 5 Esp. 41. "The doctrine of constructive delivery, without notice to the carrier, is one which should be applied with great caution. It is undoubtedly competent for him to bind himself by such a delivery, either by his express agreement that a deposit of goods at a particular place shall be a valid delivery to him, or by so advertising it to the public, or by a well-known and established custom to receive the goods in that way, which would, perhaps, be as binding upon him as to persons who had acted upon the notice or the usage, as an express

agreement; and cases may arise in which the usage and course of dealing between the parties should undoubtedly have that effect. But, certainly, to do so they should be shown to have existed, and to have been uniformly acted upon by the parties, by the most satisfactory proof, and for a sufficient length of time to have become an established usage, tantamount to an agreement to that effect, or to a declaration to the public that a delivery in accordance with the usage will be deemed an acceptance by him for the purpose of the transportation; and perhaps it should be shown that a reliance upon the previous course of dealing, or the usage, or the notice, had controlled the action of the shipper in the particular instance": Hutchinson on Carriers, sec. 93.

² Burrell v. North, 2 Car. & K. 679.

³ Blanchard v. Isaacs, 3 Barb. 388; Hutchinson on Carriers, sec. 87.

⁴ Merriam v. R. R. Co., 20 Conn. 354; 52 Am. Dec. 344; Converse v. Norwich etc. Trans. Co., 33 Conn. 166.

⁵ Leigh v. Smith, 1 Car. & P. 638. See Packard v. Getman, 6 Cow. 757.

⁶ Wright v. Caldwell, 3 Mich. 51.

delivery is made, a usage of the carrier not to be liable until something further is done is invalid.¹ The delivery may be, of course, to an agent of the carrier.²

§ 1806. **Owner Retaining Control of Goods.**—If the shipper retain the custody of the goods himself, the carrier's liability as an insurer does not attach;³ as where a ferry-man receives horses in charge of a driver.⁴ And if the consignee takes charge of the goods before they have arrived at the place of delivery, the carrier's risk then terminates.⁵

ILLUSTRATIONS. — It was agreed that a shipper of stock should load it on the cars. His men permitted the train to start before there was time for them to close the door, and a steer jumped out and was killed. *Held*, that the railroad was not liable: *Newby v. R. R. Co.*, 19 Mo. App. 391. A shipper agreed to accompany his stock, and feed and water them at his own risk. *Held*, that the carrier was liable for loss because of its failure to furnish him proper facilities for so doing: *Wabash etc. R. R. Co. v. Pratt*, 15 Ill. App. 177. By a contract with a steamship company one was entitled to ship meat from New York to Liverpool in a space assigned to him, and in which he had constructed a refrigerator. He sent an agent to take care of the meat. He shipped under the contract a quantity of beef and mutton, but the mutton was omitted from the bill of lading. *Held*, that such omission did not relieve the company from liability: *Sherman v. Steamship Co.*, 26 Hun, 107. A railroad received a car-load of mules to be delivered at A. It was agreed that the company was not to feed or water the mules, but that the shipper was to be afforded facilities for this. The company negligently carried the mules to D., forty miles beyond A., and they stood there in cars two days, without food, water, or care. *Held*, that the company was liable for the damage: *Bryant v. R. R. Co.*, 68 Ga. 805.

¹ Illinois Cent. R. R. Co. v. Smyser, 38 Ill. 354; 87 Am. Dec. 301; Hickox v. R. R. Co., 31 Conn. 281; 83 Am. Dec. 143.

² Rogers v. R. R. Co., 2 Lans. 269; Ouimit v. Henshaw, 35 Vt. 605; Minter v. R. R. Co., 41 Mo. 503; 97 Am. Dec. 289.

³ Cohen v. Frost, 2 Duer, 335; Tower

v. R. R. Co., 7 Hill, 47; 42 Am. Dec. 36; Hollister v. Nowlen, 19 Wend. 234; 32 Am. Dec. 455.

⁴ Yerkes v. Sabin, 97 Ind. 141; 49 Am. Rep. 434; Wyckoff v. Ferry Co., 52 N. Y. 32; 11 Am. Rep. 650.

⁵ Stone v. Waitt, 31 Me. 409; 52 Am. Dec. 621.

§ 1807. Delivery must be for Immediate Carriage.—The delivery must be for immediate transportation.¹ The carrier's liability does not commence until the duty to transport has completely arisen. For goods received upon the premises of the carrier to await orders before transportation, he is liable as warehouseman only until the orders are received.² But a railroad is liable as a common carrier for the loss of goods which have been placed in its depot or warehouse for shipment at its earliest convenience, and where nothing remains for the owner to do before shipment.³ And if the carrier deposits the goods in a warehouse to wait for the next train, his liability is still that of a carrier.⁴

ILLUSTRATIONS.—A trunk was left at a railroad depot with the company's agent, to be kept till the owner was ready to proceed on her journey, or to be returned on request if she should not go. *Held*, that the company's liability was that of a gratuitous bailee: *Little Rock etc. R. R. Co. v. Hunter*, 42 Ark. 200.

§ 1808. Place of Delivery.—As a rule, the delivery must be made at the ordinary and usual receiving-place of the carrier.⁵ But a delivery accepted by an authorized agent elsewhere is good.⁶ But a railroad is not liable as a common carrier for loss or destruction of goods deposited at the roadside, where there is no station or agent, though goods are sometimes taken on board there, and though a conductor of a freight train has promised to stop and take the goods up.⁷

ILLUSTRATIONS.—Goods were delivered in the usual manner for transportation by a common carrier on his private dock, and in his exclusive use, for the purpose of receiving property to be transported by him. *Held*, that such delivery was a good delivery to the carrier to render him liable for the loss of the

¹ Hutchinson on Carriers, sec. 88.

² Barron v. Eldredge, 100 Mass. 455;

³ 1 Am. Rep. 126; O'Neil v. R. R. Co., 60 N. Y. 138; Wade v. Wheeler, 3 Lans. 201.

⁴ Grand Tower etc. Co. v. Ullman, 89 Ill. 244.

⁵ Moses v. R. R. Co., 24 N. H. 71; 55 Am. Dec. 222.

⁶ Hutchinson on Carriers, sec. 87; Cronkite v. Wells, 32 N. Y. 247.

⁷ Phillips v. Earle, 8 Pick. 182.

⁸ Wells v. R. R. Co., 6 Jones, 47; 72 Am. Dec. 556.

goods, although neither he nor his agent was otherwise notified of such delivery: *Merriam v. R. R. Co.*, 20 Conn. 354; 52 Am. Dec. 344.

§ 1809. **Common Carrier an Insurer.**—The common carrier is, in addition to his liability as a bailee for hire, liable on grounds of public policy as an insurer of the goods committed to his care.¹ The question of negligence is wholly irrelevant; for if the loss does not fall within an exception recognized by law, the carrier is responsible for it, although he exercised every possible diligence to prevent it.² But the rule does not extend to the time of

¹“His insurance differs from other forms of insurance in the following respects: 1. When goods in the hands of a carrier have been lost, he cannot sue an insurance company which had insured them for the owner for contribution. In such case the liability of the carrier is primary, and that of the underwriter is only secondary. 2. His insurance is always connected with the custody of the goods. 3. In the absence of contract, the immemorial common law of England makes certain exceptions from the risks assumed by the carrier, which are not implied in other forms of insurance. 4. The insurance of the carrier results from the law applied to a particular relationship, and not from a special contract to insure”: *Lawson's Contracts of Carriers*, sec. 2. He may make an agreement with the owner that, in case of loss or damage to the goods for which he is liable, he shall have the benefit of any insurance effected by or on account of the owner: *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173; *Rentoul v. R. R. Co.*, 17 Fed. Rep. 905; *Jackson Co. v. Ins. Co.*, 139 Mass. 508; 52 Am. Rep. 728. Where an express company receipted for goods left to them to be forwarded by a particular vessel, and, that vessel being withdrawn, sent them by another, which was lost, it was held that the company was liable for the loss; and the fact that the owner demanded and collected the insurance on a portion of the goods could not operate to relieve their liability: *Goodrich v. Thompson*, 4 Rob. (N. Y.) 75; 44 N. Y. 324. It is no excuse for a carrier, in an

action against him for negligence, that the plaintiff engaged to procure insurance on the goods carried, and failed so to do. Nor is it necessary, in declaring against the carrier, to set forth such engagement, nor to allege that it has been fulfilled, nor to aver an excuse for non-fulfillment: *Brenan v. Shelton*, 2 Bail. 152. A statute forbidding common carriers to impose restrictions of their liability is not infringed by a provision in a bill of lading that the carrier shall have the benefit of any insurance to the owner on the freight: *British etc. Ins. Co. v. R. R. Co.*, 63 Tex. 475; 51 Am. Rep. 661; *Phoenix Ins. Co. v. Erie Trans. Co.*, *Lawson's Contracts of Carriers*, 383.

² *Trent Navigation Co. v. Wood*, 4 Doug. 287; 3 Esp. 131; *Siordet v. Hall*, 4 Bing. 607; *Clark v. Barnwell*, 12 How. 272; *Ewart v. Street*, 2 Bail. 157; 23 Am. Dec. 131; *King v. Shepherd*, 3 Story, 349; *Agnew v. The Contra Costa*, 27 Cal. 425; 87 Am. Dec. 87; *Stephens etc. Trans. Co. v. Tuckerman*, 33 N. J. L. 543; *Chevallier v. Straham*, 2 Tex. 115; 47 Am. Dec. 639; *Albright v. Penn*, 14 Tex. 290; *Parsons v. Monteath*, 13 Barb. 353; *McHenry v. R. R. Co.*, 4 Harr. (Del.) 448; *Hays v. Kennedy*, 41 Pa. St. 378; 80 Am. Dec. 627; *Merritt v. Earle*, 31 Barb. 38; *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 292; *Forward v. Pittard*, 1 Term Rep. 27; *Mershon v. Hobensack*, 22 N. J. L. 372; *Backhouse v. Sneed*, 1 Murph. 173; *Eagle v. White*, 6 Whart. 505; 37 Am. Dec. 434; *Schieffelin v. Harvey*, 6 Johns. 170; 5 Am. Dec. 206; *Craig v. Childress*,

delivering goods; as to time, the carrier is answerable only for want of due diligence, and may excuse delay by showing accidents that are not inevitable.¹

To the extraordinary liability of the carrier there are several exceptions, viz.: 1. Losses caused by the act of God; 2. Losses caused by the public enemy; 3. Losses caused by the inherent defect, quality, or vice of the thing carried; 4. Losses caused by the seizure of goods or chattels in his hands under legal process; 5. Losses caused by some act or omission of the owner of the goods.

§ 1810. **Exceptions—Act of God.**—By the act of God is meant such a violent, sudden, and irresistible act of nature as the carrier could not foresee or prevent.² The act of nature to excuse the carrier must be violent.³ The

Peck, 270; 14 Am. Dec. 751; Daggett v. Shaw, 3 Mo. 264; 25 Am. Dec. 439; Robertson v. Kennedy, 2 Dana, 43; 26 Am. Dec. 466; Parsons v. Hardy, 14 Wend. 215; 28 Am. Dec. 521; Gilmore v. Corman, 1 Smedes & M. 279; 40 Am. Dec. 97; Neal v. Saunderson, 2 Smedes & M. 572; 41 Am. Dec. 609; Lewis v. Ludwick, 6 Cold. 368; 98 Am. Dec. 454; Parker v. Flagg, 26 Me. 181; 45 Am. Dec. 101; Fish v. Chapman, 2 Ga. 349; 46 Am. Dec. 393; Norway Plains Co. v. R. R. Co., 1 Gray, 263; 61 Am. Dec. 423; New Brunswick Steam. Co. v. Tiers, 24 N. J. L. 697; 64 Am. Dec. 395; Cox v. Peterson, 30 Ala. 608; 68 Am. Dec. 145; Ferguson v. Brent, 12 Md. 9; 71 Am. Dec. 582; Bohannon v. Hammond, 42 Cal. 227; Welsh v. R. R. Co., 10 Ohio St. 65; 75 Am. Dec. 490; Bennett v. Byram, 38 Miss. 17; 75 Am. Dec. 90; Arnold v. Jones, 26 Tex. 335; 82 Am. Dec. 617; Hooper v. Wells, 27 Cal. 11; 85 Am. Dec. 211; Bland v. Adams Exp. Co., 1 Duvall, 232; 85 Am. Dec. 623; Read v. Spaulding, 30 N. Y. 630; 86 Am. Dec. 426; Michaels v. R. R. Co., 30 N. Y. 564; 86 Am. Dec. 415; Southern Exp. Co. v. Newby, 36 Ga. 635; 91 Am. Dec. 783; Mobile etc. R. R. Co. v. Hopkins, 41 Ala. 486; 94 Am. Dec. 607; Wolf v. Am. Exp. Co., 43 Mo. 421; 97 Am.

Dec. 407; Buckland v. Adams Exp. Co., 97 Mass. 124; 93 Am. Dec. 68.

¹ Parsons v. Hardy, 14 Wend. 215; 28 Am. Dec. 521; Strohn v. R. R. Co., 23 Wis. 126; 99 Am. Dec. 114. It is no excuse for the delay of a railroad company in forwarding stock that a bridge on its line broke down, so that it was forced to send the stock by another route: Guinn v. R. R. Co., 20 Mo. App. 453.

² In Nugent v. Smith, L. R. 1 C. P. D. 19, 423, Mr. Justice Brett said: "The definition to be extracted from all the cases is said to be given in a note on Coggs v. Bernard in the American edition (by Mr. Wallace) of Smith's Leading Cases. The best form of the definition seems to us to be that the damage or loss in question must have been caused directly and exclusively by such a direct, and violent, and sudden, and irresistible act of nature as the defendant (carrier) could not by any amount of ability foresee would happen; or if he could foresee that it would happen, could not by any amount of care and skill resist so as to prevent its effect."

³ Lawson's Contracts of Carriers, secs. 4, 5, criticising Williams v. Grant, 1 Conn. 487; Faulkner v. Wright, Rice, 107; Hays v. Kennedy, 41 Pa. St. 378; 80 Am. Dec. 627; Pennewill v. Cullen,

following have been held the act of God, viz.: Lightning;¹ tempest;² earthquake; an extraordinary flood;³ the driving of a boat against a bridge-pier by a sudden gust of wind;⁴ the freezing of navigable waters;⁵ a snow-storm which blocks up a railway;⁶ the striking of an unknown and moving snag in a river;⁷ a frost which freezes perishable goods.⁸ The following have been held not the act of God, viz.: Fire not caused by lightning;⁹ the bursting of a boiler;¹⁰ an unseen obstruction in navigation;¹¹ a collision not caused by tempest;¹² the burning of a ship by the bursting of a cask of chloride of lime, though such an occurrence had never been previously known;¹³ the sinking of a vessel by running on a piece of timber not visible in ordinary tides;¹⁴ the stranding of a vessel on a newly formed and previously unknown bar in a river;¹⁵ the shifting of a buoy.¹⁶

5 Harr. (Del.) 238; *Colt v. McMeachen*, 6 Johns. 160; 5 Am. Dec. 200; *Fish v. Chapman*, 2 Ga. 349; 46 Am. Dec. 393; *Friend v. Woods*, 6 Gratt. 189; 52 Am. Dec. 119; *Ferguson v. Brent*, 12 Md. 9; 71 Am. Dec. 582; *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 292.

¹ *Forward v. Pittard*, 1 Term Rep. 27.

² *Gillett v. Ellis*, 11 Ill. 579.

³ *Read v. Spaulding*, 5 Bosw. 395; *Nashville etc. R. R. Co. v. David*, 6 Heisk. 261; 19 Am. Rep. 594; *Wallace v. Clayton*, 42 Ga. 443; *Lovering v. Buck Mountain Coal Co.*, 54 Pa. St. 291; *Lamont v. R. R. Co.*, 9 Heisk. 58.

⁴ *Germania Ins. Co. v. The Lady Pike*, 17 Am. L. Rep. 614.

⁵ *Parsons v. Hardy*, 14 Wend. 215; 28 Am. Dec. 521; *Harris v. Rand*, 4 N. H. 259; 17 Am. Dec. 421; *Wallace v. Vigus*, 4 Blackf. 260; *West v. The Berlin*, 3 Iowa, 532; *The Maggie Hammond*, 9 Wall. 435; *Worth v. Edmonds*, 52 Barb. 40.

⁶ *Ballentine v. R. R. Co.*, 40 Mo. 491; 93 Am. Dec. 315.

⁷ *Collier v. Valentine*, 11 Mo. 299; 49 Am. Dec. 81.

⁸ *Vail v. R. R. Co.*, 63 Mo. 230.

⁹ *Thorogood v. Marsh*, 1 Gow, 105; *Forward v. Pittard*, 1 Term Rep. 27; *Hyde v. Trent Nav. Co.*, 5 Term Rep. 389; *Moore v. R. R. Co.*, 3 Mich. 23;

Parsons v. Monteath, 13 Barb. 353; *Hall v. Cheney*, 36 N. H. 26; *Chevalier v. Straham*, 2 Tex. 115; 47 Am. Dec. 639; *Cox v. Peterson*, 30 Ala. 608; 68 Am. Dec. 145; *Patton v. Magrath*, *Dud. (S. C.)* 159; 31 Am. Dec. 552; *Mitter v. Steam Nav. Co.*, 10 N. Y. 431; *Gilmore v. Carman*, 1 Smedes & M. 279; 40 Am. Dec. 96. The great fire of Chicago not "act of God": *Chicago etc. R. R. Co. v. Sawyer*, 69 Ill. 285; 18 Am. Rep. 613. *Contra*, *Hunt v. Morris*, 6 Mart. (La.) 676; 12 Am. Dec. 489.

¹⁰ *McCall v. Brock*, 5 Strob. 119; *Navigation Co. v. Dwyer*, 29 Tex. 376; *The Mohawk*, 8 Wall. 153; *Bulkley v. Naumkeag Cotton Co.*, 24 How. 386.

¹¹ *Brousseau v. The Hudson*, 11 La. Ann. 427; *Smyrl v. Niolon*, 2 Bail. 421; 23 Am. Dec. 146; *Steele v. McTyer*, 31 Ala. 667; 70 Am. Dec. 516.

¹² *Plaisted v. Boston Steam Nav. Co.*, 27 Me. 132; 46 Am. Dec. 587; *Mershon v. Hobensack*, 22 N. J. L. 372.

¹³ *Brousseau v. The Hudson*, 11 La. Ann. 427.

¹⁴ *New Brunswick Steam Nav. Co. v. Tiers*, 24 N. J. L. 697; 64 Am. Dec. 395.

¹⁵ *Friend v. Woods*, 6 Gratt. 189; 52 Am. Dec. 119.

¹⁶ *Reaves v. Waterman*, 2 Spear, 197; 42 Am. Dec. 364.

To excuse the carrier, the act of God must have been the exclusive cause of the loss.¹ Where the loss is caused partly by negligence, and partly by the act of God, the carrier is liable;² as where a master of a vessel fills her boilers overnight to be ready for starting in the morning, and a pipe freezes and bursts in the night, though it was customary to fill the boilers of outgoing vessels overnight;³ or where he has been guilty of any previous misconduct by which the goods in his charge are exposed to the act of God, and are injured thereby.⁴ It is negligence for a ferry-man to start across a river when a dangerous wind is blowing;⁵ or for a wagoner to start across a stream with an insufficient team;⁶ and a loss subsequently occurring by reason of the wind, or the sudden rising of the stream, will not be excused. But where there is a loss by the act of God, the carrier will not be held liable on a showing that there was a defect in his vessel, or a want of skill on his part; it must also be made to appear that this defect or want of skill contributed to the loss.⁷ A

¹ *Sprowl v. Kellar*, 4 Stew. & P. 382; *Ewart v. Street*, 2 Bail. 157; 23 Am. Dec. 131; *King v. Shepherd*, 3 Story, 349; *Abbott on Shipping*, 315; *New Brunswick Steam. Co. v. Tiers*, 24 N. J. L. 697; 64 Am. Dec. 395; *McArthur v. Sears*, 21 Wend. 190; *Michaels v. R. R. Co.*, 30 N. Y. 564; 86 Am. Dec. 415.

² *Lyon v. Mells*, 5 East, 428; *Davis v. Garrett*, 6 Bing. 716; *Birkett v. Willan*, 2 Barn. & Ald. 356; *Bodenhams v. Bennett*, 4 Price, 31; *Smith v. Horne*, 2 Moore, 18; *Powell v. Layton*, 2 Bos. & P. 365; *Sjordet v. Hall*, 4 Bing. 607; *Muddle v. Stride*, 9 Car. & P. 380; *Lowe v. Booth*, 13 Price, 329; *Beckford v. Crutwell*, 5 Car. & P. 242; *Cailiff v. Danvers*, 1 Peake, 155; *Hunter v. Potts*, 4 Camp. 203; *Oakley v. Steam Packet Co.*, 11 Ex. 618; *Laveroni v. Drury*, 8 Ex. 166; *Hollingworth v. Brodrick*, 7 Ad. & E. 40; *Dibble v. Morgan*, 1 Woods, 406; *Elliott v. Rossell*, 10 Johns. 1; 6 Am. Dec. 306; *Bell v. Reed*, 4 Binn. 127; 5 Am. Dec. 398; *Ewart v. Street*, 2 Bail. 157; 23

Am. Dec. 131; *Read v. Spaulding*, 30 N. Y. 630; 86 Am. Dec. 426; *Merritt v. Earle*, 29 N. Y. 115; 86 Am. Dec. 293; *Wolf v. Am. Exp. Co.*, 43 Mo. 421; 97 Am. Dec. 406. When, from the plaintiff's own evidence, it appears that the act of God caused the injury to the goods, the carrier is exonerated from liability, unless plaintiff shows the carrier was guilty of some specific negligence which co-operated to produce the loss: *Davis v. R. R. Co.*, 89 Mo. 340.

³ *Sjordet v. Hall*, 4 Bing. 607.

⁴ *Hart v. Allen*, 2 Watts, 115; *Williams v. Grant*, 1 Conn. 487; 7 Am. Dec. 235; *Morgan v. Dibble*, 29 Tex. 107; 94 Am. Dec. 264; *Chevallier v. Straham*, 2 Tex. 115; 47 Am. Dec. 639; *Klauber v. American Express Co.*, 21 Wis. 21; 91 Am. Dec. 452; *Cook v. Gourdin*, 2 Nott & McC. 19.

⁵ *Cook v. Gourdin*, 2 Nott & McC. 19.

⁶ *Loomis v. Pearson*, Harp. 470.

⁷ *Hart v. Allen*, 2 Watts, 115; *New Brunswick Steam. Nav. Co. v. Tiers*, 24 N. J. L. 697; 64 Am. Dec. 394.

carrier by water is not excused from liability for loss by the act of God operating upon an unseaworthy vessel, when such act would have proved harmless to a seaworthy vessel.¹ A carrier is responsible for injuries to perishable goods by cold, where due care, in view of all the circumstances, was not taken to protect them.² Non-performance of a contract is not excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible.³

ILLUSTRATIONS.—A wagon containing goods was blown off an open railroad-car in a high wind. *Held*, that the carrier was not liable: *Miltimore v. R. R. Co.*, 37 Wis. 190. A carrier attempted to cross a fording-place in a creek, between sunset and dark, while a shower was approaching, without examining the state of the ford, and the wheels of his wagon stuck fast, and the water rose with extraordinary suddenness, so as to injure the goods in the wagon. *Held*, that he was liable for the damage thus caused: *Campbell v. Morse*, Harp. 468. The failure by a railroad company to provide against a flood of unprecedented height, and to take all means to ascertain the coming of such flood, whereby goods being transported were lost, provision having been made against a flood equal to the highest previous known rise of water, *held*, not to render the company liable for the loss of the goods: *Nashville etc. R. R. Co. v. David*, 6 Heisk. 261; 19 Am. Rep. 594. Plaintiff sued a railroad company for injuries sustained from a natural hill, left by the company when it excavated for a road-bed, sliding onto the track. *Held*, an accident resulting from the act of God: *Gleeson v. R. R. Co.*, 5 Mackey, 356.

§ 1811. **Public Enemies—Mobs.**—Public enemies are those with whom the nation or state is at open war, and pirates on the high seas.⁴ Robbers or thieves⁵ are not pub-

¹ Packard v. Taylor, 35 Ark. 402; 37 Am. Rep. 37.

² Wing v. R. R. Co., 1 Hilt. 235.

³ Williams v. Vanderbilt, 28 N. Y. 217; 84 Am. Dec. 334.

⁴ Chitty on Carriers, 37; Jeremy on Carriers, 34; Story on Bailments, secs. 512, 526; Angell on Carriers, sec. 200; 3 Kent's Com. 216, 299. "Though the act of God or the public enemies be

in itself a good defense, yet if the loss be directly brought about by reason of the negligence or want of proper care and foresight of the party himself, it will not excuse him": Clarke v. Pac. R. R. Co., 39 Mo. 184; 90 Am. Dec. 458.

⁵ Coggs v. Bernard, 2 Ld. Raym. 909; Angell on Carriers, sec. 200; Boon v. The Belfast, 40 Ala. 184; 88 Am. Dec.

lic enemies; nor rioters or insurgents.¹ The liability of a carrier for the safe delivery of goods is not relieved by showing that they were destroyed by an overwhelming force of United States soldiers under the command of an army officer; this not being a destruction by "public enemies."² It has been held a good excuse for delay that the delay was caused solely by the violent and irresistible interference of strikers;³ and that to an action for failing to receive and carry goods according to agreement, it is a good defense that it was prevented by the armed violence of its late employees, whose wages had been reduced, and who were on strike.⁴

ILLUSTRATIONS.—A railroad was delayed for eleven days in its carriage of live-stock by strikers who had left the employ of the company because of a reduction of wages. The company had employees enough left to take the stock through but for the mob of strikers. *Held*, that the company was not liable, and that it was immaterial that the strike was conceived and organized while the strikers were in the employ of the company: *Geismer v. R. R. Co.*, 102 N. Y. 563; 55 Am. Rep. 837. Under a contract for shipment of hogs by railroad, it being agreed that the shipper "assume all risks of transportation," and that "the company shall not be responsible for any

761; *Hall v. Cheney*, 36 N. H. 26; *The Belfast v. Boon*, 41 Ala. 50; *Lewis v. Ludwick*, 6 Cold. 368; 98 Am. Dec. 454.

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909; *Forward v. Pittard*, 1 Term Rep. 27. Unless the insurrection assumes the magnitude of a civil war: *Hubbard v. Harnden Exp. Co.*, 10 R. I. 251; *Lewis v. Ludwick*, 6 Cold. 368; 98 Am. Dec. 454; *Smith v. Brazelton*, 1 Heisk. 44; 2 Am. Rep. 678; *Bland v. Exp. Co.*, 1 Duvall, 32; 85 Am. Dec. 623. See *Nashville etc. R. R. Co. v. Estis*, 7 Heisk. 622.

² *Seligman v. Armijo*, 1 N. Mex. 459. Military control of a railroad is held not to exonerate a common carrier from liability for loss by delay upon such railroad: *Illinois Central R. R. Co. v. McClellan*, 54 Ill. 58; 5 Am. Rep. 83.

³ "These men," said the court, "were no longer the employees of the

company. The case supposed is not distinguishable in principle from the assault of a mob of strangers": *Pittsburg etc. R. R. Co. v. Hazen*, 84 Ill. 36; 25 Am. Rep. 423. "If employees of a common carrier suddenly refuse to work, and the carrier cannot promptly supply their places with other employees, and injury results from the delay, the carrier is responsible; such delay results from the fault of the employees": *Pittsburg etc. R. R. Co. v. Hazen*, 84 Ill. 36; 25 Am. Rep. 423. Where an uncontrollable mob prevents a railroad company from fulfilling its contract to deliver freight, the company is not liable, although had the company not reduced wages, or insisted upon maintaining the reduction, there would have been no mob: *Lake Shore etc. R. R. Co. v. Bennett*, 89 Ind. 457.

⁴ *Pittsburg etc. R. R. Co. v. Hollowell*, 65 Ind. 188; 32 Am. Rep. 63.

delays at terminal points, nor for delays at points where stock is to be delivered to connecting lines," *held*, that the company was not responsible for a delay caused by a riot at the terminal point on its road, whereby some of the hogs fell sick and died: *Bartlett v. R. R. Co.*, 94 Ind. 281.

§ 1812. Wear and Tear or Deterioration of Goods — Animals. — Carriers are not liable for losses arising from the ordinary wear and tear of goods in the course of transportation, nor for their ordinary deterioration in quantity or quality, nor for their inherent natural infirmity or tendency to damage; and this rule includes the decay of fruits, the diminution, leakage, or evaporation of liquids, and the spontaneous combustion of goods. In all such cases, where the negligence of the carrier does not co-operate in the loss, he will be excused.¹ In an action against a common carrier for damages for refusing to receive and transport grain, it is competent for the plaintiff to show that such refusal caused the grain to become heated and spoiled, notwithstanding the fact that such injury resulted from the inherent nature of the grain.²

The exception also includes all injuries done by living animals to themselves and to each other, losses that are caused by their inherent vices and propensities, and which excuse the carrier if his negligence does not concur in causing them.³

§ 1813. Act of the Law. — A carrier is not liable for goods taken out of his hands by legal process.⁴ When

¹ Story on Bailments, sec. 492 a; 3 Kent's Com. 299-301; *Hastings v. Pepper*, 11 Pick. 41; *Chitty on Carriers*, 44; *Browne on Carriers*, 103; *Angell on Carriers*, sec. 211; *The Colenberg*, 1 Black, 170. Losses of this kind are sometimes spoken of as being caused by the act of God: *Browne on Carriers*, 102; *Warden v. Greer*, 6 Watts, 424; but the action of nature causing the loss is neither sudden, violent, nor irresistible. It does not, therefore, fall within any definition of

the act of God: See *Hall v. Renfro*, 3 Met. (Ky.) 51; *Lawson on Contracts of Carriers*, sec. 14.

² *Pittsburgh etc. R. R. Co. v. Morton*, 61 Ind. 539; 28 Am. Rep. 682.

³ See *supra*, *Carriers of Animals*; *Ohio etc. R. R. Co. v. Dunbar*, 20 Ill. 623; 71 Am. Dec. 291; *Agnew v. The Contra Costa*, 27 Cal. 425; 87 Am. Dec. 87.

⁴ *Stiles v. Davis*, 1 Black, 101; *Bliven v. R. R. Co.*, 36 N. Y. 403; 35 Barb. 188; *Van Winkle v. United States Mail*

cur such a seizure is made, the carrier must immediately notify that fact to the consignor.¹ The carrier must assure himself that the proceedings under which the seizure is made are regular and valid; but he is not bound to litigate for his bailor, nor to show that the decision of the court issuing the process is correct in law or fact.² And he is not bound to assert the title of the bailor, nor to follow the goods.³ It is no defense that the goods were taken from the carrier by an officer under an attachment against any one not their owner.⁴ It is no defense that the military officers of the government had ordered the carrier to give preference in transportation to government property, unless such interference prevented the carrier from carrying out his contract with the shipper.⁵ If goods exempt from attachment are taken from a carrier by an officer who attaches them as the property of the owner, it is no defense to an action against a carrier by the owner for failure to deliver the goods that they were taken from him against his will, and without fraud or collusion on his part, or that he was ignorant of the nature of the goods, and supposed the attachment to be valid.⁶ Goods in transit are presumed to belong to the consignee. One carrier receiving them from another is not presumed to know they belong to the shipper; nor could he hold them to answer an attachment against the shipper previously served on him.⁷ A common carrier, having received goods for transportation,

Co., 37 Barb. 122; *Burton v. Wilkin-*
son, 18 Vt. 186; 46 Am. Dec. 145;
Ohio etc. R. R. Co. v. Yohe, 51 Ind.
181; 19 Am. Rep. 727; *Bingham v.*
Lamping, 26 Pa. St. 340; 67 Am. Dec.
418; *Savannah R. R. Co. v. Wilcox*,
48 Ga. 432; provided the officer has a
legal right to take them: *Gibbons v.*
Farwell, 63 Mich. 344; 6 Am. St. Rep.
301.

¹ Ohio etc. R. R. Co. v. Yohe, 51
Ind. 181; 19 Am. Rep. 727; *Bliven v.*
R. R. Co., 35 Barb. 188; 36 N. Y. 403;

Scrantom v. Farmers' Bank, 24 N. Y.
424.

² *Bliven v. R. R. Co.*, 36 N. Y. 403.

³ Ohio etc. R. R. Co. v. Yohe, 51
Ind. 181; 19 Am. Rep. 727.

⁴ *Edwards v. White Line Transit*
Co., 104 Mass. 159; 6 Am. Rep. 213.

⁵ Ill. Cent. R. R. Co. v. McClellan,
54 Ill. 58; 5 Am. Rep. 83.

⁶ *Kiff v. R. R. Co.*, 117 Mass. 591;
19 Am. Rep. 429.

⁷ *Bingham v. Lamping*, 26 Pa. St.
340; 67 Am. Dec. 418

and given a bill of lading, cannot detain them for a debt due to himself not connected with the carriage.¹

ILLUSTRATIONS.—A carrier improperly surrendered the plaintiff's cattle to an officer. *Held*, that he was not liable, the writ not being invalid on its face: *McAlister v. R. R. Co.*, 74 Mo. 361. The carrier agreed to deliver the goods at A. On arriving at A the vessel was put in quarantine, and the goods were landed at B, the usual place of landing under the circumstances. *Held*, that the carrier was discharged from liability: *Shepherd v. Lanfear*, 5 La. 336; 25 Am. Dec. 181. C contracted with B for the purchase of goods to be paid for on delivery. C fraudulently obtained possession of them, and afterwards feloniously removed them, and placed them in charge of a carrier. *Held*, that B could recover them from the carrier: *Bassett v. Spofford*, 45 N. Y. 387; 6 Am. Rep. 101. A consignor delivered goods to a forwarding merchant, marked "J. F., Galena," the goods being in fact intended for J. Frysinger, at Galena, and the forwarding merchant erroneously entered the goods on his bill of lading, "J. Flanagan, Galena, Illinois," in consequence of which they were seized and sold by the sheriff as the property of J. Flanagan. *Held*, that the forwarding merchant was liable to the real owner of the goods, and that the fact that the consignor marked the goods with initials only would not protect the forwarding merchant from his liability: *Forsythe v. Walker*, 9 Pa. St. 148.

§ 1814. **Stoppage in Transitu.**—It is a good excuse for failing to deliver the goods that they have been stopped *in transitu*;² for the carrier is obliged to obey any notice, without regard to its form, of this kind by the consignor.³

§ 1815. **Act or Neglect of Owner.**—If the loss is caused by the act of the owner, the carrier is excused;⁴ as by the owner not marking them legibly, or addressing

¹ *Pharr v. Collins*, 35 La. Ann. 939; 48 Am. Rep. 251.

² *Hutchinson on Carriers*, sec. 409. Where goods are left with a common carrier to be delivered to the consignee without any qualification or restriction, the consignor parts with the goods and all control over them, and cannot by a subsequent direction to the carrier prevent their delivery to

the consignee, unless such facts are shown as will justify the stoppage of the goods *in transitu*: *Philadelphia etc. R. R. Co. v. Wireman*, 88 Pa. St. 264. As to stoppage *in transitu*, see *Title Contracts*.

³ *Allen v. R. R. Co.*, 79 Me. 327; 1 Am. St. Rep. 310.

⁴ *Lawson's Contracts of Carriers*, sec. 19.

them improperly,¹ or packing them improperly.² So where the owner undertakes himself part of the carrier's duties; the latter is not liable;³ as where he himself selects the carriage,⁴ or goes with the goods.⁵ A railroad is not liable as a common carrier to one who hires or charters cars absolutely, in case of injury to his property. The remedy of the latter must be on the contract of hire and the implied undertaking of the company that the hired cars are substantial, and will be duly carried to their destination.⁶ But the fact that a person who delivered goods to a railroad for transportation accepted a defective car for their conveyance, knowing it to be defective, does not exempt the corporation from liability as common carriers for the destruction of the goods through the defect in the car while in course of transportation, without proof of a distinct agreement on his part to assume the risk arising from that cause.⁷ So an agreement for the performance of the duties of the carrier in a particular manner will have the effect to relieve him of a part of his responsibilities. Thus if goods are shipped under a contract that they shall be carried on deck, the shipper, having exercised his judgment as to the place of stowage,

¹ *The Huntress*, Davies, 82; *Finn v. R. R. Co.*, 102 Mass. 283; *Congar v. R. R. Co.*, 24 Wis. 157; 1 Am. Rep. 164; *South. Exp. Co. v. Kaufman*, 12 Heisk. 161. A carrier is not liable even as a forwarder when the goods are misdirected, and he cannot, with reasonable diligence, ascertain the true direction: *Erie R. R. Co. v. Wilcox*, 84 Ill. 239; 25 Am. Rep. 451.

² *Angell on Carriers*, 212; *Klauber v. Am. Exp. Co.*, 21 Wis. 21; 91 Am. Dec. 452; *The Colonel Ledyard*, 1 Sprague, 530; *Hayes v. Wells*, 23 Cal. 185; 83 Am. Dec. 89. Improper packing which will excuse a carrier of goods is some internal and latent defect of which the carrier does not know, and from which loss or damage ensues to the goods in the ordinary course of handling and transportation. Goods may be delivered to the carrier unpacked; but if they are in that con-

dition injured by the mere handling or transportation in a careful manner, the owner must bear the loss; but if they are injured by rain or other cause for which the carrier is not excused, he is responsible: *Klauber v. Am. Exp. Co.*, 21 Wis. 21; 91 Am. Dec. 452.

³ *Lawson's Contracts of Carriers*, sec. 23.

⁴ *Ill. Cent. R. R. Co. v. Hall*, 58 Ill. 409; *Betts v. Farmers' Loan Co.*, 21 Wis. 85; 91 Am. Dec. 460.

⁵ *South Alabama R. R. Co. v. Henlein*, 52 Ala. 606; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85; 14 Am. Rep. 716; *Tower v. R. R. Co.*, 7 Hill, 47; 53 Am. Dec. 36; *Harvey v. Rose*, 26 Ark. 3; 7 Am. Rep. 595; *Roderick v. R. R. Co.*, 7 W. Va. 54.

⁶ *East Tennessee etc. R. R. Co. v. Whittle*, 27 Ga. 535; 73 Am. Dec. 741.

⁷ *Pratt v. R. R. Co.*, 102 Mass. 557.

takes upon himself all the risk arising therefrom;¹ and if one prefers to send a wagon on a platform-car to taking it to pieces and putting it in a box-car, and it is blown off by the wind, the carrier is not liable.²

If the carrier request it, the owner is required to state truly the value of the goods.³ If he is not asked, he is under no obligation to give their value.⁴

ILLUSTRATIONS.—The owner of a hogshead of molasses furnished a common carrier with skids wherewith to unload the same from his wagon; but the skids, owing to a latent defect, broke under the weight of the hogshead, and the contents thereof were lost. *Held*, that the owner could not maintain an action against the carrier for the loss: *Loveland v. Burke*, 120 Mass. 139; 21 Am. Rep. 507. Plaintiff loaded heavy machinery upon a platform-car, and blocked its wheels with insufficient blocking insecurely nailed, by reason whereof the machinery, while being transported by defendant, broke from its fastenings, without fault of defendant in running of the train or in maintenance of the track, and was injured. *Held*, that defendant was not liable therefor, although its yard-master and forwarder of freight-cars saw the fastenings and noticed their insufficiency before the injury was done: *Ross v. R. R. Co.*, 49 Vt. 364; 24 Am. Rep. 144. In an action against a common carrier to recover for damages to fruit-trees misssent, *held*, that the plaintiff was guilty of contributory negligence in marking the goods "Inka, Iowa," without designating Tama County, there being another town named "Inka," in Keokuk County: *Congar v. R. R. Co.*, 24 Wis. 157; 1 Am. Rep. 164. Defendant received from plaintiff five car-loads of cattle to be transported from Erie to Buffalo, under a written agreement whereby plaintiff assumed all risk of injuries from "delays, or in consequence of heat, suffocation, or the ill-effects of being crowded upon the cars"; the plaintiff also agreed to load and unload said cattle at his own risk, the defendant furnishing the necessary assistance. The cattle were

¹ *Lawrence v. Minturn*, 17 How. 100; *Chubb v. Renaud*, 26 Law Rep. 492.

² *Miltimore v. R. R. Co.*, 37 Wis. 190; *Ross v. R. R. Co.*, 49 Vt. 364; 24 Am. Rep. 144.

³ *Camden etc. R. R. Co. v. Baldauf*, 16 Pa. St. 67; 55 Am. Dec. 481; *Phillips v. Earle*, 8 Pick. 182; *Boskowitz v. Adams Exp. Co.*, 5 Cent. L. J. 58.

⁴ *Brooke v. Pickwick*, 4 Bing. 218; *Southern Exp. Co. v. Crook*, 44 Ala.

468; 4 Am. Rep. 140; *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. 90; *Camden etc. R. R. Co. v. Baldauf*, 16 Pa. St. 67; 55 Am. Dec. 481; *Relf v. Rapp*, 3 Watts & S. 21; 37 Am. Dec. 528; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Merchants' Dispatch Co. v. Bolles*, 80 Ill. 473; *Hayes v. Wells*, 23 Cal. 185; 83 Am. Dec. 89. A carrier has no right to open a package in order to ascertain its value or contents: *Hayes v. Wells*, 23 Cal. 185; 83 Am. Dec. 89.

in charge of plaintiff's agent. The train was detained *in transitu* three days by a snow-storm. The cattle could have been unloaded by constructing a temporary platform, which plaintiff's agent requested defendant to do. Defendant refused. The cattle remained in the cars, and some of them died. *Held*, that defendants were not liable: *Penn Jr. v. R. R. Co.*, 49 N. Y. 204; 10 Am. Rep. 355. A hired of a common carrier a hack and driver to take himself and two trunks to a house on a certain street, at each end of which were posts so placed that the hack could not enter. A told the carrier that he would help the driver with the trunks, although the carrier proposed to send another man for that purpose. On arriving at the entrance to the street, A went into the house with a valise, leaving the driver to unload the trunks, and then returned and suggested that they take in the heavier trunks first, to which the driver assented, saying, "I will set the other in here," putting the smaller trunk inside of the posts. On their return from carrying the larger trunk into the house, the other was gone, and had never been found. *Held*, that a finding that A had waived a delivery of the trunks at the house was warranted by these facts: *Patten v. Johnson*, 131 Mass. 297. A car-load of horses, etc., was in charge of the shipper's servant. They were destroyed by a fire set from a lantern used by the servant. *Held*, that the railroad company was not liable: *Hart v. R. R. Co.*, 69 Iowa, 485. The plaintiff, a resident of Vermont, sold and transported on defendant's railway veal to the state of Massachusetts, without knowledge of existence in the latter state of a statute which, for sanitary purposes, prohibited the sale of veal killed when less than four weeks old. *Held*, that the fact, if proved, that some of the veal came within the provisions of the statute, would be no defense for a want of care in transporting the same, and that the statute was to be considered so far only as it might affect the value of the veal: *Mann v. Birchard*, 40 Vt. 326; 94 Am. Dec. 399.

§ 1816. **Fraud of Owner.** — The owner must not deceive the carrier in the value of the goods; as by sending a large sum of money concealed in a bag of hay,¹ or placed in a box with articles of small value,² or by sending a diamond ring in a small paper box tied with a string,³ or by sending valuable jewelry under any circumstances

¹ *Gibbon v. Paynton*, 4 Burr. 2298.

² *Chicago etc. R. R. Co. v. Thompson*, 19 Ill. 578; *Magnin v. Dinsmore*, 62 N. Y. 35; 20 Am. Rep. 442; *Earnest v. Express Co.*, 1 Wood, 573; *Bel-*

ger v. Dinsmore, 51 N. Y. 166; 10 Am. Rep. 575.

³ *Everett v. Southern Express Co.*, 46 Ga. 303; *Sleat v. Fagg*, 5 Barn. & Ald. 342.

which would naturally lead the carrier to suppose it to be of but trifling value;¹ and if he does thus mislead the carrier, and the goods are afterwards stolen or lost, the carrier is not liable.² So if one sends glass articles in a box without informing the carrier of the nature of the articles, and they are broken;³ or sends a trunk labeled as containing articles of a different and smaller value than those really contained therein, and they are stolen;⁴ or sends a check indorsed in blank in a letter without informing the carrier of the contents of the letter, and the letter is stolen;⁵ or sends money in a package, knowing that by the rules of the carrier money-packages are required to be put up, indorsed, and sealed in a particular way, which requirement is disregarded, and the money is stolen,—the carrier will not be liable.⁶ A shipper, by concealing valuable silks and furs in a bundle, having the appearance of bedding only, and thereby shipped at a low rate of freight, releases the carrier from liability from loss, except as to what may properly be termed bedding.⁷ But the fact that articles of greater value are packed in the same box with ordinary freight does not change their character, nor relieve the carrier from liability for the loss of the ordinary freight, if the more valuable articles are not lost.⁸

So where the owner made a secret agreement with part of the owners of a vessel, in fraud of the others, the latter were held not liable.⁹ When goods are shipped with in-

¹ *Oppenheimer v. United States Express Co.*, 69 Ill. 62; 18 Am. Rep. 596.

² *Tily v. Morrice*, 3 Carth. 485; *Titchburne v. White*, 1 Strange, 145; *Earnest v. Express Co.*, 1 Wood, 579; *Coxe v. Heisley*, 19 Pa. St. 243; *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455; *Everett v. Southern Express Co.*, 46 Ga. 303; *Cincinnati etc. R. R. Co. v. Marcus*, 38 Ill. 219; *Hellman v. Holladay*, 1 Woolw. 365; *Kenrig v. Eggeston, Aleyn*, 93; *Orange County Bank v. Brown*, 9 Wend. 85; 24 Am. Dec. 129.

³ *American Express Co. v. Perkins*, 42 Ill. 458.

⁴ *Relf v. Rapp*, 3 Watts & S. 21; 37 Am. Dec. 528; *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455.

⁵ *Hayes v. Wells*, 23 Cal. 185; 83 Am. Dec. 89.

⁶ *St. John v. Express Co.*, 1 Woods, 612.

⁷ *Chicago etc. R. R. Co. v. Shea*, 66 Ill. 471.

⁸ *Hyde v. S. S. Co.*, 17 La. Ann. 29.

⁹ *Jones v. Sims*, 9 Port. 236; 33 Am. Dec. 313.

tent to smuggle them, but the carrier is ignorant of the intent, does no act to facilitate it, and is not implicated therein, such unlawful intent forms no defense to an action by the shipper against the carrier for the loss of the goods.¹

ILLUSTRATIONS. — Action against a railroad company for injuries to a cow shipped over the road. *Held*, that the shipper was not bound to inform the defendant that the cow was about eight months gone with calf: *McCune v. R. R. Co.*, 52 Iowa, 600. Plaintiff, alone, was doing business in the name of "Wood Brothers," in violation of a statute which prohibits the use of fictitious names in firms. A carriage was purchased by plaintiff in said firm name, and was shipped by him at Buffalo on defendants' railroad, marked "Wood Brothers," for delivery "to the party entitled to the same," at New York, and was injured in transit. *Held*, that the statute being highly penal, its operation would not be extended by implication, and that the plaintiff could maintain an action for the injury: *Wood v. R. R. Co.*, 72 N. Y. 196; 28 Am. Rep. 125. A box seven or eight inches long by five or six high and wide, made of three-quarter or seven-eighth inch boards, wrapped in heavy brown paper, tied with heavy twine, and sealed with sealing-wax at every crossing of the twine and on the knot where it was tied, addressed to a well-known silver manufacturing company, and weighing about twenty pounds, was delivered to a carrier without any statement made as to its value or contents, no questions being asked on these subjects. The box, in fact, contained silver coin. This box was transmitted to the carrier through an express-man, who knew that the carrier had in his place of business two counters, one for ordinary merchandise, and the other for money-packages; he delivered the box at the counter for ordinary merchandise; but he did not know the contents or value of the box, and made no statement on the subject. The sum he charged for the box was less than was ordinarily charged for valuable packages. *Held*, not to constitute fraud, imposition, or unfair concealment: *Gorham Mfg. Co. v. Fargo*, 35 N. Y. Sup. Ct. 434.

§ 1817. **Effect of Delay—Loss by Act of God after Delay.** — The carrier is liable for a negligent delay in delivering the goods.² A delay by a common carrier of seventy

¹ *Donavan v. Trans. Co.*, 39 N. Y. Sup. Ct. 519. *Co. v. Day*, 20 Ill. 375; 71 Am. Dec. 278; *Bennett v. Byram*, 38 Miss. 17;

² *Rathbone v. Neal*, 4 La. Ann. 563; 50 Am. Dec. 579; *Michigan etc. R. R.* 75 Am. Dec. 90.

days in delivering freight, if unexplained, is unreasonable, subjecting the carrier to damages.¹ A delay of twenty-four hours at a station on the way is an unnecessary one, unless excused. That the company needed its rolling stock for the purpose of conveying passengers is not a sufficient excuse.² The carrier must deliver the goods within a reasonable time. What is "reasonable time" depends on circumstances. There is no invariable rule that freight must be delivered in the order in which it is received, without regard to its character or condition.³ A railroad is not required to notify a shipper of circumstances or causes which delay delivery of goods; such as a press of freight which has existed for a long time, and which was known to the company when they received the goods. The shipper should himself seek all such information as this that he desires.⁴ In an action against a railroad for damages resulting from delay in forwarding stock, the fact that such delay was caused by the lack, on the part of the company, of proper appliances for transportation is no defense.⁵ Snow-storms of such violence as to obstruct the passage of trains must be allowed to excuse delays by a railroad in transporting articles during the continuance of the obstruction.⁶ Notification to the first carrier that the connecting line, owing to a block in freight, cannot receive and transport the goods will not relieve the first from liability for damages caused by the delay, if he fails to notify the shipper.⁷ The freezing of apples while being transported by a subsequent carrier is not so direct and natural a result of reasonable delay by the first carrier as to make such first carrier liable therefor by reason of such delay.⁸ If, by reason of

¹ *St. Louis etc. R. R. Co. v. Heath*, 41 Ark. 476.

² *Ormsby v. R. R. Co.*, 2 McCrary, 48.

³ *Peet v. R. R. Co.*, 20 Wis. 594; 91 Am. Dec. 446.

⁴ *Peet v. R. R. Co.*, 20 Wis. 594; 91 Am. Dec. 446.

⁵ *Tucker v. R. R. Co.*, 50 Mo. 385.

⁶ *Pruitt v. R. R. Co.*, 62 Mo. 527.

⁷ *Petersen v. Case*, 21 Fed. Rep. 885.

⁸ *Mich. etc. R. R. Co. v. Burrows*, 33 Mich. 6.

the inexcusably negligent delay of the carrier, the value of the goods has depreciated in the market, he is liable to the owner to the extent of the depreciation.¹ If a common carrier is chargeable with knowledge that the article carried is intended for market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment between the time it ought to have been delivered and the time it was in fact delivered, such depreciation will ordinarily constitute the measure of damages.² Where a common carrier omits for an unreasonable time to deliver property intrusted to him for transportation, and then offers to deliver it, the owner cannot refuse to receive it, and proceed against the carrier for its conversion, though the latter is liable for damages for the delay.³

Where the act of God causes a loss after a negligent delay by the carrier, the latter is, in some jurisdictions, liable,⁴ and in others not.⁵ Where, through the negligence of the servants of common carriers, goods shipped over their line are not delivered to the consignee when called for by him, and they are afterward destroyed while in the freight department of the carriers, the latter are liable for the loss.⁶

ILLUSTRATIONS.—A box shipped at Adrian, for Chicago, on the 29th of October, reached Chicago, November 3d (the usual time of transit being three days), and was not delivered until the 15th of November. *Held*, that the delay was unreasonable, and that the owner was entitled to damages: *Michigan etc. R. R. Co. v. Day*, 20 Ill. 375; 71 Am. Dec. 278. On the 13th of February, at Parkersburg, B delivered potatoes to a railroad company, for transportation to Grafton, in time to be shipped

¹ Ward v. R. R. Co., 47 N. Y. 29; 7 Am. Rep. 405.

² Devereux v. Buckley, 34 Ohio St. 16; 32 Am. Rep. 342.

³ Scovill v. Griffith, 12 N. Y. 509.

⁴ Read v. Spaulding, 30 N. Y. 630; 86 Am. Dec. 426; Browne on Carriers, 95; Dunson v. R. R. Co., 3 Lans. 265; Michaels v. R. R. Co., 30 N. Y. 564; 86 Am. Dec. 415.

⁵ Morrison v. Davis, 20 Pa. St. 171; 57 Am. Dec. 695; Denny v. R. R. Co., 13 Gray, 481; 74 Am. Dec. 645; Hoadley v. North Trans. Co., 115 Mass. 304; 15 Am. Rep. 106; McClary v. R. R. Co., 3 Neb. 44; 19 Am. Rep. 631; Railroad Co. v. Reeves, 10 Wall. 176.

⁶ Meyer v. R. R. Co., 24 Wis. 566; 1 Am. Rep. 207.

on the 14th. There was a daily train between those points. They did not arrive until the 16th, and were then frozen. The weather was mild on the 13th and 14th, but freezing on the 15th and 16th. *Held*, that the railroad company was liable for the damage: *McGraw v. R. R. Co.*, 18 W. Va. 361; 41 Am. Rep. 696. Defendant, a common carrier, transported goods consigned to plaintiff to the place of destination, and there stored them in a warehouse, but neither gave plaintiff notice of their arrival, nor made any effort to find the plaintiff, or to give him notice of such arrival. Some few months after, plaintiff received information that the goods had arrived. In the mean time the goods had depreciated in value. *Held*, that defendant was liable for the damage plaintiff had sustained: *Zinn v. Steam Co.*, 49 N. Y. 442; 10 Am. Rep. 402. The defendants contracted to transport certain goods upon a canal. By reason of an extraordinary flood in a certain division of the canal, the boat in which the goods were carried was wrecked, and the goods greatly damaged. The boat started on its voyage with one lame horse, by reason whereof great delay was occasioned, but for which the boat would have passed the point where the accident occurred before the flood came, and have arrived safely, and in time, at the point of destination. *Held*, that the use of the lame horse was too remote a cause of the accident to render the defendants liable: *Morrison v. Davis*, 20 Pa. St. 171; 57 Am. Dec. 695. A railroad received goods for transportation. At their suggestion, and for their benefit, a route had been established between one of their stations and the place of destination of the goods. But the usual custom was, not to send goods by that route, unless specially consigned, but by another. Nothing was said as to the route by which the goods should be sent. The company retained the goods at their depot, they being accustomed to do so until a sufficient amount to make a load had accumulated, when the proprietor of the intermediate route would call and take them. Before they were called for, the depot was burned, together with the goods. *Held*, that the railroad company were liable, because they had detained the goods at their station to suit their own convenience: *Lawrence v. R. R. Co.*, 15 Minn. 390. Plaintiff shipped goods at Irvineton, Pennsylvania, to be transported to Boston by defendants, common carriers, and received a bill of lading, containing a condition that "this merchandise may be carried in box-cars, covered skeleton-cars, or open platform-cars; if destined beyond Philadelphia, it may be transported by water, in vessels, boats, barges, or lighters, and if so destined to any point beyond, the same may be intrusted or delivered in the cars of this company, or otherwise, to any other railroad or transportation company or agent," etc. The usual route of defendants was by rail to

Philadelphia, and thence by water to Boston. *Held*, that defendants were not bound to send the goods by rail from Philadelphia when there was a temporary obstruction in the water communication: *Empire Trans. Co. v. Wallace*, 68 Pa. St. 302; 8 Am. Rep. 178. Plaintiff having a lot of wool which he had contracted to sell, deliverable in B., called upon the agent of defendants, common carriers, and told him that he wished to send it to B. immediately, and that it was sold if it could be forwarded at once. The agent told him that it should go without fail. The plaintiff delivered it accordingly, but the defendants neglected to forward it for several weeks, during which time it depreciated in value, and on its arrival in B., the purchaser declined to receive it on account of this delay, and the plaintiff was compelled to sell it at a diminished price. *Held*, that plaintiff could recover damages for the depreciation in its market value, and also for the loss of his chance to sell: *Deming v. R. R. Co.*, 48 N. H. 455; 2 Am. Rep. 267. Goods shipped by railroad and consigned to the plaintiff, "Byron Sherman, No. 41 Warren Street, New York," were received from an intermediate railroad company by the defendants, common carriers to New York, with directions to deliver them to "Ryan Sherman, N. Y." Defendants transported the goods to New York, and warehoused them, and made no effort to notify the nominal consignee otherwise than by mailing a letter to "Ryan & Sherman, N. Y." Although notified by plaintiff of his ownership in the goods, and of the marks on it, and the route by which it had been shipped, as means to identify it, the defendants made no efforts to discover whether they had his goods in their possession. *Held*, that they were liable to plaintiff for the damage he had suffered by their delay in delivering the goods: *Sherman v. R. R. Co.*, 5 Daly, 521.

§ 1818. **Effect of Delay on Contracts Limiting Liability of Carrier.**—In New York, where a bill of lading exempted the carrier from responsibility for loss by fire, and he delayed for an unreasonable length of time to deliver the goods to a connecting line, and the goods were burnt in the warehouse of the former, it was held that the exemption in the bill of lading did not absolve the carrier from liability for the loss.¹ On the other hand, in *Hoadley v. Northern Transportation Company*,² the plaintiff delivered to a carrier goods to be forwarded,

¹ *Rawson v. Holland*, 59 N. Y. 611; 16 Am. Rep. 394. ² 115 Mass. 304; 15 Am. Rep. 106.

and received a bill of lading exempting the carrier from all liability for loss or damage by fire while in transit, or while in depots or warehouses, or places of transshipment, and providing that it should be conclusive evidence of assent to its terms. The carrier negligently delayed to forward the goods, and they were burnt at the place of delivery in its custody. The court held that the carrier was not liable for the loss. The court said: "It is plain that the destruction of goods by fire in the calamity which happened could not reasonably be anticipated as a consequence of the wrongful detention of them on the wharf. The delay did not destroy the property, and there was no connection between the fire and the detention." In the stipulation of a bill of lading to deliver goods within a specified time, "in good order, the dangers of the railroad, fire, and other unavoidable accidents excepted," the exception relates exclusively to the condition of the goods, and the carrier is not excused from his obligation to deliver within the time by showing that the delay was caused by unavoidable accident.¹ Where the contract specifies the time, and fixes the rate of damages for delay, such damages are not the whole extent of liability, where there is injury by reason of delay.² An agreement to transport goods and deliver them, with a provision that the carrier shall pay a fixed sum for each day's delay after the time specified for the delivery, is an unconditional agreement to deliver the goods, and is not an agreement to deliver or pay the sum specified.³ An unexplained delay will not be presumed to be unavoidable where the contract excepts "unavoidable delays."⁴

¹ *Harmony v. Bingham*, 1 Duer, 209; 12 N. Y. 99.

² *Place v. Union Express Co.*, 2 Hilt. 19.

³ A carrier agreed to transport goods from New York to Missouri in a certain number of days, or to deduct for each day's delay a certain amount from the freight money. These were

held not alternative agreements, but that the amount to be deducted was in the nature of liquidated damages, and the carrier was bound to pay for a delay occasioned by an injury to a canal by a freshet: *Harmony v. Bingham*, 1 Duer, 209; 12 N. Y. 99.

⁴ *Falvey v. North. etc. Co.*, 15 Wis. 129.

A condition that the carrier shall not be liable for damage or loss to the goods beyond a certain amount does not apply in an action for damages for delay.¹ The clause in a bill of lading that the goods will be shipped "at the convenience of the company" will not protect the company from liability for unreasonable delay.²

ILLUSTRATIONS.—By the bill of lading it was stipulated that a cargo of potatoes was to be carried by the railroad at the owner's risk of freezing. *Held*, that the road would be liable for all such damage caused by the failure to forward the potatoes with reasonable dispatch: *Read v. R. R. Co.*, 60 Mo. 199.

§ 1819. **Loss after Deviation.**—Deviation is the voluntary departure from the voyage or route without reasonable cause or necessity, and makes the carrier responsible.³ The burden of showing a necessity for a deviation is on the carrier.⁴ It is the duty of a carrier by water to transport the goods to the point of destination in the very vessel mentioned in the bill of lading.⁵ If after a deviation a loss occurs by the act of God, the carrier is liable;⁶ as if the carrier agrees to send goods by land, and he sends them by water;⁷ or by canal, and they are taken out to sea;⁸ or by one line of boats, and they go by another line.⁹

ILLUSTRATIONS.—A contracted with B to forward certain goods from New York to Ohio by steam, A being owner of a

¹ *Vrooman v. American Express Co.*, 5 N. Y. Sup. Ct. 22; 2 Hun, 512.

² *Branch v. R. R. Co.*, 88 N. C. 573.

³ *Bond v. The Cora*, 2 Pet. Adm. 373; *Maryland Insurance Co. v. Le Roy*, 7 Cranch, 26; *Hand v. Baynes*, 4 Whart. 204; 33 Am. Dec. 54; *Le Sage v. R. R. Co.*, 1 Daly, 306; *Ackley v. Kellogg*, 8 Cow. 223; *Powers v. Davenport*, 7 Blackf. 497; 43 Am. Dec. 100; *Souter v. Baymore*, 7 Pa. St. 415; 47 Am. Dec. 518; *Sager v. R. R. Co.*, 31 Me. 228; 50 Am. Dec. 659; *Phillips v. Brigham*, 26 Ga. 617; 71 Am. Dec. 227; *Bennett v. Byram*, 38 Miss. 17; 75 Am. Dec. 90.

⁴ *Le Sage v. R. R. Co.*, 1 Daly, 306; *Ackley v. Kellogg*, 8 Cow. 223.

⁵ *Cox v. Foscue*, 37 Ala. 505; 79 Am. Dec. 69.

⁶ *Angell on Carriers*, secs. 203, 204; *Story on Bailments*, sec. 413; *Davis v. Garrett*, 6 Bing. 716; *Powers v. Davenport*, 7 Blackf. 496; 43 Am. Dec. 100; *Phillips v. Brigham*, 26 Ga. 617; 71 Am. Dec. 227; *Lawrence v. McGregor*, Wright, 193.

⁷ *Ingalls v. Brooks*, Edm. Sel. Cas. 104.

⁸ *Hand v. Baynes*, 4 Whart. 204; 33 Am. Dec. 54.

⁹ *Johnson v. R. R. Co.*, 33 N. Y. 610; 88 Am. Dec. 416.

line of boats on the canal, though he owned none on Lake Erie. The goods were sent on the lake by a sailing-vessel, and were lost. *Held*, that A was liable for the whole route as a common carrier; and as the goods were lost on the route, he was liable for their value: *Wilcox v. Parmelee*, 3 Sand. 610. A common carrier received goods at Worcester, Massachusetts, to transport to the consignees, at Mattoon, Illinois, and carried them by way of Chicago, instead of the most usual and direct route, by way of Indianapolis; and while stored in Chicago awaiting a reshipment, they were destroyed by the great fire of 1871. *Held*, that the carrier was not excused from liability on the ground of inevitable accident, as there was no compulsion to take the goods through Chicago: *Merchants' etc. Trans. Co. v. Kahn*, 76 Ill. 520.

§ 1820. **Effect of Deviation on Contracts Limiting Liability.** — So, where a carrier has limited his liability by contract; yet if he attempt to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods, and cannot avail himself of any exceptions made in his behalf in the contract.¹ A common carrier contracting to forward goods "by sail, on the lake," all lake dangers being in that case taken by the owners, is liable as insurer for their loss if sent by steam.² Where the bill of lading excepts "dangers of the seas," the benefit of the exception will be lost by a deviation from the usual course of the vessel, made without reasonable necessity.³ So if a carrier undertake to deliver goods, the "dangers of the river excepted," with privilege of reshipping at a particular point, and he stop short of that point, and the goods be there lost in a storm, he will be responsible.⁴ A contract by the first of several carriers on a route to forward goods by railroad in good order to the terminus of the whole route, at a stipulated price, is an entirety. If at the end of his own line he changes their route by delivering them to a

¹ *Dunseth v. Wade*, 3 Ill. 285; *Goddard v. Mallory*, 52 Barb. 87; *Atwood v. Reliance Trans. Co.*, 9 Watts, 87; 34 Am. Dec. 503.

² *Merrick v. Webster*, 3 Mich. 268.

³ *Crosby v. Fitch*, 12 Conn. 410; 31

Am. Dec. 745; *Read v. Spaulding*, 5 Bosw. 395; 30 N. Y. 630; 86 Am. Dec. 426.

⁴ *Cassilay v. Young*, 4 B. Mon. 265; 39 Am. Dec. 505.

second carrier to go by steamboat, he assumes the risk of transportation, and is liable for any loss or damage in the subsequent transit, notwithstanding a stipulation that he shall not be responsible for any damage if received in good order at the end of his own line.¹ Where an express company have agreed to forward goods by a particular vessel, and that vessel does not go, they have no right to forward the goods by any other usual and proper mode of conveyance. It is their duty to notify the owners and await their instructions.² The consent of the shipper to the deviation will excuse the carrier.³

ILLUSTRATIONS. — A carrier had a contract to carry goods to their destination "*via* the Chesapeake and Delaware Canal." On arriving at the canal he was told that the locks were out of order, and that he could not pass, upon which he undertook to go around by sea, but when on the sea his boat was sunk by a gale, and it and the goods were lost. The bill of lading contained an exception of "the dangers of navigation." *Held*, that the carrier was liable, as the exception was only intended to apply to the voyage on the canal, from which the vessel had deviated: *Hand v. Baynes*, 4 Whart. 204; 33 Am. Dec. 54. A railroad company in receiving freight stipulated against responsibility for damage beyond its own line, but agreed to forward the goods through to Chicago in the cars in which they were loaded. *Held*, that by changing the cars after they left the road of the company, it assumed the risk of the safe transportation of the goods, notwithstanding the stipulation against liability for damage beyond its own line: *Galveston etc. R. R. Co. v. Allison*,

¹ *Fatman v. R. R. Co.*, 2 Disn. 248.

² *Goodrich v. Thompson*, 4 Rob. (N. Y.) 75; 44 N. Y. 324. In *Johnson v. R. R. Co.*, 31 Barb. 196, 33 N. Y. 610, 88 Am. Dec. 416, plaintiffs sent by the defendants to Albany goods consigned to a person in New York, with directions to defendants to forward from Albany. Appended to the freight way-bill was a memorandum, "*Via* People's Line" of steamboats. On arrival at Albany, the People's Line refused to take the freight. In the supreme court it was held that defendants thereby became warehousemen and forwarders; and navigation being about to close, they only discharged

their duty by shipping by another line, which was responsible and in good reputation, and were not liable for a loss of the goods on the passage to New York by the perils of navigation. On appeal to the court of appeals this ruling was reversed. "The defendant," said that court, "was clearly liable. On the refusal of the steamboat proprietors to receive the property, the company should either have communicated the fact to the plaintiff, and awaited further instructions, or it should have relieved itself from liability by depositing the hemp for safe-keeping in a suitable warehouse."

³ *Hendricks v. The Morning Star*, 18 La. Ann. 353.

59 Tex. 193. Goods were delivered to a carrier at Worcester, Massachusetts, to be taken to Muscatine, Iowa, the bill of lading, which excepted liability from loss from fire, containing the following heading: "Merchants' Dispatch Transportation Company, fast freight line from Boston, Albany, and all New England points to the West, Northwest, and Southeast, through without transfer, in cars owned and controlled by the company." The goods, on their arrival at Chicago, were transferred to a warehouse, where, the same evening, they were burned in the great fire. *Held*, that the carrier could not avail itself of the exemption: *Stewart v. Merchants' Dispatch Co.*, 47 Iowa, 229; 29 Am. Rep. 476; *Robinson v. Merchants' Dispatch Co.*, 45 Iowa, 470. The defendants' agent at Havre issued a bill of lading containing the following clause: "Received in and upon the steamship called Shamrock, now lying in the port of Havre, and bound for Liverpool, eighteen cases of merchandise, to be transhipped at Liverpool on board the Liverpool and Philadelphia steamship City of Manchester, or other steamship appointed to sail for Philadelphia on Wednesday, September 6th, or by next steamship." The bill of lading excepted "accidents of the seas." The merchandise arrived in Liverpool on August 30th, and was shipped by the company's steamship the City of Philadelphia, which sailed on that day. The City of Philadelphia was lost by an accident of the seas, and the goods with it. *Held*, that the deviation from the contract to send by the City of Manchester made the defendants liable: *Bazin v. Steamship Co.*, 3 Wall. Jr. 229.

§ 1821. **Duty of Carrier as to Storage of Goods.** — According to the maritime law, the carrier was obliged to stow the goods in the hold of the vessel,¹ unless they were inflammable or other dangerous articles,² or live animals,³ when they might be carried on deck; and this latter exception has in more modern times been extended to all vessels upon the rivers and steamships everywhere.⁴ The carrier is liable for loss or damage caused by improper stowage.⁵ Where a cargo to be shipped needs extraor-

¹ Hutchinson on Carriers, sec. 304; *Sproat v. Donnell*, 26 Me. 185; 45 Am. Dec. 103.

² *Da Costa v. Edmunds*, 4 Camp. 141.

³ *Brown v. Cornwell*, 1 Root, 60; *Milward v. Hibbert*, 3 Ad. & E., N. S., 120.

⁴ Hutchinson on Carriers, sec. 309.

⁵ *Montgomery v. The Abby Pratt*, 6 La. Ann. 410; 54 Am. Dec. 562; *Tardos v. The Toulon*, 14 La. Ann. 429; 74 Am. Dec. 435; *Cranwell v. The Fosdick*, 15 La. Ann. 436; 77 Am. Dec. 190.

dinary protection, it is the duty of the ship-owner to provide the stevedore with means therefor; as where a lot of bacon was damaged because hogsheads of molasses were stored above it with no tarpaulins between.¹ The stowage of goods will be considered good if done according to the custom of the port or trade as to the particular articles.²

ILLUSTRATIONS. — Bales of cork-wood were cut in order to insure proper stowage. *Held*, not a breach of the obligation to deliver in good condition: *Caras v. Guimaraes*, 14 Phila. 614. Cattle shipped upon an ocean steamer in hot weather were by act of the shipper placed between decks. *Held*, that no negligence in the carrier was to be presumed from their sickening and dying: *The Powhattan*, 12 Fed. 876. Bleaching-powders and soda were improperly stowed in a vessel near iron cotton-ties, a part of the same cargo, with the result of corroding the cotton-ties. *Held*, that damages were recoverable: *The Kate Irving*, 5 Hughes, 253. The great bulk of the cargo of a vessel consisted of iron rails, steels, and tin in boxes, and that was stowed in the bottom of the vessel, the iron rails being stowed first, and in block, fore and aft, and locked together. *Held*, that such storage was bad, increasing the strain of the vessel in heavy weather, which was liable for damages resulting therefrom to other cargo: *The Excellent*, 16 Fed. Rep. 148.

§ 1822. **Duty of Carrier to Follow Shipper's Instructions.** — The carrier must follow the directions of the shipper as to the mode of carriage,³ and as to the method of delivery.⁴ So a carrier must convey the instructions of the shipper to connecting carriers.⁵ A carrier who forwards goods beyond the terminus of his own route in a mode prohibited by the owner does it at his own risk, and incurs the liability of an insurer; and if the goods are destroyed while in the custody of the person to whom

¹ *Joliet S. S. Co., v. Yeaton*, 29 Fed. Rep. 331.

² *Lawson's Usages and Customs*, sec. 84.

³ *Express Co. v. Kountze*, 8 Wall. 342; *Streeter v. Horlock*, 1 Bing. 34; *Duneth v. Wade*, 3 Ill. 285; *Maghee v. R. R. Co.*, 45 N. Y. 514; 6 Am. Rep.

124; *Hastings v. Pepper*, 11 Pick. 41; *The Star of Hope*, 17 Wall. 651; *Sager v. R. R. Co.*, 31 Me. 228; 50 Am. Dec. 659.

⁴ *Michigan etc. R. R. Co. v. Day*, 20 Ill. 375; 71 Am. Dec. 278.

⁵ *North v. Merchants' Trans. Co.*, 146 Mass. 315.

he has intrusted them, the carrier is responsible.¹ A consignor of property *in transitu* has a right to direct a change in its destination, and have it delivered to a different consignee; and the carrier is bound to obey such direction.²

ILLUSTRATIONS.—The defendants received goods for transportation, accompanied by a manifest containing the instructions: "Order A B & Co., notify C." They delivered the same to C. without the order of A, B, & Co., who were the plaintiffs. *Held*, that the defendants were liable for the loss incurred by the plaintiffs by such delivery: *Wright v. R. R. Co.*, 8 Phila. 19. A person sent to a railroad station three trunks filled with samples, and told the baggage agent to whom he delivered them to forward them the next evening, unless instructions should be given to the contrary. No contrary instructions were given. *Held*, that the liability of the railroad company was that of a common carrier, and not that of a warehouseman: *Illinois Central R. R. Co. v. Tronstine*, 64 Miss. 834. A steamer was chartered to take a lot of iron from England to New York or Perth Amboy, to be delivered "as ordered on arrival," but the bill of lading recited that the steamer was bound for New York and the cargo to be delivered at New York. *Held*, that the steamer was liable for the master's disobedience of an order to deliver at Perth Amboy: *The Chadwicke*, 29 Fed. Rep. 521.

§ 1823. Agreements to Deliver within Specified Time.

—Where the carrier has agreed to carry the goods to their destination within a fixed time, he must perform his contract, and no temporary obstruction, or even impossibility, will excuse him.³ A written agreement by a common carrier to transport merchandise for another from one place to another, for a certain period, and at a fixed price, is a binding offer for that period.⁴ Notwithstanding a special contract to transport a particular article from one

¹ *Johnson v. R. R. Co.*, 33 N. Y. 610; 88 Am. Dec. 416.

² *Strahorn v. Union Stock Yard Co.*, 43 Ill. 424; 92 Am. Dec. 142.

³ *Place v. Union Exp. Co.*, 2 Hilt. 19; *Deming v. R. R. Co.*, 48 N. H. 455; 2 Am. Rep. 267; *Parmlee v. Wilks*, 22 Barb. 539; *Harmony v. Bingham*, 12

N. Y. 99; 62 Am. Dec. 142. So held where a carrier was prevented by an unexpected rush of business from forwarding goods at the time promised: *Deming v. R. R. Co.*, 48 N. H. 455; 2 Am. Rep. 267.

⁴ *Harvey v. R. R. Co.*, 124 Mass. 421; 26 Am. Rep. 673.

place to another, if the carrier upon calling for the article as directed does not find it, but other freight is offered him, he is bound to accept it, and to abate *pro tanto* his demand under the contract.¹

ILLUSTRATIONS. — Suit against a railroad company to recover damages for delay in forwarding cattle intended for Monday's cattle-market. *Held*, that, in order to charge defendant with the consequences of the delay, it must be shown that defendant had knowledge, or from the circumstances of the case might reasonably have inferred, that the cattle were intended for that day's market: *Philadelphia etc. R. R. Co. v. Lehman*, 56 Ind. 209. A common carrier received goods with full knowledge that they were expected to be delivered at a certain time; he failed so to deliver, because of the detention of the car overnight for repairs on account of an accident, when the goods might have been transferred to another car in a few hours. *Held*, that he was liable for the actual damages sustained by the owner of the goods: *Chicago etc. R. R. Co. v. Thrapp*, 5 Ill. App. 502. A person having a policy of insurance on his life delivered the premium thereon to defendant, an express company, to be forwarded to a certain point, and there delivered to the agent of the insurance company. The money was not so delivered, and the policy lapsed. The defendant had knowledge of the purpose for which the money was sent. *Held*, 1. That if the point of delivery was beyond defendant's line, it would, in the absence of an agreement, express or implied, to the contrary, be discharged from liability by promptly delivering the money to the next carrier; 2. That if defendant was liable, the measure of damages would primarily be the net value of the policy; but 3. That the assured was bound to use reasonable and ordinary means to reduce the loss, such as being reinstated or reinsured, and could not recover damages for such loss as might have thus been prevented: *Grindle v. Express Co.*, 67 Me. 317; 24 Am. Rep. 31. A, a concert singer, contracted with B and others to give a concert at N., the latter expressly stipulating that she should furnish them posters not later than the 21st instant. These posters were printed in another town, and were delivered on the evening of the 20th to an express company to be forwarded, the person in charge being told that the forwarders wanted the package to go on "No. 5," in order to make connection, but nothing was said about its contents or purpose, or that there was any necessity for its delivery next day, nor was any departure from the usual course of

¹ *Heilbronner v. Hancock*, 33 Tex. 714.

business asked for. The package was sent by train No. 5, but owing to the running arrangements it did not reach its destination until the evening of the 21st, and could not be delivered until next day. B and others accordingly canceled the arrangement, and A, claiming to be injured in consequence, sued the express company for negligence. *Held*, that the action would not lie: *United States Express Co. v. Root*, 47 Mich. 231.

§ 1824. **Duty of Carrier as to Care of Goods during Transit.**—Where the loss sustained by the act of God is not a total one, it is the duty of the carrier to preserve such portions of the goods as may still possess some commercial value.¹ So where the loss is within an exception in the bill of lading.² A railroad is not, as a matter of law, bound to furnish refrigerator-cars to carry perishable goods. Whether it is negligence not to do so is a question for the jury.³ It may carry on a platform-car a box so large that it cannot be got into a box-car, due precaution being taken to keep it from getting wet.⁴ If it be the custom of an express company to seal valuable packages, its omission to do this is actionable negligence, notwithstanding an attempt to limit its liability generally.⁵ If the carriage is arrested by any accidental cause, the carrier must give proper protection to the goods during such delay.⁶ It seems that where two kinds of property, one perishable, and the other not, are delivered to a carrier at the same time by different owners, and he can carry only one, he must prefer the perishable. So, also, as to priority in forwarding accumulated freight.⁷ A conductor, whose freight-train is obstructed by a snow-

¹ Lawson on Contracts of Carriers, sec. 12; *Craig v. Childress*, Peck, 270; 14 Am. Dec. 751; *R. R. Co. v. Reeves*, 10 Wall. 176; *Nashville etc. R. R. Co. v. David*, 6 Heisk. 261; 19 Am. Rep. 594; *Day v. Ridley*, 16 Vt. 48; 42 Am. Dec. 489; *Chouteaux v. Leech*, 18 Pa. St. 224; 57 Am. Dec. 602. He is not responsible for not drying merchandise wet by accident: *The Lynx v. King*, 12 Mo. 272; 49 Am. Dec. 135.

² *Bird v. Cromwell*, 1 Mo. 81; 13 Am. Dec. 470.

³ *Udell v. R. R. Co.*, 13 Mo. App. 254.

⁴ *Burwell v. R. R. Co.*, 94 N. C. 451.

⁵ *Overland Mail and Express Co. v. Carroll*, 7 Col. 43.

⁶ *Wing v. R. R. Co.*, 1 Hilt. 243; *Bowman v. Teall*, 23 Wend. 306; 35 Am. Dec. 562.

⁷ *Tierney v. R. R. Co.*, 76 N. Y. 305.

storm, so that he must leave a part of the cars without shelter, is not bound, as a matter of law, to take forward a car that he knows contains articles—e. g., apples—which will be injured by freezing, rather than other cars of whose contents he is ignorant.¹

§ 1825. **Presumption of Negligence from Failure to Deliver Safely.**—Where goods never reach their destination, and the carrier can give no account of them, this is proof of negligence;² so where goods are lost or injured while in the custody of the carrier under a special contract, and he gives no account of how it occurred, a presumption of negligence is of course.³

§ 1826. **Delivery by Carrier—Personal Delivery, when Required.**—The responsibility of the carrier continues until he has made delivery of the goods.⁴ A qualified refusal by a common carrier to deliver goods on demand of one entitled to them does not constitute a conversion, if the qualification is reasonable and in good faith; and where the person making demand omits to produce any evidence of title, or to identify himself as the consignee, it is a question for the jury whether the qualification is reasonable, and the true reason for not delivering the goods.⁵ A carrier may require the pro-

¹ *Swetland v. R. R. Co.*, 102 Mass. 276.

² *Riley v. Horne*, 5 Bing. 217; *Westcott v. Fargo*, 6 Lans. 319; 63 Barb. 349; *Westcott v. Fargo*, 61 N. Y. 542; 19 Am. Rep. 300; *Adams Express Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57; *Drew v. Red Line Transit Co.*, 3 Mo. App. 495; *Steers v. Liverpool etc. Steamship Co.*, 57 N. Y. 1; 15 Am. Rep. 453.

³ *American Express Co. v. Sands*, 55 Pa. St. 140; *Newstadt v. Adams*, 5 Duer, 43; *The Bellona*, 4 Ben. 503.

⁴ *Eagle v. White*, 6 Whart. 505; 37 Am. Dec. 434; *Farmers' etc. Bank v. Champlain Trans. Co.*, 16 Vt. 52; 42 Am. Dec. 491; 23 Vt. 186; 56 Am.

Dec. 68; *Nettles v. R. R. Co.*, 7 Rich. 190; 62 Am. Dec. 409; *Michigan etc. R. R. Co. v. Day*, 20 Ill. 375; 71 Am. Dec. 278; *Marshall v. American Express Co.*, 7 Wis. 1; 73 Am. Dec. 381; *Gibson v. Culver*, 17 Wend. 305; 31 Am. Dec. 297; *Stone v. Waitt*, 31 Me. 409; 52 Am. Dec. 621; *Lamb v. R. R. Co.*, 2 Daly, 454; *Shenk v. Propeller Co.*, 60 Pa. St. 109; 100 Am. Dec. 541. The owner cannot accept part of the goods, and reject the rest because of an injury: *Shaw v. R. R. Co.*, 5 Rich. 462; 57 Am. Dec. 768; *Michigan R. Co. v. Burns*, 13 Ind. 265.

⁵ *McEntee v. Steamship Co.*, 45 N. Y. 34; 6 Am. Rep. 28.

duction of a bill of lading before he delivers the goods, and he may, before delivery, when the consignee refuses to receipt for the goods. But he cannot refuse to deliver the goods, after inspecting the bill of lading, on the ground that the bill is not surrendered to him, if the consignee tenders the freight charges as contained in the bill, and executes his receipt for the goods.¹

The carrier's liability will end if the owner assumes control of the goods before they have arrived at the place of delivery.² The obligation of a common carrier to deliver at all events may, under certain circumstances, be excused; as if the owner or shipper is induced from any cause to accept the goods short of the place to which they were first intended to be conveyed, the carrier is not only discharged from further liability, but is entitled to a *pro rata* compensation for the transportation as far as it has been continued.³ The failure of a common carrier to deliver goods at the usual place of delivery, and an attempt to deliver them at a new, unusual, and ill-suited place, resulting in the loss of the goods, makes the carrier responsible therefor, on the ground of a failure to deliver according to contract.⁴

Anciently, a carrier—except in the case of a ship from a foreign country—was obliged to make personal delivery to the consignee.⁵ This rule has now been much relaxed, the custom of the particular business being at present the test as to the requisites of delivery by a common carrier.⁶

ILLUSTRATIONS.—Plaintiff, as agent for W., collected money and forwarded it to W. by defendant's express company. The latter failing to deliver it to W., plaintiff brought this action to

¹ Dwyer v. R. R. Co., 69 Tex. 707.

² Stone v. Waitt, 31 Me. 409; 52 Am. Dec. 621.

³ Bennett v. Byram, 38 Miss. 17; 75 Am. Dec. 90.

⁴ Benbow v. R. R. Co., Phill. (N. C.) 421; 98 Am. Dec. 76.

⁵ Hutchinson on Carriers, secs. 341

et seq.; Fisk v. Newton, 1 Denio, 45; 43 Am. Dec. 649. As, for instance, a wagoner: Bansemer v. R. R. Co., 25 Ind. 434; 87 Am. Dec. 367.

⁶ Hutchinson on Carriers, sec. 342; Kohn v. Packard, 3 La. 224; 23 Am. Dec. 453; Gibson v. Culver, 17 Wend. 305; 31 Am. Dec. 297.

recover it. *Held*, that plaintiff, having no special interest in the money, could not recover: *Thompson v. Fargo*, 49 N. Y. 188; 10 Am. Rep. 342. A party, with no express exception against any perils, contracted to ship certain goods from one seaport to another. *Held*, liable for loss of a portion by the breaking of the tackle of a crane used for transferring the goods upon lighters, and standing on the pier: *Knowles v. Dabney*, 105 Mass. 437. A consignee of goods was erroneously informed by an employee of the carrier that they had not arrived, whereby she failed to get them from a warehouse to which the carrier had sent them, and they were consumed by fire, without fault of the warehouseman. *Held*, that the carrier was liable for the loss: *Jeffersonville R. R. Co. v. Cotton*, 29 Ind. 498; 95 Am. Dec. 656. A hackman, ordered to take a box "to the early train," took it to such train, and, finding no one there authorized to receive it, carried it into the depot, a safe building, locked at night, and, with the baggage-master's knowledge, placed it on the platform where trunks for the train were usually put, and the box was lost. *Held*, that the hackman was not in law negligent, unless there was clear evidence that he was also ordered to deliver it to an express company, or otherwise: *Manheim v. Carr*, 62 Me. 473. The consignees of goods, residing in Boston, contracted with a transportation company in New York for the carriage of the goods from New York to Boston, and the delivery to them at Boston. The defendants, connecting carriers residing in Massachusetts, received the goods from the New York transportation company. On the arrival at Boston the goods were demanded, but refused, because delivery was not then convenient, and the same afternoon they were unloaded and placed in defendants' warehouse too late for delivery. The same night the warehouse and goods were burned up. *Held*, that defendants were liable for the goods: *Faulkner v. Hart*, 82 N. Y. 413; 37 Am. Rep. 574.

§ 1827. **Delivery by Carriers by Water.** — A carrier by water must land the goods at a proper place, and immediately give notice of their arrival to the consignee.¹

¹ *Hutchinson on Carriers*, sec. 357; *Ostrander v. Brown*, 15 Johns. 39; 8 Am. Dec. 211; *Kohn v. Packard*, 3 La. 224; 23 Am. Dec. 453; *Young v. Smith*, 3 Dana, 91; 28 Am. Dec. 57; *McAndrew v. Whitlock*, 52 N. Y. 40; 11 Am. Rep. 657; *Dean v. Vaccaro*, 2 Head, 488; 75 Am. Dec. 744; *The Peytona*, 2 Curtis, 21; *Scholes v. Ackerland*, 15 Ill. 474; *Barclay v. Clide*, 2 E. D. Smith, 95; *Hermann v. Goodrich*, 21 Wis. 543; 94 Am. Dec. 562; *Redmond v. Steam Co.*, 56 Barb. 320; *Dibble v. Morgan*, 1 Wood, 406; *Bansemmer v. R. R. Co.*, 25 Ind. 434; 87 Am. Dec. 367; *Morgan v. Dibble*, 29 Tex. 107; 94 Am. Dec. 264; *Shenk v. Propeller Co.*, 60 Pa. St. 109; 100 Am. Dec. 541.

His liability continues until such delivery is completed.¹ Even after notice of the arrival of the goods the carrier should not leave them exposed on the wharf, but should store them for and on account of the owner.² The fact that the consignee's business address was stated in the bill of lading does not oblige the shipper to depart from his known and usual place of delivery, and deliver the cargo at a pier more contiguous to the consignee's place of business.³ A mere deposit of goods transported by water upon the carrier's own wharf, the goods not being separated and set apart from the rest of the cargo, and there being no acceptance by the consignee, and no reasonable time or opportunity given for their removal, is not a delivery to the consignee such as would discharge the carrier from liability for the loss of the goods.⁴ Where the consignee and owner of goods of a bulky nature is present soon after their arrival, accepts the consignment and pays the freight, and the goods are landed on a public wharf, with notice to him, their legal custody is transferred from the carrier to the consignee, whose duty it is to protect them; and if, in consequence of his neglect to remove them, they suffer damages from the weather, the carrier is not responsible.⁵ A carrier by water cannot be held for a loss of goods delivered at the proper landing-place, although there is no warehouse there, and he gives no notice to the consignee, if such is the uniform usage, although neither shipper nor consignee knows the usage.⁶ The obligation of a carrier of imported goods does not require a delivery in contravention of the revenue laws; but where the owner has ob-

¹ *De Mott v. Laraway*, 14 Wend. 225; 28 Am. Dec. 523. The customary discharge of goods by a carrier at its own wharf imports no obligation to discharge there if the dock is full, or there be other good reason to discharge elsewhere: *Arnold v. National S. S. Co.*, 29 Fed. Rep. 184.

² *Rowland v. Miln*, 2 Hilt. 150.

³ *Western Trans. Co. v. Hawley*, 1 Daly, 327.

⁴ *Redmond v. Steam Co.*, 46 N. Y. 578.

⁵ *Goodwin v. R. R. Co.*, 50 N. Y. 154; 10 Am. Rep. 457.

⁶ *Turner v. Huff*, 46 Ark. 222; 55 Am. Rep. 580.

tained the requisite permit to remove the goods, the fact of their removal under the supervision of the proper revenue officers does not affect the liability of the carrier.¹

ILLUSTRATIONS. — A case of goods was consigned to certain warehousemen in Milwaukee, and was left at the pier in M., not the warehouse to which they were consigned, and destroyed by fire. *Held*, that it was not a delivery according to the carrier's contract: *Sultana v. Chapman*, 5 Wis. 454. Goods had been discharged from the barge of a North River carrier to his "float" in the Albany basin, and notice repeatedly given to the forwarders to whom they were directed to take them, when they were destroyed by fire. *Held*, that the transfer to the float was not a delivery, but merely preparatory to delivery, and that by the delays the carrier did not become a depositary, but was responsible for the loss: *Goold v. Chapin*, 20 N. Y. 259; 75 Am. Dec. 398. Goods were shipped in Pennsylvania to the city of Chicago, directed to the consignee, whose name and the number of his place of business were placed upon the box. On their arrival, by water, a letter was mailed to him, without giving his number, which, in consequence thereof, was returned. The goods were destroyed by fire. *Held*, that the carrier was liable to the owner for a failure to direct the notice to the consignee at his business house: *Union Steamboat Co. v. Knapp*, 73 Ill. 506.

§ 1828. **Delivery by Railroads.** — So the responsibility of a carrier by rail continues until the goods have been landed at the station, the consignee notified of their arrival, and a reasonable time has been given him to remove them.² No notice to the consignee, where the goods arrive

¹ *Redmond v. Steam Co.*, 46 N. Y. 578; 7 Am. Rep. 390.

² *Thomas v. R. R. Co.*, 10 Met. 472; 43 Am. Dec. 444; *Norway Plains Co. v. R. R. Co.*, 1 Gray, 263; 61 Am. Dec. 423; *Zinn v. Steam Co.*, 49 N. Y. 442; 10 Am. Rep. 402; *Hill Mfg. Co. v. R. R. Co.*, 104 Mass. 122; 6 Am. Rep. 202; *Leavenworth R. R. Co. v. Maris*, 16 Kan. 333; *Chicago etc. R. R. Co. v. Bensley*, 69 Ill. 639; *Western etc. R. R. Co. v. Camp*, 53 Ga. 596; *Cahn v. R. R. Co.*, 71 Ill. 96; *Dresbach v. R. R. Co.*, 57 Cal. 462; *Morris etc. R. R. Co. v. Ayres*, 24 N. J. L. 393; 80 Am. Dec. 215; *Wood v. Crocker*, 18

Wis. 345; 86 Am. Dec. 773; *Bansemer v. R. R. Co.*, 25 Ind. 434; 87 Am. Dec. 367; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349; *Francis v. R. R. Co.*, 25 Iowa, 60; 95 Am. Dec. 769; *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Shenk v. Steam Propeller Co.*, 60 Pa. St. 109; 100 Am. Dec. 541; *Tarbell v. Royal Express etc. Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350. But see *Porter v. R. R. Co.*, 20 Ill. 407; 71 Am. Dec. 287. The carrier must keep the goods in store for the consignee a reasonable time without additional reward: *Bansemer v. R. R. Co.*, 25 Ind. 434; 87 Am. Dec. 367.

on time, is necessary to reduce the liability of the company from that of common carriers to that of warehousemen.¹ A railroad company need not notify a consignee of freight of its arrival on time at the freight-depot.² A railroad corporation, a common carrier of cattle, performs its duty when it has unloaded the cattle at their place of destination. It is bound neither to deliver them to the consignee, nor to give him notice of their arrival.³ The extent of "reasonable opportunity" afforded a consignee of goods to take them away after the carrier's transit has ended is not to be measured by any peculiar circumstances in his own condition and situation rendering it necessary for his own convenience and accommodation that he should have a longer time or better opportunity than if he resided in the vicinity of the depot, and was prepared with the means and facilities for taking the goods away.⁴ A "reasonable time" is such as would enable one residing in the vicinity of the place of delivery, and informed of the probable time of arrival, to inspect and remove the goods during business hours.⁵ Where goods are permitted by the consignee to remain eight days in the depot of the carrier, at the place of delivery, that is more than a reasonable time; and if the goods are then lost or destroyed, without any negligence on the part of the carrier, he is not responsible.⁶ When the mark upon goods in the hands of a common carrier differs from the way-bill, the carrier is justified in exercising caution in delivering the goods, and it is a question for the jury whether the delay is reasonable. Detaining beef from the 21st to the 26th of August was held to justify a finding against the carrier.⁷ A common carrier does not discharge his obligation to

¹ *Southwestern R. R. Co. v. Felder*, 46 Ga. 453.

² *Eaton v. R. R. Co.*, 12 Mo. App. 386.

³ *Chicago etc. R. R. Co. v. Pratt*, 13 Ill. App. 477.

⁴ *Wood v. Crocker*, 18 Wis. 345; 86 Am. Dec. 773.

⁵ *Bell v. R. R. Co.*, 6 Mo. App. 363.

⁶ *Leavenworth etc. R. R. Co. v. Maris*, 16 Kan. 333.

⁷ *Baltimore etc. R. R. Co. v. Pumphrey*, 59 Md. 390.

keep the goods until a reasonable time has elapsed for removal by the consignee by delivering them to a third person to keep, before the reasonable time has passed.¹ A railroad must provide convenient and reasonably safe depots, where its freight can be stored.² Where the destination is a mere flag-station, without any agent, depot, or warehouse, and this is known to the consignee, and is not unreasonable in view of its business, its liability of every sort terminates with the delivery of the goods in its car on the side-track at the destination.³ The duty of a railroad as a carrier of wheat in bulk does not cease until the cars have been so placed that they can be unloaded with a reasonable degree of convenience. It is not enough to put the cars where possibly they could be unloaded.⁴ Where goods come by the hands of successive carriers to the depot of the last one, in the city where the consignee lives, the carriage ends. If another carrier, without special authority from the consignee, or authority warranted from usage known to and acquiesced in by the consignee, takes the goods from the depot to the consignee's warehouse, the consignee incurs no obligation to him.⁵ A railroad company is not bound to make more than one delivery of any shipment of goods transported by it. The owner has no right to require the company to deliver portions of the goods at different times; but may be required to receive and receipt for the whole at once, having first been afforded an opportunity of seeing the goods, and determining whether they were all there, and in good condition.⁶

¹ Bell v. R. R. Co., 6 Mo. App. 363.

² Whitney v. R. R. Co., 27 Wis. 327.

³ South etc. Ala. R. R. Co. v. Wood, 66 Ala. 167; 41 Am. Rep. 749. In an action of damages against a railroad company for loss of freight consigned to a point where there was no depot or agent, it being shown that the car reached the destination, and was left

there on a side-track, the burden is on the plaintiff to show that the loss occurred before arrival: South and North Alabama R. R. Co. v. Wood, 71 Ala. 215; 46 Am. Rep. 309.

⁴ Independence Mills Co. v. R. R. Co., 72 Iowa, 535.

⁵ Kansas City Transfer Co. v. Neiswanger, 18 Mo. App. 103.

⁶ Morris etc. R. R. Co. v. Ayres, 24 N. J. L. 393; 80 Am. Dec. 216.

ILLUSTRATIONS.—A common carrier, having a hogshead of molasses to deliver, was furnished by the owner with skids wherewith to unload it from his wagon. The skids, owing to a latent defect, broke under the weight of the hogshead, and the contents thereof were lost. *Held*, that the owner could not maintain an action against the carrier for the loss: *Loveland v. Burke*, 120 Mass. 139; 21 Am. Rep. 507. Goods arrive at depot at from one to three o'clock in afternoon, from two to three hours are required to unload them from the cars, the gates of the depot are closed at five o'clock, and the consignee has no reasonable opportunity to see the goods or take them away before they are destroyed. *Held*, that the transit has not terminated, and the railroad company as carriers are liable for the value of the goods: *Moses v. R. R. Co.*, 32 N. H. 523; 64 Am. Dec. 381. Defendant, a carrier of goods destined to a point beyond its line, had transported them to the end of its route, and given the usual notice to the succeeding carrier, a line of vessels. The goods were destroyed on the evening following their arrival, and while in defendant's possession. *Held*, that although the defendant was ready to deliver the goods to the succeeding carrier, yet it was liable as common carrier for a reasonable time, until, according to the usual course of business, a vessel of the succeeding carrier could arrive to take the goods: *Mills v. R. R. Co.*, 45 N. Y. 622; 6 Am. Rep. 152. A bill of lading provided that the goods must be removed on the day of arrival or stored at the owner's risk, and in case of destruction in the station, that no damage should accrue. *Held*, that no notice of the arrival need be given the consignee; that the carrier was relieved from such duty, in any event, by the contract: *Gashweiler v. R. R. Co.*, 83 Mo., 112; 53 Am. Rep. 558. Plaintiff shipped by rail to Chicago, over defendant's railroad, certain goods in bond under the custom laws. By the customs regulations a notice in writing was required to be given to the collector or his deputy of the arrival of bonded goods, which could be stored only in a bonded warehouse, whereupon he would name a warehouse where they could be placed. It was the custom, well known to defendant, for the carrier to give a notice in writing of the arrival of such goods, both to the collector and the consignee. The goods in question arrived in Chicago October 4th. Their arrival was known by an inspector in the collector's office, but no notice in writing was given to the collector or to the consignee, who did not know of the arrival. They remained in defendant's cars until October 8th, when they were destroyed by fire. *Held*, that defendant was liable as carrier for the loss of the goods: *Chicago etc. R. R. Co. v. Sawyer*, 69 Ill. 285; 18 Am. Rep. 613. A railroad company receives goods at the place of their destination

on one day, and they are destroyed by fire the same night. *Held*, that its liability is that of a common carrier, and not that of a warehouseman: *Louisville etc. R. R. Co. v. McGuire*, 79 Ala. 395. Goods were sent by A directed to B, at M. They were delivered to the express company's agent on Thursday, and should have reached their destination the same day. They were sent by a circuitous route, and did not arrive at M. until Saturday evening about six o'clock. About two o'clock on Saturday afternoon B called at the office for the goods, and was informed that there were none there. B lived about one hundred rods from the express office in M.; had lived there for a year, and was well known. No effort was made to deliver the goods to him, nor any notice given of their arrival. They remained in the express office until Tuesday night, when they were consumed in a fire. *Held*, that the company was liable for their loss: *Union Express Co. v. Ohleman*, 92 Pa. St. 323. A bill of lading for hams provided that the railroad company carrying them should not be liable for the hams while at a station awaiting delivery, and that they should be delivered during business hours. The hams reached the station of their destination on Thursday. The consignee inquired for them Thursday and Friday, and was told that they had not arrived. He was notified of their arrival at 5:30, P. M., Saturday, and removed them Monday morning. They were found to have been damaged by heat. *Held*, that the company was liable: *McKinney v. Jewett*, 90 N. Y. 267. A common carrier transported goods to their destination, and, after keeping them a few days, deposited them in a warehouse, and the owner called a few days later and inquired if the goods had arrived, and was informed by an employee of the carrier's that they had not, and a few days later the goods were burned. *Held*, that the carrier is liable for their loss, if it was the direct result of the false answer; and the jury having found that it was, their finding will not be disturbed: *Jeffersonville etc. R. R. Co. v. Cotton*, 29 Ind. 498; 95 Am. Dec. 656.

§ 1829. **Delivery by Express Companies.**—Express companies are bound to make a personal delivery of the goods to the consignee,¹ except, it is held in some cases,

¹ Hutchinson on Carriers, secs. 379 et seq.; *Baldwin v. American Express Co.*, 23 Ill. 202; 74 Am. Dec. 191; *Chicago etc. R. R. Co. v. Sawyer*, 69 Ill. 289; 18 Am. Rep. 613; *American Express Co. v. Wolf*, 79 Ill. 432; *American Express Co. v. Baldwin*, 26 Ill. 504; 79 Am. Dec. 339. "They

were established for the purpose of extending to the public the advantages of personal delivery enjoyed in all cases of land carriage prior to the introduction of transportation by rail": *Witbeck v. Holland*, 45 N. Y. 13; 6 Am. Rep. 23; 55 Barb. 443; *American Express Co. v. Robinson*, 72 Pa. St.

at places where the amount of business done does not justify the employment of delivery agents or wagons.¹ But here prompt notice of the arrival of the goods must be given to the consignee.² A package of money addressed to "T., cashier of the A. bank," is duly delivered by delivering it to a clerk or receiving teller while he is behind the counter in discharge of his duties as teller.³ But delivery of a package by an express company must be actual and *bona fide*, and not merely formal; and if an agent of the company abstract the package while in the act of delivering it, the company will be liable, even though a receipt be signed, and the form of delivery gone through by the agent's laying the package for a moment out of his hands.⁴ A carrier who engages to deliver only on receipt of price, and delivers in breach of this agreement, assumes the responsibility that the price will be paid. He must pay, or retain the goods, and advise the consignor that the goods are at their destination subject to his order.⁵ An express company which for compensation receives a note for collection is liable for any neglect by which the indorsers are discharged; and if it employs a notary, he will be regarded as its agent for whose neglects and mistakes it will be responsible.⁶

Evidence of usage—though looked upon with suspicion—is admissible to vary the legal rules as to delivery by expressmen.⁷ The obligation of an expressman, on the refusal of the goods, to give notice thereof to the consignor, may be excused by custom.⁸ Where it is the custom of

274; *South. Express Co. v. Armstead*, 50 Ala. 350; *American Express Co. v. Hockett*, 30 Ind. 250; 95 Am. Dec. 691.

¹ *Hutchinson on Carriers*, secs. 379 et seq.; *Baldwin v. American Express Co.*, 23 Ill. 202; 74 Am. Dec. 191; *American Ex. Co. v. Schier*, 55 Ill. 148.

² *Hutchinson on Carriers*, sec. 380.

³ *Hotchkiss v. Artisans' Bank*, 2 Abb. App. 403.

⁴ *American Express Co. v. Haggard*, 37 Ill. 465; 87 Am. Dec. 257.

⁵ *Tooker v. Gormer*, 2 Hilt. 71.

⁶ *American Express Co. v. Haire*, 21 Ind. 4; 83 Am. Dec. 334. See *post*, § 1859, "C. O. D."

⁷ *Marshall v. American Express Co.*, 7 Wis. 1; 73 Am. Dec. 381; *Southern Express Co. v. Everett*, 37 Ga. 688; *Sullivan v. Thompson*, 99 Mass. 257; *Lawson on Usages and Customs*, sec. 96.

⁸ *Weed v. Barney*, 45 N. Y. 344; 6 Am. Rep. 96.

an express company to enter all packages before delivery in a delivery-book, and upon which a receipt is taken upon the delivery, if no such entry has been made upon the delivery-book it will not be presumed that the company has done its duty.¹ But where a demijohn of brandy being sent from P. to K. was received by the company's agent at K. and stored in its warehouse, where it was afterwards broken, the defendant gave evidence that it was customary for the agent at K. to deliver packages at the residence of the consignee, at his option; but the court held that a personal delivery was absolutely required of expressmen, and that the defendant was liable.²

ILLUSTRATIONS.—An expressman agreed to take and leave a trunk at a railroad depot at a certain time. He had it there at the time, and left it in the baggage-room, which was the only place provided for baggage by the railroad company which was not taken into its charge until checked. Plaintiff was not at the depot when the trunk arrived, and when she came it could not be found. *Held*, that the expressman was not liable for its loss: *Henshaw v. Rowland*, 54 N. Y. 242. The plaintiff occupied a room in the fourth story of a building, and a carrier brought a box weighing about sixty pounds, and placed it within the outside door of the building at the foot of the stairs, and then went up and notified a boy whom he found in the office that the box was there and must be taken care of. The boy was not authorized to receive packages. *Held*, that there was not a sufficient delivery to discharge the carrier: *Haslam v. Adams Express Co.*, 6 Bosw. 235. An express company having received an overdue draft from the drawer for collection, with instructions to return it at once if not paid, presented it and was tendered the principal only, and consented to hold it until the drawee should receive by mail from the drawer an explanation of the interest charged, but neglected to present it again till two days after the drawee had received such reply, and meanwhile he became insolvent. *Held*, that the express company was liable for the loss: *Whitney v. Express Co.*, 104 Mass. 152. An express clerk attempted to deliver a package at the office of the owner, which he found closed; he left a notice which was received by an employee of the owner, who went to the express office for the package, but was told that the

¹ *Baldwin v. American Express Co.*, 23 Ill. 197; 74 Am. Dec. 191.

² *American Express Co. v. Robinson*, 72 Pa. St. 274.

clerk had not returned yet; on the return of the clerk, the package was placed in a fire-proof safe; no demand was made for it afterwards; a fire occurred, and the package was lost by the watchman taking it, with other packages, from the safe, to send it to a place of safety. *Held*, that there was not sufficient evidence of negligence on the part of the company or its agents to render it liable for the loss: *Howard Express Co. v. Wile*, 64 Pa. St. 201.

§ 1830. **Delivery to Wrong Person.**—Neither fraud nor mistake will excuse the carrier if he make delivery to the wrong person.¹ A delivery otherwise than in accordance with a bill of lading is at his own risk.² If delivery be made to a person other than the consignee, though innocently, and by mistake, but without the order or authority of the consignor, the carrier is liable to the consignor for the value in case of loss.³ Misdelivery by a carrier of an article intrusted to him to be carried is a conversion,⁴ and he is responsible, although the address of the consignee was erroneously given.⁵ In an action against a carrier of goods, where it is claimed that he delivered them to a person not authorized to receive them, no greater proof of authority in the person to whom they were delivered to receive them is required than for any other issue in a civil action.⁶ A railroad bound by a bill of lading to deliver goods on payment of freight "and presentation of a duplicate" bill is responsible if it makes delivery without such presentation. Such a clause in a bill of lading is for the benefit of the consignor.⁷ If

¹ Hutchinson on Carriers, sec. 344; *Adams v. Blankenstein*, 2 Cal. 413, 56 Am. Dec. 350; *South. Express Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *McEntee v. N. J. Steam Co.*, 45 N. Y. 34; 6 Am. Rep. 28; *The Huntress*, Davies, 82; *American Express Co. v. Stack*, 29 Ind. 27; *American Express Co. v. Milk*, 73 Ill. 224; *Little Rock etc. R. R. Co. v. Glidewell*, 39 Ark. 487; *Hayes v. Wells*, 23 Cal. 185; 83 Am. Dec. 89; *Shenk v. Propeller Co.*, 60 Pa. St. 109; 100 Am. Dec. 541.

² *Pennsylvania R. R. Co. v. Stern*, 119 Pa. St. 24.

³ *Wernwag v. R. R. Co.*, 117 Pa. St. 46; *Furman v. R. R. Co.*, 106 N. Y. 579.

⁴ *Clafin v. R. R. Co.*, 7 Allen, 341.

⁵ *McCullough v. McDonald*, 91 Ind. 240.

⁶ *Wilcox v. R. R. Co.*, 24 Minn. 269.

⁷ *McEwen v. R. R. Co.*, 33 Ind. 368; 5 Am. Rep. 216.

a carrier delivers goods according to their address, he is not responsible for the fact that the person to whom they are addressed represented himself to the seller to be another person of the same name, and that the seller is swindled out of his goods.¹ But where goods which have been fraudulently ordered by an individual in the name of a fictitious firm, and have been shipped in compliance with the order directed to such firm, are delivered by the carrier to a stranger without requiring evidence of his identity, the carrier is liable to the consignor for their value.²

ILLUSTRATIONS. — A package addressed to plaintiff, and not to the care of any one, was delivered to the defendant by a railroad company to be transported to plaintiff. Defendant delivered it to its agent at the place of destination, to whose care plaintiff's packages were usually directed, and so delivered, who converted it to his own use. *Held*, that the plaintiff could recover in an action against the express company: *Ela v. Express Co.*, 29 Wis. 611; 9 Am. Rep. 619. Goods shipped by rail for Chicago were plainly marked "J. Weil & Bros." The station agent entered them on the way-bill as for "T. Weil & Co." When the messengers of J. Weil & Bros. called for the goods at Chicago, they were told that there was nothing for them; and the mistake was not discovered until the goods were destroyed with the depot by fire. *Held*, that the carrier was liable: *Meyer v. R. R. Co.*, 24 Wis. 566. Plaintiff consigned freight by defendant's boats to W. at G. By arrangement between W.'s agent and defendant, of which plaintiff was ignorant, defendant landed the freight on the river bank near W.'s house, and not at G. W. refused to pay charges and take the freight, and defendant subsequently permitted another, unauthorized by W., to take it on paying charges. The plaintiff had no notice of the disposition of the freight. *Held*, that plaintiff could recover the value from defendant: *Howard v. Steam Co.*, 83 N. C. 158; 35 Am. Rep. 571. The captain of a barge, by mistake, delivered a load of his employer's coal to the wrong person, who receipted for it. The captain gave the receipt to the general agent of his employer, who received it without dissent, and tried to collect from the party who received the coal. The captain was not informed of his mistake for several weeks. *Held*, that an action against

¹ The Drew, 15 Fed. Rep. 826.

² Price v. R. R. Co., 50 N. Y. 213; 10 Am. Rep. 475.

him could not be maintained: *Phila. etc. R. R. Co. v. O'Donnell*, 12 Phila. 213. A shipper of a bag of gold from an inland town in France addressed it to "Frank Guillaume, 152 Bleckert St., New York, Utica, America," and sent it to the steamer's agent at the port. The bill of lading was sent back reading "Guillaume Frank, 152 Bleckert St., New York." After the shipper received the bill, it was too late for him to return it before the steamer was supposed by him to have sailed. The gold was delivered in New York to one representing himself to be Guillaume Frank, and was lost. *Held*, in an action against the steamship company, that the facts did not show negligence on the shipper's part: *Guillaume v. General Trans. Co.*, 100 N. Y. 491. A B, representing himself as C D of P., bought goods of the plaintiff; the goods were marked for C D, and delivered to the defendants, common carriers, who carried them to P. A B, who was known to the defendants by his real name, applied for them as the property of C D, and the defendants delivered them to him on his receipt, but without his producing a bill of lading which the defendants had given to the plaintiff, promising to deliver the goods to C D or order. There was no C D in P. *Held*, that the defendants were not liable to the plaintiff for delivering the goods to A B: *Dunbar v. R. R. Co.*, 110 Mass. 26; 14 Am. Rep. 576. The plaintiffs were induced, by representations of one Collins, to send goods addressed to "J. F. Roberts, Roxbury, Massachusetts." The goods were sent over the defendant's line. Collins then went to Boston, and claimed and received the goods of defendant under the name of "J. F. Roberts," which name he had assumed for the purpose of getting the goods. There was no such person as "J. F. Roberts," and no person who was known or passed by that name. *Held*, that the defendants were liable to the plaintiff for the value of the goods: *Winslow v. R. R. Co.*, 42 Vt. 700; 1 Am. Rep. 365. A bill of lading acknowledged the receipt of a case of goods "to be forwarded . . . to Louisville depot only." The carrier delivered the case to a person who was not authorized to receive it. *Held*, that the carrier was liable: *Merchants' Despatch Transportation Co. v. Merriam*, 111 Ind. 5. Plaintiffs shipped goods by vessel of defendants—common carriers—from England for New York, and received a bill of lading providing that the defendants should not be liable for loss occasioned, among other things, by "any act, neglect, or default whatsoever of the pilot, master, or mariners." On the arrival of the vessel in New York, the officer discharging the cargo, without authority from the plaintiffs, delivered the goods to a car-man who was not empowered by the plaintiffs to receive them, and the goods were thereby lost. *Held*, that the loss was

the result of the gross carelessness of the defendants, and was not covered by the exceptions in the bill of lading: *Guillaume v. Hamburg etc. Packet Co.*, 42 N. Y. 212; 1 Am. Rep. 512. There were two men in St. Charles named H. H. A merchant at a distance received an order for goods, signed H. H., and knowing of H. H. No. 1, to whom he was willing to sell, forwarded the goods by railroad. The company tendered the goods to H. H. No. 1, who said he had not ordered them, and refused them, and the company then stored them as warehousemen. H. H. No. 2 then appeared, produced bill of lading, and demanded the goods. The company delivered them to him, and he absconded with them, the price remaining unpaid to the seller, who then sued the company on the ground of misdelivery. *Held*, that the company, as warehousemen, were liable for due diligence only; that they were not chargeable, under the circumstances, with negligence; and there had not been a misdelivery: *Bush v. R. R. Co.*, 3 Mo. App. 62. Plaintiff, at Columbus, Georgia, delivered his household goods, marked "R. Adams," to defendant, a common carrier, for carriage. He accompanied them as far as New Orleans. There he directed defendant's agent to forward them to Bremond, Texas. By mistake, the agent shipped them to Brenham. There, on the authority of a letter written from Burton, signed "R. Adams," they were forwarded to Burton, and there delivered to a man calling himself Robert Adams, a single man and day-laborer, who had no bill of lading or receipt for them, and was not the plaintiff. *Held*, that the defendant was liable for the goods as a common carrier: *Houston etc. R. R. Co. v. Adams*, 49 Tex. 748; 30 Am. Rep. 117. Plaintiffs shipped by defendant's line a quantity of butter to be carried from New York to Georgetown, consigned to plaintiffs' order. The packages were unmarked. One S. presented to defendant's delivery clerk a letter written by plaintiffs to him containing this clause: "The roll sent you to-day you will find of very good quality"; and upon this the clerk delivered the butter to S. *Held*, that, as a question of law, the letter was not a sufficient authority to justify a delivery of the butter to S.; nor was the writing of it negligence *per se*; but it was a question of fact for the jury to determine, from the letter and the other facts of the case, whether by plaintiffs' negligence, or otherwise, the defendant was excused or justified in the delivery of the property: *Viner v. Steam Co.*, 50 N. Y. 23. Two men of the same name lived in the same town. One was a solvent merchant, and the other was a swindler. The latter ordered goods by mail. The goods were sent by carrier, the seller supposing that they had been ordered by the solvent

merchant. The carrier delivered them to the swindler, who ordered them. *Held*, that the seller had no right of action against the carrier: *Wilson v. Adams Express Co.*, 27 Mo. App. 360. One forged a telegram in the name of another person, requesting a national bank to forward to Gainesville, Florida, five hundred dollars to such other person. Upon the telegram being received, the agent of such other person gave his note for the money (which was subsequently paid), and the bank forwarded the money as desired, by express. The express company delivered it to the sender of the telegram. The agent making the delivery knew that the party was a stranger who had just arrived in town. The innkeeper with whom the stranger lodged called with the stranger for the package, and treated him as the party to whom it was addressed, but there was no identification or request by the agent for an identification. *Held*, that while the innkeeper may have been known to the agent as worthy of trust and confidence, the company was liable for the loss occasioned by the delivery to the wrong person: *Southern Express Co. v. Van Meter*, 17 Fla. 783; 35 Am. Rep. 107. The owner delivered to a railroad company a quantity of flour to be shipped to C., and received a bill of lading containing a provision that the flour should be delivered to C. upon a presentation of a duplicate of such bill of lading. The owner drew a draft on C. in favor of the plaintiff, and attached the duplicate bill of lading. The plaintiff presented the draft to C., who refused payment. The plaintiff then presented the bill of lading to the railroad company, and demanded the flour, which was refused, the flour having already been delivered to C., who obtained it without the presentation of the bill of lading. *Held*, that the company was liable to the plaintiff for the loss occasioned him by the delivery of the flour to C.: *McEwen v. R. R. Co.*, 33 Ind. 368; 5 Am. Rep. 216. A hired a shop and a post-office box in Saratoga Springs, New York, assuming the name of a reputable cigar merchant of that town. He then wrote to the plaintiff by post, ordering cigars, giving his assumed name, and the number of his post-office box. The plaintiff shipped the goods to him by the defendant, a common carrier, addressed in the assumed name at Saratoga Springs, and advised him by mail of the shipment, addressing him in that name, with the number of the post-office box. The plaintiff supposed the order came from the merchant whose name was assumed, and relied on his financial responsibility. The defendant delivered the goods to A, who receipted for them in his assumed name, and soon after absconded. *Held*, that, in the absence of negligence, the defendant was not liable: *Samuel v. Cheney*, 135 Mass. 278; 46 Am. Rep. 467.

§ 1831. **When Consignee cannot be Found, Carrier Holds Goods as Warehouseman.**—When the carrier has done all that the law requires of him towards delivering the goods, he holds them, not as a carrier, but as a warehouseman.¹ So, too, where for the convenience of both parties, the carrier stores the goods in his freight-house.² The rule that it is the duty of a shipper to store the prop-

¹ Hutchinson on Carriers, sec. 354; *Smith v. R. R. Co.*, 27 N. H. 86; 59 Am. Dec. 364; *Norway Plains Co. v. R. R. Co.*, 1 Gray, 263; 61 Am. Dec. 423; *Northrup v. R. R. Co.*, 5 Abb. Pr., N. S., 425; *Kremer v. Express Co.*, 6 Cold. 356; *Hirsch v. Quaker City*, 2 Disn. 144; *Fenner v. R. R. Co.*, 44 N. Y. 505; 4 Am. Rep. 709; *Derosia v. R. R. Co.*, 18 Minn. 133; *Rice v. Hart*, 118 Mass. 201; 19 Am. Rep. 433; *American Express Co. v. Wolfe*, 79 Ill. 430; *The Bobolink*, 6 Saw. 146; *Chalk v. R. R. Co.*, 85 N. C. 423; *Hirschfield v. R. R. Co.*, 56 Cal. 484; *Kennedy v. R. R. Co.*, 74 Ala. 430; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349; *Adams Express Co. v. Darnell*, 31 Ind. 20; 99 Am. Dec. 582. In *Thomas v. R. R. Co.*, 10 Met. 472, 43 Am. Dec. 444, the court said: "The transportation of goods and the storage of goods are contracts of a different character; and though one person or company may render both services, yet the two contracts are not to be confounded or blended; because the legal liabilities attending the two are different. The proprietors of a railroad transport merchandise over their road, receiving it at one depot or place of deposit and delivering it at another, agreeably to the direction of the owner or consignor. But from the very nature and peculiar construction of the road, the proprietors cannot deliver merchandise at the warehouse of the owner, when situated off the line of the road, as a common wagoner can do. To make such a delivery, a distinct species of transportation would be required, and would be the subject of a distinct contract. They can deliver it only at the terminus of the road, or at the given depot where goods can be safely unladed, and put into a place of safety. After such delivery at a depot the

carriage is completed. But, owing to the great amount of goods transported, and belonging to so many different persons, and in consequence of the different hours of arrival, by night as well as by day, it becomes equally convenient and necessary, both for the proprietors of the road and the owners of the goods, that they should be unladed and deposited in a safe place, protected from the weather and from exposure to thieves and pilferers. And where such suitable warehouses are provided, and the goods which are not called for on their arrival at the places of destination are unladed and separated from the goods of other persons, and stored safely in such warehouses or depots, the duty of the proprietors as common carriers is, in our judgment, terminated. They have done all they agreed to do; they have received the goods, have transported them safely to the place of delivery, and, the consignee not being present to receive them, have unladed them and have put them in a safe and proper place for the consignee to take them away; and he can take them at any reasonable time. The liability of common carriers being ended, the proprietors are, by force of law, depositaries of the goods, and are bound to reasonable diligence in the custody of them, and consequently are only liable to the owners in case of a want of ordinary care."

² *Fenner v. R. R. Co.*, 44 N. Y. 505; 4 Am. Rep. 709. See *Denny v. R. R. Co.*, 13 Gray, 481; 74 Am. Dec. 645. In *Knowles v. Atlantic etc. R. R. Co.*, 38 Me. 55, 61 Am. Dec. 234, it was held that where a carrier keeps in his cars after arrival the freight at the request of the consignee, and without extra compensation, he becomes simply a depositary or a bailee without reward.

erty when the consignee refuses to receive it is inapplicable when the carrier continues to act under the direction of the shipper.¹ The shipper is entitled to a reasonable time to receive his goods before the liability of the carrier is changed to that of a warehouseman.² It is incumbent upon the consignee whose residence is unknown to the carrier to give such information before the arrival of his goods as will enable the carrier, upon their arrival, to give him the requisite notice thereof; and if, after due inquiry, the carrier fails to ascertain his residence, such notice is excused; and after a reasonable time for removal has elapsed, the liability of the carrier, as such, is discharged upon storing the goods, and thereafter he is only liable as warehouseman.³ When the consignee is absent from the place of destination, a common carrier may discharge himself from further liability by placing the goods in store with some responsible third person, at the place of delivery, for and on account of the owner. And after such third party has forwarded them to the consignee by the earliest and most available means of transportation, the carrier's liability cannot be renewed and resuscitated by a return of them to the storehouse or warehouse of such party.⁴

ILLUSTRATIONS.—Goods were consigned to the owner, "care M. & G. R. R.," station "No. 6"; they arrived at their destination, and were ready for delivery in half an hour; the owner, who lived twenty miles distant from the station, did not call for them, and they were stored in the warehouse of the railroad company. Six days afterwards the goods were destroyed by accidental fire. *Held*, the liability of the company as insurer had terminated: *Mobile etc. R. R. Co. v. Prewitt*, 46 Ala. 63; 7 Am. Rep. 586. Plaintiff consigned an express package marked "C. O. D." from New York to San Francisco. Defendants, an express company, received it, conveyed it to San Francisco,

¹ *Ide v. Sadler*, 18 Barb. 32.

² *Graves v. Hartford Steamboat Co.*, 38 Conn. 143; 9 Am. Rep. 369; *Winslow v. R. R. Co.*, 42 Vt. 700; 1 Am. Rep. 365.

³ *Pelton v. R. R. Co.*, 54 N. Y. 214; 13 Am. Rep. 568.

⁴ *Salinger v. Simmons*, 2 Lans. Rep. 325.

and on the 17th of March tendered it to the consignee and demanded payment. The consignee said he would receive the package and pay at some other time. The tender of the package and demand of payment were repeated by the company several times until the 16th of April, when the package was destroyed while in defendants' warehouse, without their fault. *Held*, that defendants' liability was that of warehousemen only, and that plaintiff could not recover the value of the package: *Weed v. Barney*, 45 N. Y. 344; 6 Am. Rep. 96. The consignee of certain kegs of butter, sent from Albany to New York by a freight-barge, was a clerk having no place of business of his own, and whose name was not in the city directory, and who was not known to the carrier, and, after reasonable inquiries by the carrier's agent, could not be found. *Held*, that the carrier discharged himself from further responsibility by depositing the property with a storehouse-keeper, then in good credit, for the owner, and taking his receipt for the same, according to the usual course of business in that trade, though the butter was subsequently sold by the storehouse-keeper, and the proceeds lost to the owner by his failure: *Fisk v. Newton*, 1 Denio, 45; 43 Am. Dec. 649. Defendants had in charge goods of the plaintiff, which arrived Thursday, and discharged on dock Friday; notice was mailed Thursday evening, but did not reach the plaintiff till Saturday forenoon. Saturday was very stormy, and the goods were not called for until Monday, when they were found to be greatly injured by rain. *Held*, that the responsibility of defendants as common carriers continued until notice of the arrival of the goods and a reasonable opportunity for removing them, and that Monday was a reasonable time to remove the goods: *Solomon v. Steam Co.*, 2 Daly, 104. Plaintiff, a resident of Michigan, on removing to G., in New York, four miles from S., delivered goods to a railroad company directed to plaintiff at S. The goods arrived at S. over defendant's railroad, but no one was present to receive them. They were then removed into defendant's warehouse, where, at the end of three days, they were consumed by fire, without defendant's fault. The agent in charge of the warehouse had made inquiries in regard to the residence or whereabouts of plaintiff, but could obtain no information. It appeared that, previous to the arrival of the goods, plaintiff called for them, but gave no information as to place of residence or address. *Held*, that plaintiff ought to have given such information to defendant before the arrival of the goods as would have enabled defendant to give the requisite notice to plaintiff that defendant's liability as common carrier had been changed to that of warehouseman, and plaintiff could not recover for the loss: *Pelton v. R. R. Co.*, 54 N. Y. 214; 13 Am. Rep. 568. Goods delivered to a railroad

corporation as a common carrier for transportation reached the point of destination at half-past three in the afternoon of Saturday in one of the rear cars of a long freight train which, on account of its length, was divided into sections, and these were moved up separately to the freight station, and their contents discharged. The consignee's teamster, who was sent for the goods, reached the station at a quarter-past four of the same afternoon, and remained until five, at which time the car containing the goods had not been moved up to the station or discharged. He was told by the agents of the carrier that the goods would not be ready for delivery that day, but that when reached they would be placed in the freight station near the door where he could get them on the following Monday. The goods were discharged and placed in the freight station on Saturday, but too late for delivery, and the building and its contents were destroyed by fire that night, without any negligence on the part of the railroad corporation. *Held*, that the liability of the railroad corporation as a carrier was ended before the loss of the goods: *Rice v. Hart*, 118 Mass. 201; 19 Am. Rep. 433.

§ 1832. Duty of Carrier to Notify Consignor.—So if the consignee refuse to receive the goods, it becomes the carrier's duty to notify the consignor of such refusal.¹ Where carriers offer the thing carried to the consignee, and he refuses to receive it, they discharge their contract as carriers by placing it upon storage; and their omission to notify the owner, within a reasonable time, of the refusal of the consignee, and that they had stored it with a warehouseman, does not render them liable, unless it is at least shown that they knew who was the owner.²

§ 1833. Right of Consignee to Inspect Goods.—The consignee has a right to inspect the goods before receiving them, and it is the duty of the carrier to afford him this opportunity.³

§ 1834. Carrier's Right of Action for Injury to Goods or Taking by Third Person.—The carrier has a

¹ Hutchinson on Carriers, secs. 353 et seq. Or he may return them to the shipper: *The Keystone v. Morris*, 28 Mo. 243; 75 Am. Dec. 123.

² *Williams v. Holland*, 22 How. Pr. 137.

³ Hutchinson on Carriers, sec. 393; *Lyons v. Hill*, 46 N. H. 49; 88 Am. Dec. 189; *Herrick v. Gallagher*, 60 Barb. 566.

right of action for an injury to the goods while in his custody or for a taking them out of his possession.¹ He has sufficient interest in goods intrusted to him to maintain an action against the owners of a canal-boat, to whom he has intrusted them on freight, for failure to deliver them according to contract.² But carriers who, by negligent delivery of goods, have been rendered liable for their value, cannot maintain an action against their agent, through whose means the goods are lost, unless such agent was in the first instance guilty of the negligence.³ Payment by a carrier for goods lost *in transitu* transfers property in them to him.⁴

ILLUSTRATIONS. — A contractor of blasting ordered one manufacturer to send him a quantity of dualin, and another to send him certain exploders. Each manufacturer, without the other's knowledge, delivered the respective articles to a carrier, who was ignorant of the danger of combining the two substances, which, while being transported with due care, exploded, injuring the property of the carrier and the goods of a third party. It was impossible to distinguish what proportion of the explosion was caused by either substance. *Held*, that the two manufacturers, but not the contractor, were jointly liable in tort to the carrier and to the third party: *Boston and Albany R. R. Co. v. Shanly*, 107 Mass. 568.

§ 1835. **Right of Carrier to Sell Goods.**—The carrier has no right to sell the goods except in a case of necessity.⁵ He may sell for his charge only upon unquestionable proof that the consignee cannot be found, and that they are perishable. In the absence of a controlling necessity

¹ Hutchinson on Carriers, sec. 425; Merrick v. Brainard, 38 Barb. 574; White v. Bascom, 28 Vt. 268.

² Deford v. Seinour, 1 Ind. 532.

³ Brooks v. Lawrence, 1 Edm. Sel. Cas. 496.

⁴ Hagerstown Bank v. Adams Exp. Co., 45 Pa. St. 419; 84 Am. Dec. 499.

⁵ Hutchinson on Carriers, sec. 434; Notara v. Henderson, L. R. 5 Q. B. 346; Saltus v. Everett, 20 Wend. 267; 32 Am. Dec. 541; Hunt v. Haskell, 24 Me. 339; 41 Am. Dec. 387; Myers v.

Baymore, 10 Pa. St. 114; 49 Am. Dec. 586; Bailey v. Shaw, 24 N. H. 297; 55 Am. Dec. 241; Hassam v. Ins. Co., 7 La. Ann. 11; 56 Am. Dec. 591; Rugeley v. Ins. Co., 7 La. Ann. 279; 56 Am. Dec. 603. He cannot pledge part of the goods as security for the purchase of a boat to enable him to reach his destination: *Kitchell v. Vanadar*, 1 Blackf. 356; 12 Am. Dec. 249. He has no right to sell to enforce his lien for freight: *Briggs v. R. R. Co.*, 6 Allen, 246; 83 Am. Dec. 626.

to sell the goods, the carrier can only enforce his lien by due process of law, meanwhile carefully storing them.¹ In selling freight for charges, a carrier is bound to use reasonable diligence to ascertain the character of the package from the external indications, and to communicate his knowledge to bidders, and if he fails to do so, and sells valuable freight to a favorite having superior knowledge, at a nominal price, he and the purchaser are liable to an action of damages by the injured party.² The authority of the carrier to sell goods—otherwise than in case of necessity—may arise by usage and custom.³ A railroad company has the right, in adjusting damages for injury to property caused by its negligence, to contract to keep the injured property and pay the owner its value.⁴

ILLUSTRATIONS.—The consignee of goods not perishable refusing to receive them, the carrier, being unable to find a warehouseman who would store them and advance the freight and charges, sold them at private sale. *Held*, that the carrier was liable for conversion: *Rankin v. Packet Co.*, 9 Heisk. 564; 24 Am. Rep. 339. Peaches were delivered to a common carrier at Fort Ancient, Ohio, on the 11th and 12th of the month, for transportation to New York City. The carrier shipped them by the New York Central railroad. On the evening of the 12th, a bridge near Utica, on that railroad, was carried away by an extraordinary freshet; and when the peaches arrived there, it was found impossible to get them across, and as they showed signs of decay, the carrier sold them for the best attainable price, for the benefit of the owner. *Held*, 1. That the carrier was not liable for the loss, as it was owing to the inherent qualities of the freight; 2. It was not bound to seek another route; 3. It was justified in selling the property: *American Ex. Co. v. Smith*, 33 Ohio St. 511; 31 Am. Rep. 561.

§ 1836. Right of Carrier to Freight—Goods must be Delivered.—The carrier is entitled to freight only on the

¹ *Rankin v. Packet Co.*, 9 Heisk. 564; 24 Am. Rep. 339.

² *Nathan v. Shivers*, 71 Ala. 117; 46 Am. Rep. 303.

³ *Taylor v. Wells*, 3 Watts, 65; *Rapp v. Palmer*, 3 Watts, 178; *Pick-*

ering v. Busk, 15 East, 44; *Kemp v. Coughtry*, 11 Johns. 107. But see *Bryant v. Commercial Ins. Co.*, 6 Pick. 131.

⁴ *Chicago etc. R. R. Co. v. Katezenbach*, 118 Ind. 174.

goods actually delivered,¹ and at the place agreed upon.² If the goods are delivered even in a worthless state, he is entitled to his freight.³ Where a carrier pays damages for the loss of goods by negligence, etc., it is tantamount to a safe delivery, so far as to entitle him to his freight.⁴ He is entitled to *pro rata* freight, where the owner is willing to receive them at a place short of that where he agreed to carry them.⁵ A connecting carrier receiving goods under a bill of lading authorizing a reshipment is entitled to freight, though the first received the goods and the through-contract by false representations.⁶ Where goods are marked by the consignor to be forwarded by a certain line, and the first carrier forwards them by another line, the last carrier can demand no pay, and has no lien for transportation if he had notice of the consignor's directions, and the marks on the goods are evidence on that question.⁷ A person is not obliged to receive a portion of the goods in whatever condition they may be.⁸

¹ Gibson v. Sturge, 10 Ex. 622; Price v. Hartshorn, 44 Barb. 655; Steelman v. Taylor, 3 Ware, 52; The Collenberg, 1 Black, 170; Halwerson v. Cole, 1 Spear, 321; 40 Am. Dec. 603; Crawford v. Williams, 1 Sneed, 205; 60 Am. Dec. 146.

² Harris v. Rand, 4 N. H. 259; 17 Am. Dec. 421.

³ Whitney v. Ins. Co., 18 Johns. 208; McGaw v. Ocean Ins. Co., 23 Pick. 405. In Griswold v. Insurance Co., 3 Johns. 321, 3 Am. Dec. 490, Kent, C. J., says: "The consideration for the freight is the carriage of the article shipped on board; and the state or condition of the article at the end of the voyage has nothing to do with the obligation of the contract. It requires a special agreement to limit the remedy of the carrier for his hire to the goods conveyed. It cannot be deduced from the nature of the undertaking. The ship-owner performs his engagement when he carries and delivers the goods. The condition which was to precede payment is then fulfilled. The right to payment then becomes absolute, and

whether we consider the spirit of this particular contract, or compare it with the common-law doctrine of carrying for hire, we cannot discover any principle which makes the carrier an insurer of the goods as to their soundness, any more than he is of the price in the market to which they are carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no concern with the diminution of their value. It may impair the remedy which his lien afforded, but it cannot affect his personal demand against the shipper. This conclusion appears to be so natural and just that I cannot perceive any plausible ground upon which it has been questioned or denied."

⁴ Hammond v. McClures, 1 Bay, 101.

⁵ Hunt v. Haskell, 24 Me. 339; 41 Am. Dec. 387.

⁶ Walker v. Cassaway, 4 La. Ann. 19; 50 Am. Dec. 551.

⁷ Bird v. R. R. Co., 72 Ga. 655.

⁸ Chicago etc. R. R. Co. v. Warren, 16 Ill. 502; 63 Am. Dec. 317.

Where goods arrive at their point of destination, and the packages or casks are, by the fault of the carrier, in a damaged condition, so that they cannot be handled without loss and further damages, it is the duty of the carrier to repair the casks, if possible, before the owner can be compelled to receive them; and if he refuses to do this, the owner may refuse to receive the goods, and may recover the value; and this, without offering to pay the freight, since the carrier has not completed his undertaking.¹ One who, having contracted to carry goods to a certain place, converts part of them to his own use on the way, may, in an action against the owner of the goods, recover the whole of the freight stipulated to be paid, if the defendant does not claim any deduction for the goods not delivered.² A carrier who has contracted to transport goods, and deliver them to the consignee, but who, on the arrival of the goods at their destination, stores a portion, instead of delivering them, is not entitled to freight, nor even to *pro rata* freight on the portion stored, although the consignee may have taken the goods, indemnifying the warehouseman against any claim for freight.³ A carrier performing the contract after discovering a misrepresentation by the shipper as to the distance the goods were to be carried can recover no more than the contract price.⁴ One who hires a car of a railroad company for the transportation of a car-load of household goods must pay the increased rate charged by the company for potatoes, bacon, vinegar, and salt carried in limited quantities for sale and barter. These are not household goods.⁵ The carrier may also recover advances he has made to a forwarder for existing charges on them.⁶ A railroad which has refused to deliver goods to the con-

¹ *Breed v. Mitchell*, 48 Ga. 533.

² *Hill v. Leadbetter*, 42 Me. 572; 66 Am. Dec. 305.

³ *Western Trans. Co. v. Hoyt*, 69 N. Y. 230; 25 Am. Rep. 175.

⁴ *Saratoga etc. R. R. Co. v. Row*,

24 Wend. 74; 35 Am. Dec. 598.

⁵ *Smith v. Findley*, 34 Kan. 316.

⁶ *White v. Vann*, 6 Humph. 70; 44 Am. Dec. 294.

signee because of his refusal to pay an illegal charge cannot insist, he having tendered the freight money, that he should have kept his tender good.¹ The fact that a carrier bound to carry at a reasonable rate fixed an unreasonable rate, which was paid without objection, does not confer on the shipper a right of action to recover back a part of the amount so paid.² If the contract between the consignor and carrier is that the carrier is to take certain amount of goods, and no more, and he take more than the specified amount, then he forfeits his right to carry any part of the goods; but if the contract is, that he take a certain amount more or less, and he take more, this works no forfeiture of his right to carry under the contract.³ The carrier's charges, if not fixed by agreement, are regulated by custom.⁴ If a carrier does not stipulate in advance for the rate and terms of his compensation, he is entitled to demand and receive what is usual in the given case. If he rely upon usage and custom for the rate of compensation, and they allow none in the given case, he will be entitled to none.⁵

ILLUSTRATIONS. — A railroad contracted at its own expense to load oil and transport it over its road to a specified point, "and thence by barges to the warehouse" of the company, and to provide suitable covered cars, etc., "and cause the same to be unloaded and returned without delay," the oil company to pay "on the delivery of the oil." *Held*, that the contract required the railroad company to unload the oil from the barges at the warehouse, and no freight could be recovered for oil not unloaded: *New York Central etc. R. R. Co. v. Standard Oil Co.*, 87 N. Y. 486. The defendant, a private carrier, contracted late in the fall to transport by canal-boat a cargo of oats for the plaintiff from Burlington to New York. The parties both expected that the boat would reach New York that fall, but owing to the lateness of the season, and without any fault on the part of the

¹ *East Tennessee etc. R. R. Co. v. Hunt*, 15 Lea, 261.

² *Killmer v. R. R. Co.*, 100 N. Y. 395; 53 Am. Rep. 194.

³ *Cooper v. Berry*, 21 Ga. 526; 68 Am. Dec. 468.

⁴ Angell on Carriers, secs. 124, 356,

392; *Bancroft v. Peters*, 4 Mich. 619; *Sutton v. R. R. Co.*, 11 Jur., N. S., 879; *Middleton v. Hayward*, 2 Nott & McC. 9; 10 Am. Dec. 554; Lawson on Usages and Customs, sec. 98.

⁵ *Kirtland v. Montgomery*, 1 Swan, 452.

defendant, the boat was frozen in the canal, and was obliged to lie there all winter. It was necessary for the safety of the boat and cargo that the oats should be taken from the vessel and stored during the winter, and the defendant accordingly procured this to be done. At the opening of navigation in the spring, the oats were reloaded, and the cargo was delivered at New York. *Held*, that the defendant was entitled to recover of the plaintiff the expense of unloading and storing the oats during the winter: *Beckwith v. Frisbie*, 32 Vt. 559.

§ 1837. **Who Liable for Freight.**—The consignee, by accepting the goods, becomes *prima facie* liable for the freight.¹ But he may be simply the agent of the owner; and then, if this relation is known to the carrier, he cannot be personally bound.² The party receiving the goods has been held in all cases responsible for the freight, the only discrepancy between the decisions being, whether damages from injury or non-delivery are to be recovered by a separate action or by recoupment from the freight earned.³ The consignee and receiver of a cargo is liable for the freight, although the master, owing to a dispute with the person who loaded the vessel about the price of trimming the cargo, sailed without signing the bill of lading, and he cannot deduct the price from the freight.⁴ The consignor or shipper is of course liable.⁵ The clause "he [consignee] paying freight," in a bill of lading, is introduced for the benefit of the carrier, and does not exempt the consignor from liability.⁶ But even where, by the bill of lading, the shipper is bound to pay the freight, he may show that the carrier agreed to look to another for his freight.⁷

ILLUSTRATIONS.—A carrier received goods in Philadelphia, for T. & C. of Lexington, and gave a receipt for the same, "to be delivered to H. & L. of Pittsburgh, on presenting this receipt and payment of freight." The goods were delivered, and the

¹ Hutchinson on Carriers, sec. 448.

² Hutchinson on Carriers, sec. 448.

³ Hill v. Leadbetter, 42 Me. 572; 66 Am. Dec. 305.

⁴ Hatch v. Tucker, 12 R. I. 501; 34 Am. Rep. 707.

⁵ Hutchinson on Carriers, sec. 451;

Grant v. Wood, 21 N. J. L. 294; 47

Am. Dec. 162; Holt v. Westcott, 43

Me. 445; 69 Am. Dec. 74; Wooster v.

Tarr, 8 Allen, 270; 85 Am. Dec. 707.

⁶ Layng v. Stewart, 1 Watts & S. 222.

⁷ Wayland v. Mosely, 5 Ala. 430; 39

Am. Dec. 335.

freight paid by T. & C. to H. & L. H. & L. failed, without paying the carrier. *Held*, that the carrier might recover of T. & C.; *Collins v. Union Co.*, 10 Watts, 384.

§ 1838. **Who may Sue.** — Mr. Hutchinson,¹ after a lengthy review of the subject, adopts the following conclusions: "1. That when the risk of the safe transportation of the goods is upon the consignor, he will be considered as the owner, for the purpose of maintaining an action against the carrier for their loss or injury; 2. That whether he retains any property in the goods or not, if the contract for the transportation by the carrier is directly with him, he may maintain the action upon such contract in his own name for the failure safely to carry and deliver to the consignee, but that the recovery in such a case will be for the benefit of the consignee, if he was the real owner of the goods; 3. That the law will presume, when nothing appears to the contrary, that the consignee is the owner of the goods, and that the contract for their transportation was made with him as such owner, but that this presumption may be rebutted by showing the actual facts or the intention of the parties to the contrary; 4. That the consignee who had no property in the goods, either general or special, and incurred no risk in their transportation, cannot maintain an action for their loss or damage."

¹ Hutchinson on Carriers, sec. 736.

CHAPTER XCII.

LIMITATION OF COMMON-LAW LIABILITY.

- § 1839. Power of carrier to limit his liability.
- § 1840. The American rule.
- § 1841. Rule in Pennsylvania and South Carolina.
- § 1842. Rule in New York and West Virginia.
- § 1843. Special consideration necessary to support restrictive contract.
- § 1844. Notice as to value and quality of goods.
- § 1845. Notices by advertisement and placard.
- § 1846. Conditions in notice do not bind shipper until assented to.
- § 1847. Presumption of assent to conditions in notice.
- § 1848. Notices in bills of lading and receipts.
- § 1849. Cases where assent of shipper was inferred.
- § 1850. Cases where assent of shipper was not inferred.
- § 1851. Bills of lading.
- § 1852. Bill of lading cannot be explained or contradicted by parol.
- § 1853. Exceptions to this rule.
- § 1854. Delivery of bill of lading after receipt of goods.
- § 1855. Conditions in contracts as to manner and time of making claim.
- § 1856. Other conditions and regulations contained in carrier's contracts.
- § 1857. Conditions in contracts as to carriage of live-stock.
- § 1858. Construction of special contracts.
- § 1859. Different words and phrases in carrier's contracts construed.
- § 1860. Presumption of liability from happening of loss or damage — Burden on carrier.
- § 1861. Burden of proof of restrictive contract on carrier.
- § 1862. Loss falling within exemption — Burden of proof of negligence.
- § 1863. Usage as to restrictive contracts.

§ 1839. **Power of Carrier to Limit his Liability.** — Anciently in England a common carrier was not permitted to relieve himself from his extraordinary liability as an insurer by making a special contract to that effect. This rule, however, in that country was gradually relaxed until finally a carrier became able to contract for exemption from even the consequences of his own neglect. The evil policy of such a rule soon became apparent to the courts; but as they had established it they felt themselves bound to sustain it, while at the same time lamenting it. At last Parliament came to the rescue, and by a

series of acts declared, in effect, that only such contracts between a carrier and customer restricting his liability as the courts should consider "just and reasonable" should be valid.¹

§ 1840. **The American Rule.**—The American courts, with one exception, have been more careful than the English. The rule laid down and adhered to by the federal courts and the courts of most of the states is, that from his liability as an insurer the carrier may relieve himself by special contract, but not from his liability as a bailee. And a contract assented to by the customer is required; it is not enough that the carrier notify the shipper that he will carry only under a restricted liability. The assent of the shipper, express or implied, to the proposal must be shown. In other words, the carrier may by contract exempt himself from liability from accidental losses, but not from negligent ones.²

¹ For a detailed history of the English law on this subject, see Lawson on Contracts of Carriers, secs. 24-27. As to the policy of allowing a restrictive contract, see Lawson on Contracts of Carriers, c. 3, secs. 68-84. As to the construction of the words "just and reasonable," in the English statutes, see Lawson on Contracts of Carriers, secs. 117 et seq.

² This doctrine is well established in the following jurisdictions, viz.:—

United States Courts.—*Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Pratt*, 22 Wall. 123; *Earnest v. Express Co.*, 1 Wood, 573; *Express Co. v. Kountze*, 8 Wall. 342; *Hunnell v. Taber*, 2 Sprague, 1; *The Pacific*, 1 Deady, 17; *The City of Norwich*, 4 Ben. 271; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; *The May Queen*, 1 Newb. Adm. 465; *The New World v. King*, 16 How. 469; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *York Co. v. R. R. Co.*, 3 Wall. 107; *The Rocket*, 1 Biss. 354; *The David and Caroline*, 5 Blatchf. 266; *The Bellona*, 4 Ben. 503; *Nelson v. National Steamship Co.*, 7 Ben. 340; *The Invincible*,

1 Low. 225; *The Delhi*, 4 Ben. 345; *Bank of Kentucky, v. Adams Express Co.*, 93 U. S. 174; *Railroad Co. v. Stevens*, 95 U. S. 655; *Ayres v. Western Co.*, 14 Blatchf. 9; *Galt v. Adams Express Co.*, McAr. & Mackey, 124; 28 Am. Rep. 742; *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331.

Alabama.—*Grey v. Mobile Trade Co.*, 55 Ala. 387; 28 Am. Rep. 729; *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 50; *South and North Alabama R. R. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578; 56 Ala. 368; *Southern Express Co. v. Armstead*, 50 Ala. 350; *Southern Express Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140; *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607; *Southern Express Co. v. Caperton*, 44 Ala. 101; 4 Am. Rep. 118; *Mobile etc. R. R. Co. v. Jarboe*, 41 Ala. 644; *Louisville etc. R. R. Co. v. Oden*, 80 Ala. 38.

Arkansas.—*Taylor v. Little Rock R. R. Co.*, 32 Ark. 393; 29 Am. Rep. 1.

California.—By statute: Cal. Civ. Code, secs. 2174, 2175. See *Hooper v. Wells*, 27 Cal. 11; 85 Am. Dec. 211.

§ 1841. Rule in Pennsylvania and South Carolina.—In Pennsylvania, while a carrier cannot by contract exempt

Colorado.—Merchants' Dispatch etc. Co. v. Cornforth, 3 Col. 280; 25 Am. Dec. 757; Western Union Telegraph Co. v. Graham, 1 Col. 230.

Connecticut.—Welch v. Boston etc. R. R. Co., 41 Conn. 333; Derwort v. Loomer, 21 Conn. 245; Camp v. Hartford etc. Steamboat Co., 43 Conn. 333; Lawrence v. New York etc. R. R. Co., 36 Conn. 63; Hale v. New Jersey Steam Nav. Co., 15 Conn. 539; 39 Am. Dec. 398; Peck v. Weeks, 34 Conn. 145.

Delaware.—Flinn v. Philadelphia etc. R. R. Co., 1 Houst. 469.

Georgia.—Cooper v. Berry, 21 Ga. 526; Berry v. Cooper, 28 Ga. 543; Southern Express Co. v. Newby, 36 Ga. 635; 91 Am. Dec. 783; Wallace v. Matthews, 39 Ga. 617; 99 Am. Dec. 473; Wallace v. Sanders, 42 Ga. 486; Georgia R. R. Co. v. Beatie, 66 Ga. 75; 42 Am. Rep. 75; Georgia R. R. Co. v. Spears, 66 Ga. 485; 42 Am. Rep. 81; Georgia R. R. Co. v. Gann, 68 Ga. 350; Southern Express Co. v. Purcell, 37 Ga. 103; 92 Am. Dec. 53.

Illinois.—Anchor Line v. Dater, 68 Ill. 369; Illinois Central R. R. Co. v. Frankenberg, 54 Ill. 88; 5 Am. Rep. 92; Western Trans. Co. v. Newhall, 24 Ill. 466; 76 Am. Dec. 760; Field v. Chicago etc. R. R. Co., 71 Ill. 458; Illinois Central R. R. Co. v. Morrison, 19 Ill. 136; Chicago etc. R. R. Co. v. Montfort, 60 Ill. 175; Illinois Central R. R. Co. v. Smyser, 38 Ill. 354; 87 Am. Dec. 301; Illinois Central R. R. Co. v. Read, 37 Ill. 484; 87 Am. Rep. 260; Baker v. Michigan etc. R. R. Co., 42 Ill. 73; Erie etc. Transportation Co. v. Dater, 91 Ill. 195; Merchants' Dispatch Trans. Co. v. Theilbar, 86 Ill. 71; Illinois Central R. R. Co. v. Adams, 42 Ill. 474; 92 Am. Dec. 85; Boscowitz v. Adams Express Co., 93 Ill. 523; 34 Am. Rep. 191; Erie R. R. Co. v. Wilcox, 84 Ill. 239; 25 Am. Rep. 451; Adams Express Co. v. Stettaners, 61 Ill. 184; 14 Am. Rep. 57; Illinois Central R. R. Co. v. Jonte, 13 Ill. App. 24.

Indiana.—St. Louis etc. R. R. Co. v. Smuck, 49 Ind. 302; Michigan etc. R. R. Co. v. Heaton, 37 Ind. 448; 10 Am. Rep. 89; Ohio etc. R. R. Co. v.

Selby, 47 Ind. 471; 17 Am. Rep. 719; United States Express Co. v. Harris, 51 Ind. 127; Adams Express Co. v. Reagan, 29 Ind. 21; 92 Am. Dec. 332; Indianapolis etc. R. R. Co. v. Allen, 31 Ind. 394; Wright v. Gaff, 6 Ind. 416; Thayer v. St. Louis etc. R. R. Co., 22 Ind. 26; 85 Am. Dec. 409; Adams Express Co. v. Fendrick, 38 Ind. 150; Indianapolis etc. R. R. Co. v. Cox, 29 Ind. 360; 95 Am. Dec. 640; Evansville etc. R. R. Co. v. Young, 28 Ind. 516.

Iowa.—McCoy v. R. R. Co., 44 Iowa, 424; Brush v. R. R. Co., 43 Iowa, 554. Now governed by statute (Laws 1866, c. 13, p. 121), which prescribes a stricter rule even.

Kansas.—Goggin v. R. R. Co., 12 Kan. 416; Missouri etc. R. R. Co. v. Caldwell, 8 Kan. 244; Kansas etc. R. R. Co. v. Reynolds, 8 Kan. 623; Kallman v. United States Exp. Co., 3 Kan. 205; Kansas etc. R. R. Co. v. Nichols, 9 Kan. 235; 12 Am. Rep. 494; St. Louis etc. R. R. Co. v. Piper, 13 Kan. 505.

Kentucky.—Adams Exp. Co. v. Guthrie, 9 Bush, 78; Adams Exp. Co. v. Nock, 2 Duvall, 562; 87 Am. Dec. 510; Louisville etc. R. R. Co. v. Hedger, 9 Bush, 645; 15 Am. Rep. 740; Rhodes v. R. R. Co., 9 Bush, 688; Orndorff v. Adams Exp. Co., 3 Bush, 194; 96 Am. Dec. 207; Reno v. Hogan, 12 B. Mon. 63; 54 Am. Dec. 513; Louisville etc. R. R. Co. v. Brownlee, 14 Bush, 590.

Louisiana.—Roberts v. Riley, 15 La. Ann. 103; 77 Am. Dec. 183; Simon v. Fung Shuey, 21 La. Ann. 363; New Orleans Mut. Ins. Co. v. R. R. Co., 20 La. Ann. 302; Baldwin v. Collins, 9 Rob. (La.) 468; Higgins v. R. R. Co., 28 La. Ann. 133; Logan v. R. R. Co., 11 Rob. (La.) 24; 43 Am. Dec. 199.

Maine.—Sager v. R. R. Co., 31 Me. 228; 50 Am. Dec. 659; Bean v. Green, 12 Me. 422; Willis v. R. R. Co., 62 Me. 488; Fillebrown v. R. R. Co., 55 Me. 462; 92 Am. Dec. 606; Little v. R. R. Co., 66 Me. 239.

Maryland.—Brehme v. Adams Exp. Co., 25 Md. 323; McCoy v. Erie Trans. Co., 42 Md. 498.

Massachusetts.—Brown v. R. R. Co. 11 Cush. 97; Gott v. Dinsmore, 111

himself from liability for negligence,¹ yet as to his extraordinary liability he may limit that by a general no-

Mass. 45; *Malone v. R. R. Co.*, 12 Gray, 388; 74 Am. Dec. 598; *Judson v. R. R. Co.*, 6 Allen, 485; 83 Am. Dec. 646; *Perry v. Thompson*, 98 Mass. 249; *Grace v. Adams*, 100 Mass. 505; 1 Am. Rep. 131; 97 Am. Dec. 117; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304; 15 Am. Rep. 106; *Pemberton Co. v. R. R. Co.*, 104 Mass. 144; *Squire v. R. R. Co.*, 98 Mass. 239; 93 Am. Dec. 162; *School District v. R. R. Co.*, 102 Mass. 552; 3 Am. Rep. 502; *Buckland v. Adams Exp. Co.*, 97 Mass. 124; 93 Am. Dec. 68.

Michigan. — *Am. Trans. Co. v. Moore*, 5 Mich. 368; *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208.

Minnesota. — *Christenson v. Am. Exp. Co.*, 15 Minn. 270; 2 Am. Rep. 122; *Jacobus v. R. R. Co.*, 20 Minn. 125; 18 Am. Rep. 360; *Shriver v. R. R. Co.*, 24 Minn. 506; 30 Am. Rep. 353; *Moulton v. R. R. Co.*, 31 Minn. 85; 47 Am. Rep. 781.

Mississippi. — *Mobile etc. R. R. Co. v. Weiner*, 49 Miss. 725; *Whitesides v. Thurlkill*, 12 Smedes & M. 597; 51 Am. Dec. 128; *Chicago etc. R. R. Co. v. Abels*, 60 Miss. 1017.

Missouri. — *Ketchum v. Am. Exp. Co.*, 52 Mo. 390; *Lupe v. R. R. Co.*, 3 Mo. App. 77; *Cantling v. R. R. Co.*, 54 Mo. 385; 14 Am. Rep. 476; *Levering v. Union Trans. etc. Co.*, 42 Mo. 88; 97 Am. Dec. 320; *Rice v. R. R. Co.*, 63 Mo. 314; *Sturgeon v. R. R. Co.*, 65 Mo. 569; *Oxley v. R. R. Co.*, 65 Mo. 629; *Clark v. R. R. Co.*, 64 Mo. 440; *Snider v. Adams Exp. Co.*, 63 Mo. 376; *Read v. R. R. Co.*, 60 Mo. 199; *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369; *Drew v. Red Line Transit Co.*, 3 Mo. App. 495; *McFadden v. R. R. Co.*, 92 Mo. 343; 1 Am. St. Rep. 721.

Nebraska. — *Atchison etc. R. R. Co. v. Washburn*, 5 Neb. 117.

New Hampshire. — *Bennett v. Dutton*, 10 N. H. 481; *Moses v. R. R. Co.*, 24 N. H. 71; 55 Am. Dec. 222; 32 N. H. 523; 64 Am. Dec. 381; *Barter v. Wheeler*, 49 N. H. 9; *Rand v. R. R. Co.*, 59 N. H. 363.

New Jersey. — *Ashmore v. Pa. Steam Co.*, 28 N. J. L. 180.

North Carolina. — *Lee v. R. R. Co.*, 72 N. C. 236. See *Smith v. R. R. Co.*, 64 N. C. 235.

Ohio. — *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362; 62 Am. Dec. 285; *Welsh v. R. R. Co.*, 10 Ohio St. 65; 75 Am. Dec. 490; *Cleveland etc. R. R. Co. v. Curran*, 19 Ohio St. 1; 2 Am. Rep. 362; *Cincinnati etc. R. R. Co. v. Pontius*, 19 Ohio St. 221; 2 Am. Rep. 391; *Knowlton v. R. R. Co.*, 19 Ohio St. 260; 2 Am. Rep. 395; *United States Express Co. v. Bachman*, 2 Cin. Rep. 251; affirmed 28 Ohio St. 144; *Erie R. R. Co. v. Lockwood*, 28 Ohio St. 358; *Gaines v. Union Transportation Co.*, 28 Ohio St. 418; *Union Express Co. v. Graham*, 26 Ohio St. 595.

Tennessee. — *Olwell v. Adams Exp. Co.*, 1 Cent. L. J. 100; *Craig v. Childress, Peck*, 270; 14 Am. Dec. 751; *Nashville etc. R. R. Co. v. Jackson*, 6 Heisk. 271; *Southern Express Co. v. Womack*, 1 Heisk. 256; *East Tennessee etc. R. R. Co. v. Nelson*, 1 Cold. 272; *Walker v. Skipwith, Meigs*, 502; 33 Am. Dec. 161; *Dillard v. R. R. Co.*, 2 Lea, 288; *Merchants' Disp. Trans. Co. v. Block*, 86 Tenn. 392; 6 Am. St. Rep. 847.

Texas. — In Texas, by statute, a common carrier cannot limit his common-law liability: *Paschal's Dig.*, art. 4253; *Houston etc. R. R. Co. v. Burke*, 55 Tex. 323; 40 Am. Rep. 808; *Gulf etc. R. R. Co. v. McGown*, 65 Tex. 640; *Gulf etc. R. R. Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 495.

Vermont. — *Farmers' etc. Bank v. Champlain Trans. Co.*, 18 Vt. 131; 23 Vt. 186; 56 Am. Dec. 68; *Mann v. Birchard*, 40 Vt. 326; 94 Am. Dec. 398; *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 349; *Kimball v. R. R. Co.*, 26 Vt. 247; 62 Am. Dec. 567.

Virginia. — *Wilson v. R. R. Co.*, 21 Gratt. 654; *Virginia etc. R. R. Co. v. Sayers*, 26 Gratt. 328.

West Virginia. — *Maslin v. R. R. Co.*, 14 W. Va. 180; 36 Am. Rep. 478; *Brown v. Express Co.*, 15 W. Va. 812, overruling *Baltimore etc. R. R. Co. v. Rathbone*, 1 W. Va. 77, where the doctrine of the New York cases had been adopted.

Wisconsin. — *Boorman v. Am. Exp. Co.*, 21 Wis. 152; *Betts v. Farmers' Loan Co.*, 21 Wis. 80; 91 Am. Dec. 460.

¹ *Beckman v. Shouse*, 5 Rawle, 179; 28 Am. Dec. 653; *Atwood v. Reliance*

tice shown to be known or assented to.¹ The same rule seems to prevail in South Carolina.²

ILLUSTRATIONS.—An oil company shipped a quantity of oil by the Empire Transportation Company, under a condition, set forth in the receipt, that the oil company should assume all risk, and the transportation company should be released from all responsibility for loss or damage. The car containing the refined oil was coupled in a train to one containing crude oil, which took fire from sparks from the engine, and on account of a defect in the coupling, could not be separated from the car of refined oil, and both were consumed. *Held*, that the transportation company was liable, notwithstanding the condition in the receipt: *Empire Trans. Co. v. Wamsutta Oil Co.*, 63 Pa. St. 14; 3 Am. Rep. 515.

§ 1842. **Rule in New York.**—The decisions in New York present a curious picture. For a time it was held in that state that a common carrier could not restrict any of his liabilities—not even his liability as an insurer—even by a contract.³ For nearly ten years this stood as

Trans. Co., 9 Watts, 87; 34 Am. Dec. 503; Camden etc. R. R. Co. *v.* Baldauf, 16 Pa. St. 67; 55 Am. Dec. 481; Pennsylvania R. R. Co. *v.* Butler, 57 Pa. St. 335; Pennsylvania R. R. Co. *v.* Henderson, 51 Pa. St. 315; Pennsylvania R. R. Co. *v.* McCloskey, 23 Pa. St. 526; Goldey *v.* R. R. Co., 30 Pa. St. 242; 72 Am. Dec. 703; Empire Trans. Co. *v.* Wamsutta etc. Oil Co., 63 Pa. St. 14; 3 Am. Rep. 515; American Express Co. *v.* Sands, 55 Pa. St. 140; Adams Express Co. *v.* Sharpless, 77 Pa. St. 516; American Express Co. *v.* Second National Bank, 69 Pa. St. 394; 8 Am. Rep. 268; Farnham *v.* R. R. Co., 55 Pa. St. 53; Lucesco Oil Co. *v.* R. R. Co., 2 Pittsb. Rep. 477; Powell *v.* R. R. Co., 32 Pa. St. 414; 75 Am. Dec. 564; Ritz *v.* R. R. Co., 3 Phila. 82; Gordon *v.* Little, 8 Serg. & R. 533; 11 Am. Dec. 632; Grogan *v.* Adams Express Co., 114 Pa. St. 523; 60 Am. Rep. 360; Pennsylvania R. R. Co. *v.* Rioridan, 119 Pa. St. 577; 4 Am. St. Rep. 670.

¹ Beckman *v.* Shouse, 5 Rawle, 179; 28 Am. Dec. 653; Laing *v.* Colder, 8 Pa. St. 479; 49 Am. Dec. 533; Bingham

v. Rogers, 6 Watts & S. 495; 40 Am. Dec. 581; Verner *v.* Sweitzer, 32 Pa. St. 208; Pennsylvania R. R. Co. *v.* Schwarzenberger, 45 Pa. St. 208; 84 Am. Dec. 490; Farnham *v.* R. R. Co., 55 Pa. St. 53; Camden etc. R. R. Co. *v.* Baldauf, 16 Pa. St. 67; 55 Am. Dec. 481. In Laing *v.* Colder, 8 Pa. St. 479, Bell, J., says: "The expediency of recognizing in him [the carrier] a right to do so by general notice, such as was given here, has been strongly and justly questioned, and in some of our sister states altogether denied. Were the question an open one in Pennsylvania, I should, for one, unhesitatingly follow them in repudiating a principle which places the bailor absolutely at the mercy of the carrier, whom, in the vast majority of cases, he cannot but choose to employ."

² Porter *v.* Southern Express Co., 4 S. C. 135; 16 Am. Rep. 762; Levy *v.* Southern Express Co., 4 S. C. 234; Swindler *v.* Hilliard, 2 Rich. 216; 45 Am. Dec. 632.

³ Gould *v.* Hill, 2 Hill, 623; and see Alexander *v.* Greene, 3 Hill, 20.

law. It was then overruled.¹ Afterwards the courts, after some fluctuations,² went to the other extreme, and it is now the settled law of this state that common carriers may by special contract exempt themselves from liability for losses arising from any degree of carelessness and negligence on the part of their servants and agents,³ and even, it is said, for their faults and willful and criminal acts.⁴ But alarmed apparently at the length to which they have gone, the New York courts are of late insisting on the fullest proof of the assent of the shipper to the contract,⁵ and that the intent to exclude negligence should appear in the contract in the plainest and most unmistakable terms.⁶ If negligence is not expressly excluded, the presumption will be that it was not intended to be.⁷

¹ *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524.

² See *Parsons v. Monteath*, 13 Barb. 353; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sand. 136; 11 N. Y. 485; 62 Am. Dec. 125; *Alexander v. Greene*, 7 Hill, 533; *Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Magnin v. Dinsmore*, 3 Jones & S. 182; 6 Jones & S. 284; *Heinemann v. R. R. Co.*, 31 How. Pr. 430; *Keeney v. R. R. Co.*, 59 Barb. 104; all of which cases have been modified or overruled.

³ *Westcott v. Fargo*, 63 Barb. 349; 6 Lans. 319; 61 N. Y. 542; *Lee v. Marsh*, 28 How. Pr. 275; 43 Barb. 102; *Meyer v. Harnden's Exp. Co.*, 24 How. Pr. 290; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Cragin v. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559; *Condict v. R. R. Co.*, 54 N. Y. 500; *Lamb v. R. R. Co.*, 46 N. Y. 271; 7 Am. Rep. 327; *Bissell v. R. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369; *Perkins v. R. R. Co.*, 24 N. Y. 196; 82 Am. Dec. 281; *Wells v. R. R. Co.*, 24 N. Y. 181; 82 N. Y. 282; *Mynard v. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28; *Steinweg v. R. R. Co.*, 43 N. Y. 123; 3 Am. Rep. 673; *Boswell v. R. R. Co.*, 5 Bosw. 699; 10 Abb. Pr. 442; *French v. R. R. Co.*, 4 Keyes, 108; 2 Abb. App. 196; *Prentice v. Decker*, 49 Barb. 21; *Limbinger v. Westcott*, 49 Barb. 283; *Sunderland v. Westcott*, 2

Sweeny, 260; *Smith v. R. R. Co.*, 29 Barb. 132; affirmed 24 N. Y. 222; *Guillaume v. Hamburg etc. Packet Co.*, 42 N. Y. 212; *Nelson v. R. R. Co.*, 48 N. Y. 498; *Nicholas v. R. R. Co.*, 4 Hun, 327; *Wilson v. R. R. Co.*, 27 Hun, 149; 97 N. Y. 87.

⁴ *Knell v. U. S. Steam Co.*, 33 N. Y. Sup. Ct. 423.

⁵ *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. 251; 32 Am. Dec. 470, and cases cited; *Lawson on Contracts of Carriers*, sec. 55.

⁶ *Condict v. R. R. Co.*, 54 N. Y. 500; *Lamb v. R. R. Co.*, 46 N. Y. 271; 7 Am. Rep. 327; *Lamb v. R. R. Co.*, 2 Daly, 454; *Knell v. U. S. etc. Steamship Co.*, 33 N. Y. Sup. Ct. 423; *French v. R. R. Co.*, 4 Keyes, 108; 2 Abb. App. 196; *Smith v. R. R. Co.*, 29 Barb. 132; affirmed 24 N. Y. 222; *Stoddard v. R. R. Co.*, 5 Sand. 180; *Edsall v. R. R. Co.*, 50 N. Y. 661; *Guillaume v. Hamburg etc. Packet Co.*, 42 N. Y. 212; *Gleadell v. Thomson*, 56 N. Y. 194; *Stedman v. West. Transp. Co.*, 48 Barb. 97; *Keeney v. R. R. Co.*, 59 Barb. 104; *Holstapple v. R. R. Co.*, 86 N. Y. 275; *Nicholas v. R. R. Co.*, 89 N. Y. 370. See *Seybolt v. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75.

⁷ *Moore v. Evans*, 14 Barb. 524; *Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Wooden v. Austin*, 51 Barb. 9;

§ 1843. **Special Consideration Necessary to Support Restrictive Contract.**—A special consideration is necessary to support a release of the common-law liability of the carrier;¹ for a common carrier is bound to carry without any other contract than such as the law implies.² A reduced compensation is a sufficient consideration to support a contract for a limited liability,³ and the same is true of a free pass.⁴ Where the bill of lading limited the liability of the carrier to a certain sum in case the goods were lost, and contained the words "the ship-

Westcott v. Fargo, 63 Barb. 349; *Camden etc. R. R. Co. v. Burke*, 13 Wend. 611; 28 Am. Dec. 488; *Maynard v. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28. But see *Cragin v. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559; *Nicholas v. R. R. Co.*, 4 Hun, 327.

¹ *Lawson on Contracts of Carriers*, sec. 212; *Bissell v. R. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369; *Nelson v. R. R. Co.*, 48 N. Y. 498; *German v. R. R. Co.*, 38 Iowa, 127; *Farnham v. R. R. Co.*, 55 Pa. St. 53; *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208. In *Lawson on Contracts of Carriers*, section 212, it is said: "The performance of an act which a party is under a legal obligation to perform does not constitute a good consideration for a promise. It follows from this that as a common carrier is bound to carry when requested, the mere agreement to carry does not furnish a consideration for a contract in derogation of his responsibility at common law, nor does his agreement to carry for the price which he might charge in case his liability was not limited, or which it was his custom to charge in such case." This question received an illustration in a recent New York case: *Seybolt v. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75. The federal statute as to carrying the mail provides that every mail train shall carry free of charge a mail messenger. In an action by a mail messenger injured by the negligence of the Erie railroad, on whose line he was traveling as a mail messenger, it appeared that the pass which had been issued to him by the company contained an exemp-

tion from liability for negligence. It was held that this was not binding on the plaintiff. "The defense," said the court, "must rest upon the proposition that a person to whom is secured an absolute statutory right to transportation over a railroad forfeits his right to damages for an injury inflicted upon him by the negligence of such railroad corporation, by the involuntary acceptance of a voucher containing provisions intended by the corporation to exempt it from liability for its negligence, although the person receiving it supposed it was intended solely to facilitate the enjoyment of his right of transportation. We are of the opinion that the agent's acceptance of the pass under the circumstances of this case did not indicate an intention to assent to the provisions therein contained, and even if it might be so construed, that the want of a consideration for such an agreement rendered it *nudum pactum*. A promise by one party to do that which he is already under a legal obligation to perform has frequently been held to be insufficient as a consideration to support a contract: *Vanderbilt v. Schreyer*, 91 N. Y. 392; 12 Abb. N. C. 390."

² *Adams Exp. Co. v. Nock*, 2 Duvall, 562; 87 Am. Dec. 510; *Wallace v. Matthews*, 39 Ga. 617; 99 Am. Dec. 473.

³ *Bissell v. R. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369; *Nelson v. R. R. Co.*, 48 N. Y. 498; *Dillard v. R. R. Co.*, 2 Lea, 288.

⁴ *Bissell v. R. R. Co.*, 25 N. Y. 442; 82 Am. Dec. 369.

per declining to pay for any higher risk," it was held that these words showed a consideration for the reduced risk.¹ So the words "tariff rates," in the bill of lading, have been construed to mean a less rate than the carrier might have charged, and so to uphold the special contract.² Where a bill of lading contains restrictions on the liability of the carrier, the court will not presume, in the absence of testimony, that it was not done upon proper and sufficient consideration.³

§ 1844. Notices as to Value and Quality, etc., of Goods.

—An exception to the general rule that a common carrier cannot limit his liability at all by a general notice exists as to notices as to the value and contents of parcels carried. The carrier, it is said, has a right to ask this in order that he may fix his charges according to the value and the nature of the goods received, as these circumstances may very much affect the degree of responsibility and care which he may take.⁴ A provision in a bill of lading that the ship-owner will not be liable for more

¹ *Farnham v. R. R. Co.*, 55 Pa. St. 53.

² *Nelson v. R. R. Co.*, 48 N. Y. 498.

³ *York Co. v. R. R. Co.*, 3 Wall. 107; *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208.

⁴ *Lawson on Contracts of Carriers*, secs. 85-108; *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Fish v. Chapman*, 2 Ga. 349; 46 Am. Dec. 393; *Western Trans. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760; *Moses v. R. R. Co.*, 24 N. H. 71; 55 Am. Dec. 222; *Judson v. R. R. Co.*, 6 Allen, 485; 38 Am. Dec. 646; *Kallman v. United States Exp. Co.*, 3 Kan. 205; *Farmers' Bank v. Champlain Trans. Co.*, 23 Vt. 186; 56 Am. Dec. 68; *Magnin v. Dinsmore*, 62 N. Y. 35; 19 Am. Rep. 442; *Lawrence v. R. R. Co.*, 36 Conn. 63; *Fibel v. Livingston*, 64 Barb. 179; *The May Queen*, 1 Newb. Adm. 465; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Hopkins v. Westcott*, 6 Blatchf. 64; *Oppenheimer v. U. S.*

Exp. Co., 69 Ill. 62; 18 Am. Rep. 596; *Graves v. R. R. Co.*, 137 Mass. 33; 50 Am. Rep. 282; *The Bermuda*, 29 Fed. Rep. 379. In *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470, the court say: "So long as the printed notice of a common carrier is confined to the purposes which I have enumerated, and others calculated to save himself, without mischief to his customer, or for the benefit of the latter, I see no objection in principle to giving it full effect. So far it is not a refusal to carry for a reasonable reward. So far it is not a limitation of the carrier's liability. He merely declares to the customer what is true and just. 'You know the value of your goods; I will not rummage your parcel; I will take your own account; but I will not incur the responsibility of a common carrier unless your account shall prove true. If you commit a fraud, or deal captiously or capriciously on your own part, you cannot complain if my duty is reduced to that of a mandatary.'"

than the invoice or declared value of the goods, which ever shall be the least, is reasonable, and will be enforced.¹ And so as to a stipulation that "in case of loss, damage, or non-delivery, the ship-owner shall not be liable for more than the invoice value of the goods."² A notice as to the value or contents of parcels is severable from one limiting the carrier's liability contained in the same paper; the former may be enforced, though the latter cannot.³ The statute of Illinois prohibiting a carrier from limiting his common-law liability does not affect his right to restrict his liability to a certain amount, where the value of the property received is asked, and not given.⁴ The shipper is not obliged to state the value of the goods, where the carrier has not given notice that he requires it,⁵ or where the value is apparent on the face of the goods.⁶ A recital in a carrier's receipt given for a package of money in a sealed envelope, that it is "said to contain" a given amount is not *prima facie* evidence that the package did in fact contain the amount named.⁷ If the carrier notifies the shipper that he will not be liable for any article of more than a certain value unless specially entered as such, and paid for accordingly, and these conditions are not complied with, the owner cannot recover anything,—not even the smaller value excluded in the notice.⁸ But where the terms of the notice are that the carrier will not

¹ The Lydian Monarch, 23 Fed. Rep. 298.

² The Hadji, 18 Fed. Rep. 459.

³ Oppenheimer v. U. S. Exp. Co., 69 Ill. 62; 18 Am. Rep. 596; Moses v. R. R. Co., 24 N. H. 71; 55 Am. Dec. 222.

⁴ Mather v. Am. Exp. Co., Lawson on Contracts of Carriers, 453.

⁵ Phillips v. Earle, 8 Pick. 182; Macklin v. Waterhouse, 5 Bing. 212; 2 Moore & P. 319; Baldwin v. Collins, 9 Rob. 468; Fassett v. Ruark, 3 La. Ann. 694; Levois v. Gale, 17 La. Ann. 302; Little v. R. R. Co., 66 Me. 239; Merchants' Dispatch Trans. Co. v.

Bolles, 80 Ill. 473; Brown v. R. R. Co., 83 Pa. St. 316.

⁶ Down v. Fromont, 4 Camp. 40; Boskowitz v. Adams Exp. Co., 5 Cent. L. J. 58; Van Winkle v. Adams Exp. Co., 3 Rob. 59; Dwight v. Brewster, 1 Pick. 50; 11 Am. Dec. 133.

⁷ Fitzgerald v. Adams Exp. Co., 24 Ind. 447; 87 Am. Dec. 341.

⁸ Izett v. Mountain, 4 East, 371; Nicholson v. Willan, 5 East, 507; Yate v. Willan, 2 East, 128; Clay v. Willan, 1 H. Black. 298; Batson v. Donovan, 4 Barn. & Ald. 21; Harris v. Packwood, 3 Taunt. 264; Baldwin v. Collins, 9 Rob. 468.

be liable beyond a certain sum, that sum may be recovered in any event.¹

But a common carrier is liable for the value of the goods lost through his negligence, notwithstanding the bill of lading provides that he shall not be liable beyond an amount named therein, when the true value is not given, or when it is understood by the parties that the sum so agreed on is less than the value of the goods. Such agreements can at most only cover a loss arising from some cause other than the negligence or default of the carrier or his servants, and the rule of damages is the same, although less is charged and paid for the transportation than when the exempting clause is omitted.² The carrier may waive the requirements of the notice.³

ILLUSTRATIONS. — A clause in a contract between an express company and a shipper stated that goods shipped are of the value of fifty dollars, unless their value should be inserted in the contract, and that the company, in case of loss, would not be liable for more than fifty dollars unless the value was so inserted, and the value of the goods was not inserted. *Held*, that this did not relieve the company from liability for the full value of the goods, if lost through its fault, and that a presumption of negligence arose from the mere fact of loss: *Kirby v. Adams Express Co.*, 2 Mo. App. 369. Plaintiff delivered to an express company

¹ *Clarke v. Gray*, 6 East, 564; 4 Esp. 177; 2 Smith, 622; *Hart v. R. R. Co.*, 2 McCrary, 333.

² *Lawson on Contracts of Carriers*, sec. 133; *United States Express Company v. Bachman*, 28 Ohio St. 144; *Adams Express Co. v. Stettaners*, 61 Ill. 184; 14 Am. Rep. 57; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Grace v. Adams*, 100 Mass. 506; 97 Am. Dec. 117; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362; 62 Am. Dec. 285; *Judson v. R. R. Co.*, 6 Allen, 485; 83 Am. Dec. 646; *Michigan etc. R. R. Co. v. Heaton*, 37 Ind. 448; 10 Am. Rep. 89; *Lamb v. R. R. Co.*, 46 N. Y. 271; 7 Am. Rep. 327; *American Exp. Co. v. Sands*, 55 Pa. St. 140; *Oppenheimer v. U. S. Exp. Co.*, 69 Ill. 62; 18 Am. Rep. 596; *Westcott v. Fargo*, 61

N. Y. 542; 19 Am. Rep. 300; *Harvey v. R. R. Co.*, 74 Mo. 538; *Orndorff v. Adams Exp. Co.*, 3 Bush, 194; 96 Am. Dec. 207. *Contra*, *Hart v. R. R. Co.*, 112 U. S. 331. Where there is an express stipulation limiting the responsibility of a carrier for baggage to a specified sum, this will not exempt the carrier from liability for the negligence or malfeasance of himself or his servants: *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607.

³ *Helsby v. Mears*, 5 Barn. & C. 504; *Winkfield v. Packington*, 2 Car. & P. 599; *Pickford v. R. R. Co.*, 12 Mees. & W. 766; *South. Exp. Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *Kember v. South. Exp. Co.*, 22 La. Ann. 158; *Wilson v. Freeman*, 3 Camp. 527.

a package for transportation, and received a receipt providing that the company should not be liable for any loss or damage "to any box, package, or other thing for over fifty dollars, unless the true value thereof is herein stated." *Held*, that this condition did not include a loss occasioned by the negligence of the company: *Westcott v. Fargo*, 61 N. Y. 542; 19 Am. Rep. 300; *Westcott v. Fargo*, 63 Barb. 349; 6 Lans. 319. An express company gave a freight receipt for eight boxes of boots and shoes, with the stipulation, "valued under fifty dollars, unless otherwise herein stated." *Held*, that it could not exonerate itself from liability for any neglect by any such stipulation, even if it should be considered that the words of the receipt amounted to such a covenant; but to allow such a limitation in cases of gross neglect and conversion would recognize their right to convert other people's property to their own use at their own price: *Orndorff v. Adams Express Co.*, 3 Bush, 194; 96 Am. Dec. 207. A horse was shipped by railroad, and the carrier arbitrarily inserted in the bill of lading the words, "value not to exceed one hundred dollars." The horse was injured by the carrier's negligence. *Held*, that the owner was not limited in the recovery by the above words: *Kansas City etc. R. R. Co. v. Simpson*, 30 Kan. 645; 46 Am. Rep. 104. A common carrier gave a receipt for a barrel of whisky. The receipt contained the words: "One bbl. of whisky, 400 lbs.; liquor carried at val., \$20 per bbl." *Held*, that if this imported a contract limiting his liability to twenty dollars in case of loss, it could only apply to loss without his fault: *Black v. Trans. Co.*, 55 Wis. 319; 42 Am. Rep. 713. In a suit against a railroad, they offered to prove a notice given which exempted them from being liable for all losses not caused by themselves or agents, and also providing that they should not be liable "for a greater amount than one hundred dollars on any one package or article, unless the value thereof be disclosed and an extra amount paid therefor." This notice was shown to have been known to the plaintiff, but his assent to the terms was not shown. *Held*, that the notice was not binding on the plaintiff, except as to the clause limiting the amount of liability: *Moses v. R. R. Co.*, 24 N. H. 71; 55 Am. Dec. 222. Under a bill of lading providing that "in consideration of rates inserted, it is agreed that in case of loss or damage the same shall be adjusted at a valuation of twenty dollars per barrel," *held*, that a railroad company was not exempted from paying the full value of goods, where the loss was by its own negligence: *Alabama etc. R. R. Co. v. Little*, 71 Ala. 611. A shipped cows by a common carrier. It was stipulated that the value of each should be a certain sum, and that the carrier should incur no liability except from a collision. A cow was

killed by the carrier's negligence, but not by a collision. *Held*, that A could recover the value of the cow as stipulated, and no more: *Hill v. R. R. Co.*, 144 Mass. 284.

§ 1845. **Notices by Advertisement and Placard.**—Notices by carriers by advertisement in newspapers are not favored by the courts, and are not often resorted to by carriers.¹ Nor are notices placed in posted placards or signs more popular, the difficulty of proving that a particular person read the notice being almost as great in this case as in the case of advertisements in newspapers.² For these reasons, the use of a receipt or token which can be placed in the hand of every customer has become at the present time almost the universal method for carriers to convey to the public in each particular case the terms and conditions under which they agree to carry. Such receipts are generally in the form of a bill of lading, a printed receipt, a check, or a ticket.³

ILLUSTRATIONS.—A notice is posted in conspicuous places on a boat, stating the carrier's regulations as to baggage. A passenger is not bound by these unless it is shown that he read them: *Macklin v. New Jersey Steam. Co.*, 7 Abb. Pr., N. S., 229; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85. A passenger had been in the habit of going on a train and there paying her fare. A new rule was posted in the office. *Held*, not notice to her: *Lake Shore etc. R. R. Co. v. Greenwood*, 79 Pa. St. 373. There was posted up in a railroad-car notices limiting the company's liability for passengers' baggage, and as to smoking in the cars, standing on the platforms, and putting heads and arms out of

¹ Lawson on Contracts of Carriers, sec. 98. It cannot be presumed that a person reads all the advertisements in a newspaper he may take: *Munn v. Barker*, 2 Stark. 255. "The mere publication of a notice in one or more newspapers, no matter how long the time, of an intention not to be responsible for particular articles, unless upon disclosure of contents and value, is not sufficient to release the carrier from responsibility. The notice must be brought home to the shipper or depositor. The circumstance of its being published in several newspapers

is one fact; that the party was a regular subscriber to and reader of one or more of those papers is another important fact": *Baldwin v. Collins*, 9 Rob. 468. See *Barney v. Prentiss*, 4 Har. & J. 317; 7 Am. Dec. 670.

² Lawson on Contracts of Carriers, sec. 99; *Kerr v. Willan*, 6 Maule & S. 150; *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455; *Peck v. Weeks*, 34 Conn. 145; *Walker v. Jackson*, 10 Mees. & W. 161.

³ Lawson on Contracts of Carriers, sec. 100.

windows. The plaintiff, a passenger in the car, admitted that he had read the notice as to smoking and standing on the platform. *Held*, that there was no presumption that he had seen the notice as to baggage: *Malone v. R. R. Co.*, 12 Gray, 388; 74 Am. Dec. 598. Plaintiff, not being permitted to take his dog with him in defendant's passenger-car, delivered it to the baggage-master of the train, and paid him for its transportation. By the defendant's regulations, which were posted at various stations, "live animals" were "allowed as baggage-men's perquisites," but plaintiff had no special notice of this regulation. The dog was lost through the baggage-man's negligence. *Held*, that defendant was liable for the value of the dog: *Cantling v. R. R. Co.*, 54 Mo. 385; 14 Am. Rep. 476.

§ 1846. Conditions in Notice do not Bind Shipper until Assented to. — But after all a notice is one-sided, and cannot bind the customer unless he assents to it. A notice is only a proposal for a contract.¹ Its terms may be accepted by the shipper either by words or by conduct, and therefore the question what amounts to an implied assent is an important one.

ILLUSTRATIONS. — An express company, upon receiving three packages for transportation, gave the shipper a receipt in which it was stated that the company were "forwarders only." *Held*, that these words were ineffectual to restrict its liability: *Galt v. Adams Express Co.*, Lawson on Contracts of Carriers, p. 426; *McArthur & M.* 124; 48 Am. Rep. 742.

§ 1847. Presumption of Assent to Conditions in Notice. — The best view seems to be, that from the mere fact that a party has seen a notice no presumption arises that he has assented to its terms.²

¹ *Blumenthal v. Brainerd*, 38 Vt. 402; 91 Am. Dec. 350; *Bean v. Green*, 12 Me. 422; *Sager v. R. R. Co.*, 31 Me. 228; 50 Am. Dec. 659; *Fillebrown v. R. R. Co.*, 55 Me. 462; 92 Am. Dec. 606; *Little v. R. R. Co.*, 66 Me. 239; *Mobile etc. R. R. Co. v. Weiner*, 49 Miss. 725; *Western Trans. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760; *Kimball v. R. R. Co.*, 26 Vt. 247; 62 Am. Dec. 567; *Farmers' etc. Bank v. Champlain Trans. Co.*, 18 Vt. 131; 23 Vt. 186; 56 Am. Dec. 68; *Mann*

v. Birchard, 40 Vt. 326; *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Buckland v. Express Co.*, 97 Mass. 124; 93 Am. Dec. 68.

² *Buckland v. Adams Express Co.*, 97 Mass. 124; 93 Am. Dec. 68; *Moses v. R. R. Co.*, 24 N. H. 71; 55 Am. Dec. 222. In *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455, *Bronson, J.*, said: "The argument is, that where a party delivers goods to be carried after seeing a notice that the carrier intends to limit his responsi-

§ 1848. **Notices in Bills of Lading and Receipts.**— But where a party receives a bill of lading, his assent to all the terms and conditions contained in it is inferred.¹ And the same has been held concerning express receipts.² So, where he signs the contract.³ As to notices not on the face of a bill of lading or receipt, or simply attached to it,

lity, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise. Now, the carrier is under a legal obligation to receive and convey the goods safely, or answer for the loss. He has no right to prescribe any other terms; and a notice can at the most only amount to a proposal for a special contract, which requires the assent of the other party. Putting the matter in the most favorable light for the carrier, the mere delivery of goods after seeing a notice cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities."

¹ *McCoy v. Erie Trans. Co.*, 42 Md. 498; *Maghee v. R. R. Co.*, 45 N. Y. 514; *May v. Babcock*, 4 Ohio, 334;

Boorman v. American Express Co., 21 Wis. 152; *Strohn v. R. R. Co.*, 21 Wis. 554; 94 Am. Dec. 564; *Grace v. Adams*, 100 Mass. 505; 1 Am. Rep. 131; 97 Am. Dec. 117; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304; 15 Am. Rep. 106; *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49; *Taylor v. R. R. Co.*, 32 Ark. 393; 29 Am. Rep. 1; *Lake v. Hurd*, 38 Conn. 536; *Lawrence v. R. R. Co.*, 36 Conn. 63; *Mulligan v. R. R. Co.*, 36 Iowa, 180; 14 Am. Rep. 514; *Robinson v. Merchants' Dispatch Trans. Co.*, 45 Iowa, 470; *The Emily v. Carney*, 5 Kan. 645; *Blossom v. Dodd*, 43 N. Y. 264; *Steinweg v. R. R. Co.*, 43 N. Y. 123; 3 Am. Rep. 673; *Germania Fire Ins. Co. v. R. R. Co.*, 72 N. Y. 90; 28 Am. Rep. 113; *Phifer v. R. R. Co.*, 89 N. C. 311; 45 Am. Rep. 687; *Louisville etc. R. R. Co. v. Brownlee*, 14 Bush, 590; *Dillard v. R. R. Co.*, 2 Lea, 288; *Merchants' Dispatch Trans. Co. v. Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847. *Contra* in Illinois: *Lawson on Contracts of Carriers*, sec. 104; *Erie Trans. Co. v. Dater*, 91 Ill. 195; 33 Am. Rep. 51; *Merchants' etc. Co. v. Theilbar*, 86 Ill. 71; *Adams' Express Co. v. King*, 3 Ill. App. 316; *Merchants' Trans. Co. v. Leysor*, 89 Ill. 43; *Merchants' Trans. Co. v. Jaesting*, 89 Ill. 152; *Central R. R. Co. v. Dwight Mfg. Co.*, 75 Ga. 609.

² *Huntingdon v. Dinsmore*, 6 Thomp. & C. 195; 4 Hun, 66; *Brehme v. Adams Express Co.*, 25 Md. 328; *Kirkland v. Dinsmore*, 62 N. Y. 171; 20 Am. Rep. 475; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575. *Contra*, *Southern Express Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783.

³ *St. Louis etc. R. R. Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104.

a different rule has been adopted.¹ And baggage-checks are of this character, and persons receiving them are not presumed to know the conditions they may contain.²

ILLUSTRATIONS.—Plaintiff delivered goods to defendant's express company for transportation, and received a receipt containing a condition that the company was not to be held liable for any loss occasioned by the dangers of transportation. The goods were lost *en route*, without fault or negligence. Plaintiff did not read the receipt, and the condition was not brought to his knowledge. *Held*, that plaintiff was bound by the condition, and that defendants were not liable: *Kirkland v. Dinsmore*, 62 N. Y. 171; 20 Am. Rep. 475. Plaintiff shipped horses on defendant's railroad, and received therefor a receipt containing the letters "O. R.," meaning "owner's risk." It was the defendant's custom to carry animals at owner's risk for a reduced charge. In an action for an injury to the horses while in defendant's care, the plaintiff put in evidence the receipt, and testified that he did not see those letters when he took it, but did not testify that he did not understand their meaning. *Held*, that the receipt conclusively showed that the horses were received upon a restricted liability, the shipper being bound to know the contents of the receipt: *Morrison v. Const. Co.*, 44 Wis. 405; 28 Am. Rep. 599.

§ 1849. Cases where Assent of Shipper was Inferred.

—The assent of the shipper to the carrier's proposals or terms has been inferred in the following cases, viz.: Where a carrier sent a notice to a merchant that it would carry only on certain conditions, and he afterwards delivered goods for carriage without mentioning or objecting to the notice;³ where goods having arrived at their destination, the carrier gave notice to the consignee that if not removed he would hold them, not as a common carrier, but as a warehouseman, at his risk, and subject to the usual warehouse charges, and the owner failed to remove them;⁴ where, in a bill of lading con-

¹ *Newell v. Smith*, 49 Vt. 255; *Western Trans. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760; *R. R. Co. v. Mfg. Co.*, 16 Wall. 318; *Ayres v. R. R. Co.*, 14 Blatchf. 9; *The Isabella*, 8 Ben. 139; *Michigan etc. R. R. Co. v. Hale*, 6 Mich. 243.

² *Blossom v. Dodd*, 43 N. Y. 264; 3 Am. Rep. 701; *Indianapolis etc. R. R. Co. v. Cox*, 29 Ind. 360; 95 Am. Dec. 640.

³ *Walker v. R. R. Co.*, 2 El. & B. 750.

⁴ *Mitchell v. R. R. Co.*, L. R. 10 Q. B. 256.

taining the words, "which are to be delivered at Detroit," the freight agent inserted in red ink between "at" and "Detroit" the words "Toledo for," and immediately forwarded the goods and sent back the bill of lading, but the goods were lost by fire at Detroit, and the shipper failed to dissent within a reasonable time;¹ where blank receipts were left by the carrier with the customer for daily use, and were filled up by his clerk;² where it was the usual course of business for a shipper of goods to send his boxes, etc., to a carrier by a teamster, and for the carrier to deliver to the teamster a bill of lading for each shipment, which bill was in a form containing an exception of loss by fire, and was brought by the teamster to the shipper and retained;³ where a shipper and owner of goods, at the time of delivering the same to an express company for transportation, also delivered to the express company for their signature a blank receipt filled up by him at his office, containing the names of both parties, and a series of conditions and clauses regulating the manner of transportation and the liability of the express company in certain cases and contingencies, and such receipt at the time of the delivery of the merchandise was presented by the shipper to the express company for their signature, and was signed by the latter and returned to the shipper;⁴ where plaintiff had been in the habit of doing business with the carrier, and had been furnished by him with a book of its blank receipts, from which the receipt for the goods, valued at more than fifty dollars, had been taken and sent to defendant to sign when delivered, and the receipt contained a stipulation that the carrier's liability for loss or damage should not exceed

¹ *Muller v. R. R. Co.*, 2 Cin. Rep. 280.

² *Gibson v. American etc. Express Co.*, 1 Hun, 387; and see *Oppenheimer v. United States Express Co.*, 69 Ill. 62; *Erie R. R. Co. v. Wilcox*, 84 Ill. 239; 25 Am. Rep. 451; *Field v. R. R.*

Co., 71 Ill. 458; *Merchants' Dispatch Trans. Co. v. Moore*, 88 Ill. 136; 30 Am. Rep. 541.

³ *Van Schaack v. Northern Trans. Co.*, 3 Biss. 394.

⁴ *Falkenau v. Fargo*, 44 How. Pr. 325; 35 N. Y. Sup. Ct. 332.

fifty dollars, unless the true value should be stated in the receipt; a blank left in the receipt for the value was not filled, and it appeared that neither defendant nor its agent who received and receipted for the package knew that the value of the goods exceeded fifty dollars.¹ Acceptance of a free railroad ticket bearing an indorsement that the person "accepting this ticket" agrees that the company shall not be liable for certain losses is said to constitute a contract on the part of the passenger with the company qualifying the carrier's common-law liability. The passenger will be presumed to have known the contents of the ticket at the time of the acceptance.²

ILLUSTRATIONS.—A railroad company accustomed to carry live-stock at the owner's risk delivered to a shipper of certain horses a receipt therefor, marked "O. R." *Held*, that the presumption of the owner's assent to the risk, raised by his possession of such receipt, was not overcome by his testimony that he did not "see" the letters "O. R.,"—not that he did not understand their meaning to be "owner's risk": *Morrison v. Const. Co.*, 44 Wis. 405; 28 Am. Rep. 599. A, who had shipped many goods by a certain express carrier, and who was familiar with its custom to limit its liability to fifty dollars unless the value of the article was expressed, filled up the usual form of contract containing this stipulation without expressing the value of the article, and delivered it with the article to the company. *Held*, that he was bound by the limitation: *Ghormley v. Dinsmore*, 53 N. Y. Sup. Ct. 36.

§ 1850. **Cases where Assent of Shipper was not Inferred.**—The courts have refused to infer that the shipper had assented to the terms of the carrier's notice in the following cases, viz.: Where the carrier gave the customer a receipt containing a clause which was unintelligible because of a revenue-stamp pasted over it;³ where the shipper paid at a tariff of charges under which by

¹ *Westcott v. Fargo*, 63 Barb. 349; *Smith v. R. R. Co.*, 24 N. Y. 222; *Perkins v. R. R. Co.*, 24 N. Y. 196.
6 Lans. 319; affirmed 61 N. Y. 542; 19 Am. Rep. 300.

² *Wells v. R. R. Co.*, 24 N. Y. 181;

³ *Perry v. Thompson*, 98 Mass. 249.

the carrier's printed table of rates the latter assumed no responsibility for certain losses.¹

ILLUSTRATIONS.—A receipt given by a railroad company referred to certain rules and regulations of the company, "a part of which notice is given on the back hereof." On the back were printed certain conditions restricting the common-law liability of the company. The receipt was taken by the consignor without either assent or dissent. *Held*, that he was not bound: *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318. The defendants received from plaintiff's agent a package of gold for transportation. The defendants' clerk in charge of the office was informed, at the time, of the contents of the package, and directed to collect for its carriage from the person receiving it. The package was lost while being transported. *Held*, that the defendants were liable for the full value of the package, and that the fact that the plaintiff's agent accepted a receipt in which it was set forth that the package was an ordinary one, and that the liability of the company therefor in case of loss should not exceed fifty dollars, did not operate to so limit its liability: *Kember v. Express Co.*, 22 La. Ann. 158; 2 Am. Rep. 719. The agent of a baggage-express company entered a dimly lighted railroad car, and called for baggage to be delivered. He received the plaintiff's check, and handed him a printed receipt without saying anything of its contents. The plaintiff put it in his pocket without looking at it, but he could not have read it where he sat. It was marked "domestic bill of lading," and purported to be a contract restricting defendant's liability, among other cases, to one hundred dollars, save in case of a special contract. *Held*, that the delivering of the receipt under the circumstances did not create a contract according to its terms, but it was a question for the jury: *Madan v. Sherard*, 73 N. Y. 329; 29 Am. Rep. 153.

§ 1851. Bills of Lading.—A contract limiting the carrier's liability may be made by word of mouth, but it is usually made in writing.² In strictness, a bill of lading is the acknowledgment given by the master of a vessel stating the receipt of the goods, setting out the engagement to carry and deliver, and executed in triplicate, one copy being sent to the consignee, one retained by the con-

¹ *Baltimore etc. R. R. Co. v. Brady*, Ann. 452; *Roberts v. Riley*, 15 La. 32 Md. 333. Ann. 103; 77 Am. Dec. 183; *Shelton*

² *American Trans. Co. v. Moore*, 5 v. *Merchants' Dispatch Co.*, 36 N. Y. Mich. 368; *Dunn v. Branner*, 13 La. Sup. Ct. 527; 59 N. Y. 258.

signor, and one by the master.¹ But similar instruments, except that no duplicates are made, are now used by carriers by land, and are also denominated bills of lading, though sometimes the word "inland" is prefixed to the description; and the papers delivered by express companies are of like character. In case of a variance between bills of lading, the terms of the one given to the shipper control.²

§ 1852. **Cannot be Explained or Contradicted by Parol.**—A bill of lading being a contract to carry and deliver, it cannot be altered by parol evidence.³ All antecedent verbal agreements and undertakings are merged in it.⁴ Owners of a vessel are responsible only for goods described in the bill of lading and delivered into the custody of the master at the accustomed place of receipt, and evidence is incompetent to show that the bill was intended to or did include goods elsewhere.⁵

ILLUSTRATIONS.—A entered into a parol contract with a railroad corporation for the carriage of certain goods upon certain terms and conditions. The bill of lading failed to state a material matter, and A neglected to examine it. *Held*, that A was not concluded by its statements in so far as they conflicted with the parol contract made: *Missouri etc. R. R. Co. v. Beeson*, 30 Kan. 298. An agent of a railroad company gave a shipping bill which provided for the carriage of goods to the end of the company's line. *Held*, that a verbal agreement of

¹ Abbott's Law Dict. 148; *Wooster v. Tarr*, 8 Allen, 270; 85 Am. Dec. 707.

² *Ontario Bank v. Hanlon*, 23 Hun, 283.

³ *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *York Company v. R. R. Co.*, 3 Wall. 107; *Grace v. Adams*, 100 Mass. 505; 97 Am. Dec. 117; *Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485; 62 Am. Dec. 125; *Kirkland v. Dinsmore*, 62 N. Y. 171; 20 Am. Rep. 475; *White v. Van Kirk*, 25 Barb. 16; *Wolfe v. Myers*, 3 Sand. 7; *Cox v. Peterson*, 30 Ala. 608; 68 Am. Dec. 145; *Wayland v. Moseby*, 5 Ala. 430; 39 Am. Dec. 335; *Roberts v. Riley*,

15 La. Ann. 103; 77 Am. Dec. 183; *Indianapolis etc. R. R. Co. v. Remmy*, 13 Ind. 518; *Oppenheimer v. United States Express Co.*, 69 Ill. 62; 18 Am. Rep. 596; *Pemberton Co. v. R. R. Co.*, 104 Mass. 144.

⁴ *Southern Express Co. v. Dickson*, 94 U. S. 549; *Collender v. Dinsmore*, 55 N. Y. 200; 14 Am. Rep. 224; *Long v. R. R. Co.*, 50 N. Y. 76; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575; *Hinckley v. R. R. Co.*, 56 N. Y. 429; *St. Louis etc. R. R. Co. v. Cleary*, 77 Mo. 634; 46 Am. Rep. 13; *Germania Fire Ins. Co. v. R. R. Co.*, 72 N. Y. 90; 28 Am. Rep. 113.

⁵ *Witzler v. Collins*, 70 Me. 290; 35 Am. Rep. 327.

the agent that the goods should be sent farther did not bind the company: *Riley v. R. R. Co.*, 34 Hun, 97. The consignee receives a large quantity of staves from the carrier without counting them, and without suggesting that they may fall short of the number claimed to exist. *Held*, that he cannot afterwards, and after an opportunity has occurred for the abstraction of some of them, deny having received the full number: *Broughty v. Five Thousand Two Hundred and Fifty-six Bundles Staves*, 23 Fed. Rep. 106.

§ 1853. **Exceptions to This Rule.** — A bill of lading is therefore at once a receipt and a contract; and so far as it is merely the former, it may be varied or contradicted by parol evidence.¹ Thus the quantity of goods received, the contents of boxes or bales, or the like, and their value or condition, may be shown by parol to be different from the statements regarding them made in the receipt.² Parol evidence is also admissible to show that the paper was never accepted as a contract between the parties.³ A collateral agreement may be shown by parol; as that the carrier agreed to carry the goods shipped to a point beyond that named in the bill of lading,⁴ or agreed to enlarge his liability.⁵ So the shipper may show fraud,⁶ mistake,⁷ or duress.⁸

¹ *Cox v. Peterson*, 30 Ala. 608; 78 Am. Dec. 145; *Wayland v. Mosely*, 5 Ala. 430; 39 Am. Dec. 335; *Meyer v. Peck*, 28 N. Y. 590.

² *Cox v. Peterson*, 30 Ala. 608; 78 Am. Dec. 145; *Wayland v. Mosely*, 5 Ala. 430; 39 Am. Dec. 335; *Meyer v. Peck*, 28 N. Y. 590; *Kember v. South. Express Co.*, 22 La. Ann. 158; 2 Am. Rep. 719; *South. Express Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *O'Brien v. Gilchrist*, 34 Me. 554; 56 Am. Dec. 677; *Strong v. R. R. Co.*, 15 Mich. 206; 93 Am. Dec. 185.

³ *Boorman v. Am. Express Co.*, 21 Wis. 152; *Strohn v. R. R. Co.*, 21 Wis. 554; 94 Am. Dec. 564; *King v. Woodbridge*, 34 Vt. 565; *Blossom v. Griffin*, 13 N. Y. 569; 67 Am. Dec. 75; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; 34 Am. Rep. 191.

⁴ *Malples v. R. R. Co.*, L. R. 1 Com. P. 336; *Balt. etc. Steam Co. v. Brown*, 54 Pa. St. 77.

⁵ *Morrison v. Davis*, 20 Pa. St. 171; 57 Am. Dec. 695; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; 34 Am. Rep. 191.

⁶ *The Wisconsin v. Young*, 3 G. Greene, 268; *Meyer v. Peck*, 28 N. Y. 590; *Collender v. Dinsmore*, 55 N. Y. 200; 14 Am. Rep. 224; *Long v. R. R. Co.*, 50 N. Y. 76; *Belger v. Dinsmore*, 51 N. Y. 166; 10 Am. Rep. 575; *Adams Express Co. v. Guthrie*, 9 Bush, 78; *Strohn v. R. R. Co.*, 21 Wis. 554; 94 Am. Dec. 564; *Simons v. R. R. Co.*, 2 Com. B., N. S., 620.

⁷ *Chouteaux v. Leech*, 18 Pa. St. 224; 57 Am. Dec. 602; *Warden v. Greer*, 6 Watts, 424; *Adams Express Co. v. Nock*, 2 Duvall, 562; *Norris v. Milwaukee Dock Co.*, 21 Wis. 130; 91 Am. Dec. 464.

⁸ "As a common carrier cannot coerce the owner to yield assent to a limitation of responsibility (see *Wallace v. Matthews*, 39 Ga. 617; 99 Am.

ILLUSTRATIONS.—P. sued a railroad company for delay in the transportation of cattle. The cattle were received February 12th, and on February 14th duplicate contracts were executed for their transportation. *Held*, that proof of delay on the part of the company before the signing of the written contracts was admissible: *Cleveland etc. R. R. Co. v. Perkins*, 17 Mich. 296.

§ 1854. **Delivery of Bill of Lading after Receipt of Goods.**—Upon the receipt of goods for transportation the liability of the common carrier commences, and this liability, whether unconditional or partly qualified, cannot be altered by the subsequent delivery to the customer of a bill of lading altering the contract as first made.¹

ILLUSTRATIONS.—A shipper delivered a portion of a quantity of wool to a railroad company for transportation, the understanding being that the balance should be delivered as soon as the company notified him that they had cars in which to ship it. This they afterwards did, and the balance of wool was delivered to and accepted by them, at which time the shipper signed a shipping request, which contained certain exemptions in favor of the company. Some of the wool was lost before the balance was shipped. *Held*, that the exemptions did not apply to that: *Detroit etc. R. R. Co. v. Adams*, 15 Mich. 458. A package was delivered to a carrier at New York, marked "Iowa City," and a receipt given to the consignor, which entitled him to a bill of lading. Some days after, the carrier, knowing that the goods had been destroyed *in transitu* at Chicago, gave the shipper a bill of lading which undertook to carry the package only to Chicago. *Held*, that the bill of lading was of no effect

Dec. 473) by making exorbitant charges when his assent is refused to a condition limiting the general liability of the carrier, it has been said in one case that where there exists an extraordinary necessity for the immediate transportation of goods, and the carrier refuses to take them except under a special contract, the exaction of such a contract ought not to be sanctioned, — such unreasonable extortion being equivalent to duress: *Adams Express Co. v. Nock*, 2 Duvall, 562; *Lawson on Contracts of Carriers*, sec. 116.

¹ *Shelton v. Merchants' Dispatch Co.*, 36 N. Y. Sup. Ct. 527; *Coffin v. R. R. Co.*, 64 Barb. 379; *Bostwick v. R. R. Co.*, 45 N. Y. 712; *The Edwin*,

1 *Sprague*, 477; *Cleveland etc. R. R. Co. v. Perkins*, 17 Mich. 296; *Gott v. Dinsmore*, 111 Mass. 45; *Am. Express Co. v. Spellman*, 90 Ill. 455; *Michigan etc. R. R. Co. v. Boyd*, 91 Ill. 268; unless the verbal agreement and the subsequent delivery of the bill of lading is one transaction: *Hill v. R. R. Co.*, 73 N. Y. 351; 29 Am. Rep. 163. A railroad company cannot rely on a clause in the bill of lading as a limitation of liability where the bill of lading was not delivered at the time the goods were received, but were sent by mail to the place of their destination: *Louisville and Nashville R. R. Co. v. Meyer*, 78 Ala. 597.

to restrict the carrier's liability: *Wilde v. Merchants' Dispatch Trans. Co.*, 47 Iowa, 247; 29 Am. Rep. 479. A carrier orally contracted, in winter, to transport a lot of oranges, lemons, and bananas in a refrigerator-car through from New York to Denver without change. After the fruit was loaded in the car, the carrier delivered to the owner's agent a bill of lading containing a printed condition not to be liable for injury occasioned by the weather, over which was written the words "general release." The fruit reached Denver in an ordinary box-car, and badly frozen. *Held*, that the carrier was liable for the damages: *Merchants' etc. Trans. Co. v. Cornforth*, 3 Col. 280; 25 Am. Rep. 757. The agent of a railroad company agreed to have cars ready to forward freight on a certain day. The cars were not ready on that day. *Held*, that the contract was not abrogated by the terms of a bill of lading issued when the freight was shipped on a subsequent day: *Hamilton v. R. R. Co.*, 96 N. C. 398.

§ 1855. **Conditions in Contracts as to Manner and Time of Making Claim.**—Conditions in carrier's contracts limiting the time within which a claim for a loss or damage must be presented are valid, the only requisite being that the time and manner of presenting the claim must not be unreasonable. Under this rule, these have been held good: A condition by an express company that claims for loss or damage shall be made within ninety days of the receipt by the company of the article;¹ a condition that the consignee of goods on a ship should examine his goods as they were deposited on the wharf from the vessel;² that claim should be made, in writing, at the shipping office, within thirty days from date;³ that

¹ *Express Co. v. Caldwell*, 21 Wall. 264; *Weir v. Express Co.*, 5 Phila. 355; *United States Express Co. v. Harris*, 51 Ind. 127. In *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118, a receipt given by an express company contained a condition that the company should not be liable for any loss, unless a claim therefor should be made within thirty days from the date of the receipt. In a suit against the company, it appeared that the plaintiff was not aware of the loss of the goods until a year after the date of the receipt. It was held that the plaintiff was not bound by

the limitation contained in the receipt. The court said: "He [the carrier] cannot be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud. Thirty days might elapse before the consignee became aware that anything had been consigned to him, especially if he was absent from home." But in *Express Co. v. Caldwell* this case was criticised. And see *Adams Express Co. v. Reagan*, 29 Ind. 21; 92 Am. Dec. 332.

² *The Santee*, 2 Ben. 519.

³ *Southern Express Co. v. Hunnicutt*, 54 Miss. 566; 28 Am. Dec. 385; *Hirschberg v. Dinsmore*, 67 How. Pr. 103.

a claim for damages to cattle shall be made within five days after they are unloaded;¹ that a claim for damages shall be made before the horses are mingled with other stock;² that a claim for loss should be absolutely barred unless within five days of the loss a written statement thereof should be sent by the shipper to the carrier;³ that an action shall not be brought after forty days after the injury.⁴ And these have been held unreasonable and invalid, viz.: A condition that a claim must be made at the time the goods are delivered to the consignee;⁵ or within ninety days after delivery to the carrier;⁶ that the damage should be adjusted before removal from the station, and claim made within thirty days to the company's "trace agent";⁷ that the claim should be presented at the company's New York office;⁸ that the claim should be made within ten days after delivery of the article injured.⁹ The right of a carrier, under the contract, to insist on the presentation of a written claim for damages may be waived by his conduct when an oral claim is made.¹⁰ If a contract for the carriage of cattle by rail stipulates for notice of the owner's claim for damages to an officer or station agent before the cattle are removed from the place of destination, the carrier, when sued for damages, must show that it had an officer or agent so situated that the notice could be given.¹¹

¹ *Dawson v. R. R. Co.*, 76 Mo. 514; *Wabash etc. R. R. Co. v. Black*, 11 Ill. App. 465.

² *Sprague v. R. R. Co.*, 34 Kan. 347.

³ *Chicago etc. R. R. Co. v. Simms*, 18 Ill. App. 68.

⁴ *Gulf etc. R. R. Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494.

⁵ *Memphis R. R. Co. v. Holloway*, 9 Baxt. 188.

⁶ *Porter v. Southern Express Co.*, 4 S. C. 135; 16 Am. Rep. 762; or thirty days: *Adams Express Co. v. Reagan*, 29 Ind. 21; 92 Am. Dec. 332.

⁷ *Capehart v. R. R. Co.*, 81 N. C. 438; 31 Am. Rep. 505; overruling *Capehart v. R. R. Co.*, 77 N. C. 355.

⁸ *Place v. Union Exp. Co.*, 2 Hilt. 19.

⁹ *Browning v. R. R. Co.*, 2 Daly, 117. Where an express company gave a receipt for goods containing a clause exempting it "from any loss or damage whatever, unless claim should be made therefor within ninety days from the delivery to it," it was held that this clause had no application to a suit against the company for the non-delivery of the goods themselves,—that not being a suit either for "loss" or "damage"; *Porter v. Southern Express Co.*, 4 S. C. 135.

¹⁰ *Bennett v. Northern Pacific Express Co.*, 12 Or. 49.

¹¹ *Missouri Pacific R. R. Co. v. Harris*, 67 Tex. 166.

ILLUSTRATIONS.—A carrier's contract stipulated that written claims for losses should be presented within a month. *Held*¹, that the month did not run while the carrier was making efforts to trace and find lost goods: *Ghormley v. Dinsmore*, 51 N. Y. Sup. Ct. 196. Contract of affreightment provided that "claims for loss and damages must be presented in thirty days from date of shipment, in order to receive attention." *Held*, not to be so definite that a failure to present within thirty days would cut off a claimant's cause of action: *Dunn v. R. R. Co.*, 68 Mo. 268. A contract between a railroad company and a shipper of horses stipulated that for injuries to the animals shipped over the line of the road the owner should make a demand in writing of the agent of the company before removing them from the place of destination or from the place of delivery. *Held*, that this clause was not applicable where the injury was the illness of the animals, and the extent of such illness could not be known until their removal from the cars, and probably not for some time after such removal: *Ormsby v. R. R. Co.*, 2 McCrary, 48. A shipper and a carrier stipulated that the former should sue for a loss within sixty days or be barred. After discovering by correspondence that a settlement could not be had, there remained to the shipper twelve days of the sixty. He failed to sue within that time. *Held*, that the stipulation was reasonable, and that he was barred: *Thompson v. R. R. Co.*, 22 Mo. App. 321. A special contract of shipment provided for no recovery for injuries unless upon notice by the shipper, "before said stock is removed from the place of destination, and before such stock is mingled with other stock." *Held*, that the taking an injured mule from the cars at the place of destination and allowing it to run on the commons there, the shipper refusing to receive it, was not such removal or mingling: *Chicago etc. R. R. Co. v. Abels*, 60 Miss. 1017. An express company fails to pay over money collected; a condition annexed to a receipt given by it upon receiving the draft for collection, that it shall not be liable for any loss or damage unless a claim be made in ninety days, *held*, to have no application: *Bardwell v. American Express Co.*, 35 Minn. 344.

§ 1856. Other Conditions and Regulations Contained in Contracts.—A regulation that before a consignee can obtain his wheat from the company's bins he shall receipt for the quantity has been held unreasonable.¹ Where an express company, a common carrier of money and valuables, in a contract of carriage, provided against lia-

¹ *Christian v. R. R. Co.*, 20 Minn. 21.

bility for loss by the act of God, etc., and that in no event should it be liable for "such loss" without notice, it was held that for any loss a notice was necessary.¹

§ 1857. **Conditions in Contracts as to Carriage of Live-stock.**—In the carriage of live-stock these conditions have been held reasonable, viz.: That the carrier shall not be responsible for loss or injury to any one animal for more than a sum specified;² that the owner shall bear the risk of loss or damage by reason of delay; and that the owner shall take the risk of injuries which the animals may receive "in consequence of heat, suffocation, or being crowded," or the burning of their hay or straw;³ that the value of the cattle at the time and place of shipment, not to exceed fifty dollars per head for ordinary beef cattle, should be the measure of recovery for loss;⁴ that claims for loss or damage must be made "before or at the time the stock is unloaded";⁵ that the carrier shall not be liable except for collision or running off the track.⁶ A common carrier may provide by express agreement that the owner of live-stock delivered to it for carriage shall assume all risk of damage or injury from whatsoever cause happening in the course of transportation not arising from its own negligence or that of its servants.⁷ Where, by a contract for the shipment of sheep, the shipper, in consideration of reduced rates, is to care for them while in transit, and attend to loading and unloading them, and assume all risks incident thereto, and of all injuries from any cause, he cannot cast the duty upon the carrier of caring for the sheep after being unloaded at their destination, although its stock-yards

¹ Express Co. v. Glenn, 16 Lea, 472.

² St. Louis etc. R. R. Co. v. Weakly, 50 Ark. 397; 7 Am. St. Rep. 104.

³ Squire v. R. R. Co., 98 Mass. 239; 93 Am. Dec. 162; Georgia R. R. Co. v. Beattie, 66 Ga. 75; 42 Am. Rep. 75.

⁴ South etc. R. R. Co. v. Henlien, 52 Ala. 606; 23 Am. Rep. 579.

⁵ Goggin v. R. R. Co., 12 Kan. 416; Rice v. R. R. Co., 63 Mo. 314.

⁶ Georgia R. R. Co. v. Spears, 66 Ga. 485; 42 Am. Rep. 81.

⁷ Betts v. Farmers' etc. Co., 21 Wis. 80; 91 Am. Dec. 460. See *ante*, Carriage of Animals, sec. 1793.

were too small to hold them all.¹ But a stipulation for exemption for liability for negligence is unreasonable.² And a condition that the shipper will give written notice of his claim to some officer of the carrier, or its nearest station agent, before the stock is removed from its place of destination or of delivery to the shipper, and before it is mingled with another stock, is void for uncertainty as to the person to whom the notice should be given, and because it is an attempt to protect the carrier from liability for losses caused by its own fault, by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to recover.³

§ 1858. **Construction of Special Contracts.**—Exceptions to the carrier's liability in contracts are strictly construed by the courts against the carrier.⁴ Thus general words of exemption, when used after a specification of particular exemptions and risks, will be presumed to include only those of a similar character, unless a different intent appear.⁵ A receipt given by a common carrier must be taken altogether; one part cannot be separated from the other in interpreting it.⁶ It was said in an

¹ *Myers v. R. R. Co.*, 90 Mo. 98.

² *Moulton v. R. R. Co.*, 31 Minn. 85; 47 Am. Rep. 781; *East Tennessee R. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489.

³ *Smitha v. R. R. Co.*, 86 Tenn. 198.

⁴ *Magnin v. Dinsmore*, 56 N. Y. 168; *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49; *Ayres v. R. R. Co.*, 14 Blatchf. 9; *Union Mut. Ins. Co. v. R. R. Co.*, 1 Dis. 480; *St. Louis etc. R. R. Co. v. Smuck*, 49 Ind. 302; *Barter v. Wheeler*, 49 N. H. 9; 6 Am. Rep. 434; *Southern Express Co. v. Moon*, 39 Miss. 832. While it is competent for common carriers to provide by contract for exemption from their common-law liability, it must be done in clear and unambiguous language, and the rule that the language of contracts, if ambiguous, is to be construed against the party using it, should be rigidly applied to such contracts: *Edsall v.*

R. R. Co., 50 N. Y. 661. "As the exception is an innovation on the principles of law, and introduced exclusively for the benefit of the carrier, the construction must be most strongly against him": *Levering v. Union Trans. etc. Co.*, 42 Mo. 88; 97 Am. Dec. 320. "Restrictions on the common-law liabilities of common carriers in a receipt given for goods delivered to them for transportation, drawn up and executed for them alone and for their benefit, must be taken most strongly against the carriers": *Hooper v. Wells*, 27 Cal. 11; 85 Am. Dec. 211; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Indiana etc. R. R. Co. v. Munday*, 21 Ind. 48; 83 Am. Dec. 339.

⁵ *Hawkins v. R. R. Co.*, 17 Mich. 57; 97 Am. Dec. 179.

⁶ *Butler v. The Arrow*, 6 McLean, 470.

early case in South Carolina that if a common carrier specially undertake to deliver safely any article carried, he will be bound by his undertaking to answer for the loss, although it may happen from a cause which in the absence of an express contract would excuse him;¹ and in *Fish v. Chapman*,² where a wagoner contracted to deliver certain packages in good order and condition, "unavoidable accidents only excepted," it was held that this exception excluded all others, and that therefore he would be liable for a loss by the public enemy. These rulings rest upon the maxim, *Expressio unius est exclusio alterius*.

§ 1859. **Different Words and Phrases in Carriers' Contracts Construed**—"Perils of the Seas"—"C. O. D."—"Fire"—"Good Order and Condition"—"Leakage and Breakage"—"Owner's Risk"—"Privilege of Reshipping"—"Value and Contents Unknown."—In a large number of cases the meaning of particular words and phrases in contracts of carriage has been before the courts for consideration.³ The most important, and the ones most

¹ *Gaither v. Barnet*, 2 Brev. 488.

² 2 Ga. 349. But see *Gage v. Tirrell*, 9 Allen, 299, *contra*.

³ As "accidental delays": *Lawrence v. R. R. Co.*, 36 Conn. 63. "Agreed": *Wells v. R. R. Co.*, 42 N. Y. 181; *Mosher v. Southern Express Co.*, 38 Ga. 37. "All rail": *Maghee v. R. R. Co.*, 45 N. Y. 514; 6 Am. Rep. 124. "Article": *Earle v. Cadmus*, 2 Daly, 237; *Green v. R. R. Co.*, 128 Mass. 221; 35 Am. Rep. 370. "Baggage": *Beckman v. Shouse*, 5 Rawle, 179; 28 Am. Dec. 653; *Dwight v. Brewster*, 1 Pick. 50; 11 Am. Dec. 133. "Carriage": *Cream City R. R. Co. v. R. R. Co.*, 63 Wis. 93; 53 Am. Rep. 267. "Damage": *The Tommy*, 16 Fed. Rep. 601; *Menzell v. R. R. Co.*, 1 Dill. 531. "Deficiency in quantity": *Meyer v. Peck*, 28 N. Y. 590. "Delays": *Dawson v. R. R. Co.*, 79 Mo. 296. "Depot": *Maghee v. R. R. Co.*, 45 N. Y. 514; 6 Am. Rep. 124. "Errors": *Sanford v. R. R. Co.*, 11 Cush. 155. "Escapes": *Oxley v. R. R. Co.*,

65 Mo. 629. "Extraordinary marine risk": *Leary v. U. S.*, 14 Wall. 607. "Feed, water, and take proper care of": *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578. "Forward": *Reed v. United States Express Co.*, 48 N. Y. 462; 7 Am. Rep. 561. "Freezing": *Wolf v. American Express Co.*, 43 Mo. 421; 97 Am. Dec. 406. "From whatever cause": *My-nard v. R. R. Co.*, 71 N. Y. 180; 27 Am. Rep. 28. "Inherent deterioration": *The America*, 8 Ben. 491. "Load and unload": *Indianapolis etc. R. R. Co. v. Allen*, 31 Ind. 374; *Penn. v. R. R. Co.*, 49 N. Y. 204; 10 Am. Rep. 355. "Loss": *Porter v. Southern Express Co.*, 4 S. C. 135; 16 Am. Rep. 762. "On lakes and rivers": *St. Louis etc. R. R. Co. v. Smuck*, 49 Ind. 302. "On the train": *Poucher v. R. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 364. "Package": *Southern Express Co. v. Crook*, 44 Ala. 468; 4 Am. Rep. 140. "Perishable property": *Ill. Cent. R. R. Co. v. McClellan*, 54 Ill. 58; 5 Am.

frequently occurring in such contracts, are the following:—

The phrases “perils of the seas,” “perils of the river,” “perils of the lake”; “dangers of navigation,” “dangers of the seas,”¹ “dangers of the river,” “dangers of the lake”; “unavoidable dangers of the river,”² “dangers incident to the navigation of the river,”³ “inevitable accidents,” and “unavoidable accidents,”⁴ are synonymous in their legal construction. They are such perils, dangers, and accidents as are of an extraordinary nature, and arise from irresistible force which cannot be guarded against by the ordinary exertions of human skill, and which are peculiar to the elements.⁵ They are broader

Rep. 83. “Pilots, masters, or mariners”: *Zung v. Howland*, 5 Daly, 136. “Place of destination”: *Ayers v. R. R. Co.*, 14 Blatchf. 9. “Port of discharge”: *Knell v. United States Steam Co.*, 33 N. Y. Sup. Ct. 423. “Quantity guaranteed”: *Bissell v. Campbell*, 54 N. Y. 353. “Restraints of princes”: *Finlay v. Steam Co.*, 23 L. T., N. S., 251. “Riding free”: 32 N. Y. 333; 88 Am. Dec. 332. “Robbers”: *De Rothschild v. Steam Co.*, 21 L. T. Ex. 273. “Leakage, breakage, or rust”: *The Vaderland*, 18 Fed. Rep. 737. “Suffocation”: *Sturgeon v. R. R. Co.*, 65 Mo. 569. “Thieves”: *Tarbell v. Royal Express etc. Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350. “Through without transfer”: *Robinson v. Merchants’ Dispatch Co.*, 45 Iowa, 470. “Viciousness”: *Rhodes v. R. R. Co.*, 9 Bush, 688. “Watered and fed”: Ill. Cent. R. R. Co. v. *Adams*, 42 Ill. 474; 92 Am. Dec. 85. “Weather”: *Merchants’ Dispatch Co. v. Cornforth*, 3 Col. 280; 25 Am. Rep. 757. For a complete collection of phrases of this description, and a statement of the construction put upon them by the courts, see *Lawson’s Contracts of Common Carriers*.

¹ *Baxter v. Leland*, Abb. Adm. 348; *Jones v. Pitcher*, 3 Stew. & P. 135; 24 Am. Dec. 716.

² *The Favorite*, 2 Biss. 502.

³ *The Wathan*, 13 Opin. Att.-Gen. 119.

⁴ *Fowler v. Davenport*, 21 Tex. 626; *Marsh v. Blythe*, 1 McCord, 360; 1 Nott & McC. 170.

⁵ *The Reeside*, 2 Sum. 567; *Baxter v. Leland*, 1 Abb. Adm. 348; *Bearse v. Ropes*, 1 Sprague, 331; *Story on Bailments*, sec. 512; 3 Kent’s Com. 216; *The Niagara v. Cordes*, 21 How. 7; *Tuckerman v. Stephens etc. Co.*, 32 N. J. L. 321; *Gilmore v. Carman*, 1 Smedes & M. 279; 40 Am. Dec. 96; *Turney v. Wilson*, 7 Yerg. 340; 27 Am. Dec. 515; *Gordon v. Buchanan*, 5 Yerg. 71; *Johnson v. Friar*, 4 Yerg. 48; 26 Am. Dec. 215; *Hill v. Sturgeon*, 28 Mo. 323; *Tysen v. Moore*, 56 Barb. 442. The phrase the “dangers of the seas” has been defined in a late case as including all unavoidable accidents from which common carriers by the general law are not excused unless they arise from the act of God: *Woods, J.*, in *Dibble v. Morgan*, 1 Woods, 406; and see *Friend v. Woods*, 6 Gratt. 189; 52 Am. Dec. 119; but this definition is much too broad, and is not the law. “This phrase might certainly be construed to mean dangers which arise on the sea, and it would then include every hazard and danger from the beginning to the end of the voyage, of whatever kind. But the inclination of the courts is to interpret it as including only dangers

than the "act of God," because they include human agency.¹

The following have been held within these phrases: Hidden obstructions in a river, such as logs, rocks, snags, and the like, which prudence could neither discover nor avoid;² a dense fog;³ a deflection of the compass from accidental or unforeseen causes;⁴ the careening of a vessel after arrival at a wharf, by which water enters her ports;⁵ boisterous weather, adverse winds, and low tides, causing delay;⁶ a sudden squall or gust of wind;⁷ the "blowing" of a vessel,⁸ or the opening of its seams, caused by straining during a storm;⁹ a loss occasioned by mistaking a shore light on a dark and stormy night;¹⁰ damage done to cotton thread by dampness of the hold of a vessel, not occasioned by bad stowage or by any negligence of those employed in the conveyance of the goods;¹¹ damage by sweating;¹² a collision;¹³ a loss by jettison, occasioned by a peril of the sea.¹⁴

which arise from the action of the elements, and those incident to that cause, rather than to include all that arise upon the sea": *Merrill v. Arey*, 3 Ware, 215.

¹ *McArthur v. Sears*, 21 Wend. 190.
² *Turney v. Wilson*, 7 Yerg. 340; 27 Am. Dec. 515; *The Keokuk*, 1 Biss. 522; *The Favorite*, 2 Biss. 502; *Redpath v. Vaughan*, 52 Barb. 489; affirmed, 48 N. Y. 655; *Van Hern v. Taylor*, 7 Rob. (La.) 201; 41 Am. Dec. 279; 2 La. Ann. 587; *Boyce v. Welch*, 5 La. Ann. 623; *Collier v. Valentine*, 11 Mo. 299; 49 Am. Dec. 81; *Ferguson v. Brent*, 12 Md. 9; 71 Am. Dec. 583.

³ But a shipper is not excused by the presence of a dense fog, although it is a danger of navigation, if the loss occur through negligence or want of care, as while running at a high rate of speed: *The Rocket*, 1 Biss. 354; *The Portsmouth*, 9 Wall. 682.

⁴ *The Rocket*, 1 Biss. 354.

⁵ *Laurie v. Douglas*, 15 Mees. & W. 746.

⁶ *Lewis v. The Success*, 18 La. Ann. 1.

⁷ *Slocum v. Fairchild*, 19 Wend. 329; 7 Hill, 292; *The Lady Pike*, 2 Biss. 141. But see *The Mollie Mohler*, 2 Biss. 505; 21 Wall. 230.

⁸ *Crosby v. Grinnell*, 9 N. Y. Leg. Obs. 281.

⁹ *Rich v. Lambert*, 12 How. 347.

¹⁰ *The Juniata Paton*, 1 Biss. 15. So where a sand reef had recently formed, of the existence of which the pilot was not chargeable with knowledge, and a tree having fallen from the bank under the water: *Hibernia Ins. Co. v. Trans. Co.*, 120 U. S. 166.

¹¹ *Clark v. Barnwell*, 12 How. 272.

¹² If not the result of negligent stowage: *The Star of Hope*, 17 Wall. 651.

¹³ *Lawson on Contracts of Carriers*, sec. 165; *Van Hern v. Taylor*, 7 Rob. (La.) 201; 41 Am. Dec. 279; *Whitesides v. Thurlkill*, 12 Smedes & M. 599; 51 Am. Dec. 128; *Hays v. Kennedy*, 41 Pa. St. 378; 80 Am. Dec. 627. See *Simpson v. Hand*, 6 Whart. 311; 36 Am. Dec. 231.

¹⁴ *Lawrence v. Minturn*, 17 How. 100; *The Portsmouth*, 2 Biss. 56; 9 Wall. 682; *The Milwaukee Belle*, 2 Biss. 197; *Ray v. The Milwaukee Belle*, 18 Am.

The following have been held not within these phrases: Losses however accidental, which might have been avoided by the exercise of discretion, care, and foresight;¹ a dampness or sweating of the hold of a vessel, and shown to be the ordinary accompaniment of a voyage from southern to northern ports, and to result not from tempestuous weather, but from occult atmospheric causes;² the mere rolling of a vessel in a cross sea, an ordinary incident of every voyage;³ a mere leak not shown to have been caused by the irresistible action of the elements;⁴ damage caused by rats⁵ or other vermin;⁶ theft or robbery, unless piracy on the high seas;⁷ theft

L. T. 311; *Nemours v. Vance*, 19 How. 162; *Crosby v. Fitch*, 12 Conn. 410; 31 Am. Dec. 745; *Bentley v. Bustard*, 16 B. Mon. 643; 63 Am. Dec. 561. Where the vessel ran aground in sailing up the harbor in pursuit of a pilot-boat, and the master broke open heavy casks of liquor to lighten the vessel, instead of throwing them overboard, it was held that the loss might, under the circumstances, be regarded as a "peril of the sea": *Van Syckel v. The Ewing, Crabbe*, 405.

¹ *Williams v. Branson*, 1 Murph. 417; 4 Am. Dec. 562; *Spencer v. Daggett*, 2 Vt. 92; *Jones v. Pitcher*, 3 Stew. & P. 135; 24 Am. Dec. 716; *Fairchild v. Slocum*, 19 Wend. 329; *Dibble v. Morgan*, 1 Woods, 406; *The Casco, Daveis*, 184; *The Rebecca*, 1 Ware, 188; *Christenson v. American Express Co.*, 15 Minn. 270; 2 Am. Rep. 122; *Whitesides v. Russell*, 8 Watts & S. 44; *Hays v. Kennedy*, 41 Pa. St. 378; 80 Am. Dec. 627; *Steamboat Co. v. Bason, Harp*, 262; *The Ocean Wave*, 3 Biss. 317; *Gordon v. Buchanan*, 5 Yerg. 71. Running against a cape or continent cannot be termed an "accident of the sea," which proper foresight and skill in the commanding officer might have avoided: *Bazin v. Steamship Co.*, 3 Wall. Jr. 229. A loss occasioned by the master of a steamer attempting to enter a port in a dense fog, he not being compelled by any exigency to make the attempt, will not be attributed to "perils of the sea": *The Costa Rica*, 3 Saw. 538.

² *Baxter v. Leland*, Abb. Adm. 348.

³ *The Reeside*, 2 Sum. 567.

⁴ *The Emma Johnson*, 1 Sprague, 527; *The Compta*, 4 Saw. 375.

⁵ *The Isabella*, 8 Ben. 139; *Kay v. Wheeler*, 36 L. J. Com. P. 180; L. R. 2 C. P. 302; 15 Week. Rep. 495; 16 L. T., N. S., 66; *Laveroni v. Drury*, 22 L. J. Ex. 3; 8 Ex. 166; 16 Jur. 1024.

Where the master of a vessel received skins to be carried from New Orleans to New York, there to be delivered in good order, the "dangers of the seas" excepted, and the skins were injured by rats, the court refused to admit evidence to show that, according to mercantile usage and understanding, injuries by rats were considered and treated as dangers of the sea: *Aymar v. Astor*, 6 Cow. 266.

⁶ Cockroaches ate off and defaced the paper labels pasted on the outside covering of chests of tea, which injury embarrassed the assortment and delivery of the goods to the consignees, and depreciated their market value. Held, that the damages were not the result of a "peril of the sea," or of any of the "dangers or accidents of navigation," within an exception to that effect in a bill of lading, but were damages for which the ship and its owners were liable as insurers of the safe conveyance of the cargo: *The Miletus*, 5 Blatchf. 335.

⁷ *King v. Shepherd*, 3 Story, 349; *Tenderden on Shipping*, pt. 3, c. 3, sec. 9, p. 244; *Abbott on Shipping*, pt. 3, c. 4, sec. 1, p. 252.

or robbery committed by persons coming on board the ship by consent of the master, or by persons on board;¹ depredations on the ship's stores or cargo committed by her passengers or crew in consequence of a short allowance made necessary by the length of the voyage;² the barratrous act of the crew in boring holes in the ship for the purpose of scuttling her;³ embezzlement;⁴ plundering of the ship by a custom-house officer while in charge of it;⁵ the unskillfulness of the pilot;⁶ the desertion or insubordination of seamen;⁷ an accidental fire;⁸ the explosion of a boiler of a steamship;⁹ low water in a river or harbor;¹⁰ the shifting of a buoy;¹¹ an injury to cargo caused by contact with other cargo,¹² or by want of ventilation.¹³ The carrier to make good his defense is bound to show that the damage arose from a sea peril. It is not enough for him to show that it might have arisen from that cause: he must prove that it did;¹⁴ and whether the loss happened by a peril of the sea, or by the negligence of the carrier, is in every case a question for the jury.¹⁵ If the goods be badly stowed, or put on deck without the owner's consent, the exceptions will not save the carrier.¹⁶ But where a bill of lading declares that the property is to be stowed on deck, and excepts "perils of the seas," the exception must be construed with reference to the particular adventure which the contract of affreightment shows was contemplated by the parties;

¹ *King v. Shepherd*, 3 Story, 349.

² *The Gold Hunter*, Blatchf. & H. 300.

³ *The Chasca*, L. R. 4 Adm. 446; 23 L. T., N. S., 838; 44 L. J. Adm. 17.

⁴ *King v. Shepherd*, 3 Story, 349.

⁵ *Schieffelin v. Harvey*, Anth. 56; 6 Johns. 170; 5 Am. Dec. 206.

⁶ *Harvey v. Pike*, N. C. Term Rep. 82; 7 Am. Dec. 698.

⁷ *The Ethel*, 5 Ben. 154.

⁸ *Gilmore v. Carmen*, 1 Smedes & M. 279; 40 Am. Dec. 96.

⁹ *The Mohawk*, 8 Wall. 153.

¹⁰ *Hatchett v. The Compromise*, 12 La. Ann. 783; 68 Am. Dec. 782; Broad-

well v. Butler, 1 Newb. Adm. 171; *Mahon v. The Olive Branch*, 18 La. Ann. 107; *Transportation Co. v. Downer*, 11 Wall. 129.

¹¹ *Reeves v. Waterman*, 2 Speers, 197.

¹² *The Antoinetta C.*, 5 Ben. 564.

¹³ *The Freedom*, L. R. 3 P. C. 594.

¹⁴ *Hoffman, J.*, in *The Compta*, 4 Saw. 375.

¹⁵ *Marsh v. Blyth*, 1 Nott & McC. 170; *Hammond v. McClure*, 1 Bay, 99; *Gordon v. Buchanan*, 5 Yerg. 71; *Humphreys v. Reed*, 6 Whart. 435.

¹⁶ *The Rebecca*, 1 Ware, 188; *The Casco*, Daveis, 184; *The Newark*, 1 Blatchf. 203.

and under such bill of lading the question is not what in other circumstances could be deemed a "peril of the sea," but what is to be deemed such when operating on this vessel with this deck-load.¹ Where goods are damaged by water arising from an excepted peril, it is the duty of the carrier to exercise ordinary care and diligence to prevent the consequences of the injury; and where it would be of advantage, he should open the package and dry the goods; and if such precautionary measures are not taken, the carrier will be liable for the loss.² Where a steamboat in going through an inland passage grounded upon the reflux of the tide, and fell over so that bilge-water rose into the cabin and injured a box of books, it was held that the owners of the boat were responsible for this injury, though the bill of lading excepted "dangers of navigation," as the carriers were bound to remove the books from the cabin before the water reached them.³

The letters "C. O. D." refer to the value or price of the package which, as marked on it, is to be collected on delivery, and transmitted to the consignor.⁴ They have nothing to do with the transportation charges,⁵ nor do they affect the character of the shipment. The duty to transport safely remains the same. But if the consignee neglects or refuses to take the property and pay the money, the former remains in the carrier's hands, subject only to his liability as a warehouseman.⁶ If a carrier of goods marked C. O. D. takes the consignee's check on deliver-

¹ *Lawrence v. Minturn*, 17 How. 100.

² *Chouteaux v. Leech*, 18 Pa. St. 224; 57 Am. Dec. 602; *Bird v. Cromwell*, 1 Mo. 81; 13 Am. Dec. 470.

³ *Steamboat Co. v. Bason*, Harp. 262.

⁴ These letters are by no means cabalistical. They have no occult nor mysterious meaning. In the ordinary commerce of the country these letters have acquired a fixed and determinate meaning, that courts and juries from their general information will readily understand what is meant thereby when averred in a pleading without

explanation: *United States Express Co. v. Keefer*, 59 Ind. 263; *American etc. Express Co. v. Schier*, 55 Ill. 140; *American Express Co. v. Lessem*, 39 Ill. 312; *Collender v. Dinsmore*, 55 N. Y. 200; 14 Am. Rep. 224. A consignee of goods sent "C. O. D." cannot maintain replevin against the carrier before payment: *Lane v. Chadwick*, 146 Mass. 68.

⁵ *Am. Express Co. v. Schier*, 55 Ill. 140.

⁶ *Gibson v. Am. Express Co.*, 1 Hun, 387.

ing the goods, and the consignor receives the check from the carrier without objection, and it turns out that there are no funds, the carrier is not liable.¹ Where a request to collect is made on delivering a parcel to a carrier, he is under no obligation or agreement to do so. "Please collect," written on a bill accompanying parcels, is a request only.² But when a bill of lading, by fair construction, requires the carrier to collect charges upon the goods on delivery, if the carrier delivers the goods without collecting the sum due, he becomes liable therefor himself.³ Where a common carrier received goods marked "C. O. D.," to be delivered at a point beyond his line, and delivered them to defendant, a connecting carrier, to be transported to their destination and delivered, and defendant delivered them without collecting payment, it was held that the plaintiff could maintain an action against defendant for such wrongful delivery.⁴

The exception of fire in a carrier's contract never covers a negligent fire.⁵ The failure of a steamboat carrying passengers and freight on an inland river to have the cotton on its decks "protected by a complete and suitable covering of canvas, or other suitable material, to prevent ignition from sparks," as required under a penalty by statute,⁶ renders the carrier liable for a loss by fire, although the bill of lading exempts "dangers of the river and fire."⁷ In a bill of lading of a steamboat, the word

¹ *Rathbun v. Steam. Co.*, 57 How. Pr. 191.

² *Tooker v. Gormer*, 2 Hilt. 71.

³ *Meyer v. Lemcke*, 31 Ind. 208.

⁴ *Murray v. Warner*, 55 N. H. 546; 20 Am. Rep. 227.

⁵ *New Orleans Ins. Co. v. R. R. Co.*, 20 La. Ann. 302; *Levy v. R. R. Co.*, 23 La. Ann. 477; *York Co. v. R. R. Co.*, 3 Wall. 107; *Grey v. Mobile Trade Co.*, 55 Ala. 387; 28 Am. Rep. 729; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Erie R. R. Co. v. Lockwood*, 28 Ohio St. 358; *Michigan etc. R. R. Co. v. Heaton*, 37 Ind. 448; 10 Am. Rep. 89; *Stedman v. West*.

Trans. Co., 48 Barb. 97; *Lamb v. R. R. Co.*, 46 N. Y. 271; 7 Am. Rep. 327; *Condict v. R. R. Co.*, 54 N. Y. 500; *Pemberton Co. v. R. R. Co.*, 104 Mass. 144; *Montgomery R. R. Co. v. Edmonds*, 41 Ala. 667; *Empire Trans. Co. v. Oil Co.*, 63 Pa. St. 14; 3 Am. Rep. 515; *Powell v. R. R. Co.*, 32 Pa. St. 14; 75 Am. Dec. 564; *Steinweg v. R. R. Co.*, 43 N. Y. 123; 3 Am. Rep. 673; *Colton v. R. R. Co.*, 67 Pa. St. 211; 5 Am. Rep. 424; *Scruggs v. R. R. Co.*, 5 McCrary, 590.

⁶ 14 U. S. Stats. at Large, 227.

⁷ *Grey v. Mobile Trade Co.*, 55 Ala. 387; 28 Am. Rep. 729.

"fire" means any fire, and is not restricted to fire originating from the boat's furnace.¹ Nor is it qualified by "unavoidable" in the clause "fire and all other unavoidable accidents," and therefore such an exception will cover a loss by fire, whether unavoidable or not, if not negligent.² Where goods were sent by carriers by water over a line which included railroad carriage also, the bill of lading given by the carrier by water excepting "dangers of navigation, fire, and collisions on the lakes and rivers, and on the Welland canal," it was held that this limitation did not extend to a loss by fire on a railroad.³

The admission in a bill of lading that the goods were received in "good order and condition" refers only to their external appearance; the carrier is not concluded by this statement, but may explain or contradict it by parol evidence.⁴ A receipt for bales of cotton, "in good order and well conditioned," does not warrant the internal quality or condition of the cotton in the bales.⁵ And the clause, "shipped in apparent good order and condition, five cases of merchandise," was held an admission only that the cases contained merchandise, and were out-

¹ *Swindler v. Hilliard*, 2 Rich. 216; 45 Am. Dec. 732.

² *Colton v. R. R. Co.*, 67 Pa. St. 211; 5 Am. Rep. 424.

³ *Barter v. Wheeler*, 49 N. H. 9.

⁴ *Keith v. Amende*, 1 Bush, 455; *Barrett v. Rogers*, 7 Mass. 297; 5 Am. Dec. 45; *The Missouri v. Webb*, 9 Mo. 193; *Tierney v. R. R. Co.*, 10 Hun, 569; *Archer v. The Adriatic*, 9 Cent. L. J. 201; *Carson v. Harris*, 4 G. Greene, 516; *Mitchell v. United States Express Co.*, 46 Iowa, 214; *West v. The Berlin*, 3 Iowa, 532; *The Freedom*, L. R. 3 P. C. 594; *The Olbers*, 3 Ben. 148; *Vaughan v. Six Hundred and Thirty Casks*, 7 Ben. 506; *Austin v. Talk*, 20 Tex. 164; *Currell v. Johnson*, 12 La. 290; 32 Am. Dec. 117; *Witzler v. Collins*, 70 Me. 290; 35 Am. Rep. 327. In *Gowdy v. Lyon*, 9 B. Mon. 112, it is said: "The adoption of the principle that the bill of lading is conclusive on the carrier, not only as to the apparent but also as to the actual

condition of goods, would impose on him the necessity, for self-protection, of opening every box of merchandise to examine and ascertain the condition of its contents before he receives it. This would not only be inconvenient but impracticable on the part of steamboat owners, on account of the vast carrying business on the rivers. The injury that would be inflicted on the owners of freight by the process that it would be subjected to in consequence of such a requisition is also a cogent argument against it. The bulk of every package would have to be broken up and examined, and the contents of every box of merchandise of the most delicate texture opened and handled before a bill of lading could be safely signed. Public policy, therefore, prohibits a rule which would be productive of such results, and which, instead of benefiting, would inflict an injury upon the community."

⁵ *Bradstreet v. Heran*, 2 Blatchf. 116.

wardly sound.¹ But where a bill of lading was given for a box of marble tops, "in good order and well conditioned," it was held that the burden of proof was upon the carrier to show that the marble was broken when it came into his hands; for here there was the carrier's admission that the specified articles were in the box, and in good order.² The word "apparent" inserted before the word "good" does not change its legal effect.³

The phrase "leakage and breakage" excuses the carrier from losses of this kind which are not the result of his own default.⁴ Negligence being absent, the word "leakage" extends to both ordinary and extraordinary leakage.⁵ But it does not allow the carrier to deliver empty casks. The ordinary signification of "leakage" is the loss of a part, not the whole.⁶ "Leakage" will not cover damage done by the liquid to other goods; nor will "breakage" cover damage done by the broken goods to other goods;⁷ nor if the leakage is caused by cases of oil being tampered with.⁸

The phrase "owner's risk" means that the owner assumes all risks and dangers which the carrier by ordinary care cannot prevent.⁹ The carrier is still liable for his own or his agent's neglect or misconduct.¹⁰ A shipping receipt that goods are shipped "at owner's risk" exempts even connecting lines of railroad from liability, save the negligence of the party sought to be charged.¹¹

¹ Abbott on Shipping, 339; The California, 2 Saw. 12.

² Price v. Powell, 3 N. Y. 332.

³ The Oriflamme, 1 Saw. 176.

⁴ Philips v. Clarke, 2 Com. B., N. S., 156; Lawson on Contracts of Carriers, sec. 184.

⁵ Ohrloff v. Briscall, L. R. 1 P. C. 231.

⁶ Brauer v. The Almoner, 18 La. Ann. 266; Thomas v. The Morning Glory, 13 La. Ann. 269; 71 Am. Dec. 509; Arend v. Liverpool etc. Steamship Co., 6 Lans. 459; 64 Barb. 118.

⁷ Thrift v. Youle, L. R. 2 Com. P. Div. 432.

⁸ The Giglio, 31 Fed. Rep. 432.

⁹ French v. R. R. Co., 4 Keyes, 108; 2 Abb. App. 196; Baltimore etc. R. R. Co. v. Rathbone, 1 W. Va. 87; 88 Am. Dec. 664.

¹⁰ Schieffelin v. Harvey, 6 Johns. 170; 5 Am. Dec. 206; Anth. 56; Alexander v. Greene, 7 Hill, 533; Moore v. Evans, 14 Barb. 524; Wells v. Steam Navigation Co., 8 N. Y. 375; Wallace v. Sanders, 42 Ga. 486; Nashville etc. R. R. Co. v. Jackson, 6 Heisk. 271; D'Arc v. R. R. Co., L. R. 9 Com. P. 325.

¹¹ Kiff v. R. R. Co., 32 Kan. 263.

The "privilege of reshipping" is reserved in a bill of lading to allow the carrier to reship the goods in another boat, without rendering him responsible for the consequences of a deviation.¹ But it does not discharge the boat from any liability not excepted in the contract; and though the right is secured of transshipping on another boat, the liability continues until the goods are safely delivered at the port of destination, if under the like circumstances the carrier would be liable had the loss occurred on his own boat.² It is a privilege reserved to the boat, and not an additional undertaking of the carrier.³ It is not, therefore, a breach of his contract if, by reason of low water, his boat is obstructed and he fails to deliver the goods which by reshipping he might have delivered.⁴ But the clause only gives power to transfer to another boat, and will not authorize a temporary storing of the goods on a wharf-boat at the point of reshipment.⁵ The additional expense of reshipping is to be borne by the vessel on which the goods were first sent.⁶

The words "value and contents unknown" in a bill of lading exclude the inference of any admission by the carrier as to the quantity or quality of the contents of

¹ But where a carrier receives goods to be conveyed with "privilege of reshipping," and the goods are reshipped on a boat which diviates from her route, the carrier is liable: *Little v. Semple*, 8 Mo. 99; 40 Am. Dec. 123.

² *Carr v. The Michigan*, 27 Mo. 196; 72 Am. Dec. 257; *Little v. Semple*, 8 Mo. 99; 40 Am. Dec. 123. "It is but a privilege to the carrier in the execution of his contract to convey and deliver, inserted for his own benefit, to secure him the advantage of as great a portion of freight as he could earn, and to throw upon the owner any increase of expense. The relation of carrier continues from the shipment of the goods until their arrival at the destined port and delivery": *McGregor v. Kilgore*, 6 Ohio, 358; 27 Am. Dec. 260; *Cassilay v. Young*, 4 B. Mon. 265; 39 Am. Dec. 505; *White-*

sides v. Russell, 8 Watts & S. 44; *Dun-
seth v. Wade*, 3 Ill. 285.

³ Goods were shipped from New Orleans to Cincinnati, under bills of lading in the usual form, undertaking for their delivery, and containing the words "privilege of reshipping." At the Ohio Falls the boat waited a month before there was water enough to carry her over. Held, that it was competent to show by usage that under these words as used in a bill of lading, it was not the carrier's duty to reship instead of waiting for a rise: *Broadwell v. Butler*, 1 Newb. Adm. 171; 6 McLean, 296.

⁴ *Sturgess v. The Columbus*, 23 Mo. 230.

⁵ *Carr v. The Michigan*, 27 Mo. 196; 72 Am. Dec. 257.

⁶ *Hatchett v. The Compromise*, 12 La. Ann. 783; 68 Am. Dec. 782.

the package at the time of delivery, beyond what is visible to the eye or apparent from handling it,—nothing is implied but the receipt of the property in good order externally, and the carrier may show by parol that the value and contents were below the estimate placed upon them by the shipper.¹ The carrier has complied, *prima facie*, with his contract when he has delivered the box or case or other article externally in good condition. The burden of proof is then upon the shipper to show that the contents were in good order and condition when shipped.² On the other hand, a receipt, for example, for “boxes of raisins” would imply the receipt of boxes filled with raisins.³

§ 1860. Presumption of Liability from Loss or Damage—Burden on Carrier.—Where goods in the hands of a common carrier are lost or damaged, the presumption is against the carrier, and the burden is on him to prove that it arose from a cause for which he is not by law responsible.⁴ The presence of a leak in the hold, and consequent injury to the cargo, raises a presumption of negligence on the part of a vessel.⁵

§ 1861. Burden of Proof of Restrictive Contract on Carrier.—Upon the carrier who alleges it, and who seeks to avoid liability through its provisions, rests the burden of proof of a contract limiting his common-law responsibility.⁶ And the burden of proof is upon the carrier not

¹ The *California*, 2 Saw. 12; The *Colombo*, 3 Blatchf. 521; *Clark v. Barnwell*, 12 How. 272.

² *Wentworth v. The Realm*, 16 La. Ann. 18.

³ The *Bellona*, 4 Ben. 503.

⁴ *Nelson v. Woodruff*, 1 Black, 156; *Hunt v. The Cleveland*, 6 McLean, 76; *Bearse v. Ropes*, 1 Sprague, 331; *Kerr v. The Norman*, 1 Newb. Adm. 525; *Wolf v. American Express Co.*, 43 Mo. 421; 97 Am. Dec. 406; *Loving v. Union etc. Trans. Co.*, 42 Mo. 88; 97

Am. Dec. 320; *Grogan v. Adams Express Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Chapman v. R. R. Co.*, 21 La. Ann. 224; 99 Am. Dec. 722; *Shenk v. Phila. Steam. Co.*, 60 Pa. St. 109; 100 Am. Dec. 541.

⁵ *The Samuel E. Spring*, 29 Fed. Rep. 397.

⁶ *Western Trans. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760; *Gaines v. Union Trans. Co.*, 28 Ohio St. 418; *Adams Express Co. v. Nock*, 2 Duvall, 562; 87 Am. Dec. 510; *Fillebrown v.*

only to show that a limited contract has been made, but also that the loss in question arose from a cause excepted in his contract.¹ And this fact must be established with reasonable certainty, and not rest upon conjecture or possibility; for if upon the whole case it is doubtful whether the loss arose from an excepted cause or through the negligence or want of skill of the carrier, the latter will have to bear it.² It cannot restrict its liability by merely proving a usage on its part in giving bills of lading to notify shippers that the company would not be liable for certain kinds of losses.³

§ 1862. Loss Falling within Exemption — Burden of Proof of Negligence.—In England and in most of the states it is sufficient for the carrier to show that the loss is one falling within an exception in the contract, and the burden of sustaining his case then devolves upon the shipper,—i. e., to prove negligence.⁴ A few states place

R. R. Co., 55 Me. 462; 92 Am. Dec. 606; *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208.

¹ *The Freedom*, L. R. 3 P. C. 594; 24 L. T., N. S., 452; *Verner v. Sweitzer*, 32 Pa. St. 208; *Bennett v. Filyaw*, 1 Fla. 403; *Alden v. Pearson*, 3 Gray, 342; *Swindler v. Hilliard*, 2 Rich. 286; 45 Am. Dec. 732; *Cameron v. Rich*, 4 Strob. 168; 53 Am. Dec. 670; 5 Rich. 352; 57 Am. Dec. 747; *Shriver v. R. R. Co.*, 24 Minn. 506; 31 Am. Rep. 353; *Merchants' Dispatch Trans. Co. v. Bloch*, 86 Tenn. 392; 6 Am. St. Rep. 847.

² *The Live Yankee*, 1 Deady, 420.

³ *Illinois etc. R. R. Co. v. Smyser*, 38 Ill. 354; 87 Am. Dec. 301.

⁴ *Ohrloff v. Briscall*, L. R. 1 P. C. 231; *Alden v. Pearson*, 3 Gray, 342; *The Antoinetta C.*, 5 Ben. 564; *Bazin v. Steam Co.*, 3 Wall. Jr. 229; *Bearse v. Ropes*, 1 Sprague, 331; *Brauer v. The Almoner*, 18 La. Ann. 266; *Carey v. Atkins*, 6 Ben. 562; *Clark v. Barnwell*, 12 How. 272; *American Express Co. v. Sands*, 55 Pa. St. 140; *Baltimore etc. R. R. Co. v. Brady*, 32 Md. 333; *Bennett v. Filyaw*, 1 Fla. 403; *Chubb v. Renaud*, 26 Law Rep. 492;

Clark v. R. R. Co., 64 Mo. 440; *Colton v. R. R. Co.*, 67 Pa. St. 211; 5 Am. Rep. 424; *French v. R. R. Co.*, 4 Keyes, 108; *Farnham v. R. R. Co.*, 55 Pa. St. 53; *The Invincible*, 1 Low. 225; *Jones v. Walker*, 5 Yerg. 427; *The Juniata Paton*, 1 Biss. 15; *Kallman v. U. S. Express Co.*, 3 Kan. 205; *Kellham v. The Kensington*, 24 La. Ann. 100; *The Keokuk*, 1 Biss. 522; *Kansas etc. R. R. Co. v. Reynolds*, 8 Kan. 623; *King v. Shepherd*, 3 Story, 349; *Kirk v. Folsom*, 23 La. Ann. 584; *The Lady Pike*, 2 Biss. 141; *Lamb v. R. R. Co.*, 46 N. Y. 271; 7 Am. Rep. 327; *Lamb v. Parkman*, 1 Sprague, 343; *Lawrence v. R. R. Co.*, 36 Conn. 63; *Magnin v. Dinsmore*, 6 Jones & S. 284; *Mitchell v. U. S. Express Co.*, 46 Iowa, 214; *The Mollie Mohler*, 2 Biss. 505; *Moore v. Evans*, 14 Barb. 524; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *New Orleans Ins. Co. v. R. R. Co.*, 20 La. Ann. 302; *The Niagara v. Cordes*, 21 How. 7; *The Ocean Wave*, 3 Biss. 317; *The Olbers*, 3 Ben. 148; *The Oriflamme*, 1 Saw. 176; *Patterson v. Clyde*, 67 Pa. St. 500; *Price v. Uriel*, 10 La. Ann. 413; *Rich v. Lambert*, 12 How. 347; *The*

the burden on the carrier throughout, following Greenleaf's view of the law, who says: "And if the acceptance of the goods was special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care."¹ In Alabama, where the carrier shows that the loss occurred from a cause for the consequences of which he is not liable under his contract, the *onus* is still on him to show the exercise of due care and diligence on his part to prevent the injury.² While a common carrier could not excuse a delay by showing that it arose from the acts of a mob, such a delay will not warrant an imputation of negligence showing a cause of loss for which he is expressly relieved from liability by the terms of his contract.³ But evidence that the destruction of the goods by fire (an excepted liability) was the act of a mob engaged in a struggle with the authorities of the state, without any proof that the carrier was bound, from the circumstances, to anticipate such a result, is insufficient to charge him with negligence.⁴

Rocket, 1 Biss. 354; *Smith v. R. R. Co.*, 64 N. C. 235; *Sunderland v. Westcott*, 2 Sweeny, 260; 40 How. Pr. 468; *Thomas v. The Morning Glory*, 13 La. Ann. 269; 71 Am. Dec. 509; *Transportation Co. v. Downer*, 11 Wall. 129; *Turner v. The Black Warrior*, 1 McAll. 181; *Turney v. Wilson*, 7 Yerg. 340; *Tysen v. Moore*, 56 Barb. 442; *Van Schaack v. Northern Trans. Co.*, 3 Biss. 394; *The Vivid*, 4 Ben. 319; *Bankard v. R. R. Co.*, 34 Md. 197; 6 Am. Rep. 321; *Little Rock etc. R. R. Co. v. Talbot*, 39 Ark. 523; *Hill v. Sturgeon*, 35 Mo. 212; 86 Am. Dec. 149; *St. Louis etc. R. R. Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104.

¹ 2 Greenleaf on Evidence, sec. 219; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362; 62 Am. Dec. 285; *United States Express Co. v. Bachman*, 2 Cin. Rep. 251; affirmed, 28 Ohio St. 144; *Erie R. R. Co. v. Lockwood*, 28 Ohio St. 358; *Gaines*

v. Union Trans. Co., 28 Ohio St. 418; *Whitesides v. Russell*, 8 Watts & S. 44; *Hays v. Kennedy*, 41 Pa. St. 378; 80 Am. Dec. 627; *Union Express Co. v. Graham*, 26 Ohio St. 595; *Berry v. Cooper*, 28 Ga. 543; *Swindler v. Hilliard*, 2 Rich. 216; *Baker v. Brinson*, 9 Rich. 201; 67 Am. Dec. 548; *Cameron v. Rich*, 4 Strob. 168; 53 Am. Dec. 670; 5 Rich. 352; *Southern Express Co. v. Newby*, 36 Ga. 635; 91 Am. Dec. 783; *Chicago etc. R. R. Co. v. Moss*, 60 Miss. 1003; 45 Am. Rep. 428; *Brown v. Adams Express Co.*, 15 W. Va. 812; *Levering v. Union Trans. Co.*, 42 Mo. 88; 97 Am. Dec. 320.

² *Steele v. Townsend*, 37 Ala. 247; 79 Am. Dec. 49; *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578.

³ *Hall v. R. R. Co.*, *Lawson on Contracts of Carriers*, 419; 1 Fed. Rep. 226.

⁴ *Wertheimer v. R. R. Co.*, *Lawson on Contracts of Carriers*, 416; 17 Blatch. 421.

ILLUSTRATIONS.—Casks of wine were shipped under a bill of lading, with a condition “not liable for leakage or breakage.” Some were empty on their arrival, and others partially so. Proof of the inferior quality of the casks having been given, *held*, that the burden of showing negligence was on the shipper: *Six Hundred and Thirty Casks*, 14 Blatchf. 517. Plate-glass was shipped under a bill of lading exempting liability for damage by “breakage.” When it arrived it was broken. *Held*, that the burden of proving negligence was on the shipper: *The Pereire*, 8 Ben. 301. In an action against a railroad company for injury to a phaeton by fire in transit, it appeared that the bill of lading provided that, unless their agents were guilty of gross negligence, the company was not responsible for injuries “from fire,” and that the company had refused to give the plaintiff any information as to how or where the fire occurred. *Held*, that this raised a presumption of negligence, not *ipso facto* repelled by evidence that the defendant used ordinary care, and the question of negligence was for the jury: *Penn. R. R. Co. v. Miller*, 87 Pa. St. 395. Goods in transit were destroyed by fire. The bill of lading exempted the carrier from liability for loss by fire. *Held*, that it devolved on the carrier to show that the fire did not occur through his negligence: *Ryan v. R. R. Co.*, 65 Tex. 13; 57 Am. Rep. 589.

§ 1863. **Usage as to Restrictive Contracts.**—Where the terms of a bill of lading or other similar contract have acquired by usage a particular meaning, the parties will be presumed to have used them in that sense.¹ But the usage must be uniform; and therefore, if carriers on a particular river sometimes give bills of lading containing an exemption from loss by fire, and at other times containing no such exemption, such a usage is not established, because not uniform; and this, although in a majority of cases the exemption was contained in the bills of lading.² It has been expressly ruled in several cases that the common-law liability of a carrier cannot be restricted by anything less than a contract, and that a usage on the part of the carrier not to receive goods on any other terms than on those of a limited liability cannot be invoked for his

¹ *Wayne v. The General Pike*, 16 Ohio, 421; *Rawson v. Holland*, 59 N. Y. 611; 18 Am. Rep. 394. ² *Cooper v. Berry*, 21 Ga. 526; *Berry v. Cooper*, 28 Ga. 543.

protection in any case.¹ Thus a usage not to be liable for accidental losses by fire,² and not to accept looking-glasses for transportation without exemption from breakage,³ have been held inadmissible. So the sending of goods under a restrictive contract in any number of instances does not bind the party sending them to a similar contract in the future, without his agreement to that effect.⁴ A bill of lading may be explained by evidence of the customary meaning of the terms employed.⁵ Evidence of usage is admissible to a bill of lading, as to the time in which loading is to be done or delivery is to be made,—as, for instance, whether the “days” in which the delivery is to be concluded are to be considered as working or running days,⁶ or whether the “rainy days,” which are to be excepted, apply to all days on which there is some rain, or only to those days when the rain is sufficient to prevent the loading or unloading of the vessel with safety and convenience.⁷ So, to explain the meaning of “Derby Line”⁸ and “their freight,”⁹ as used in these instruments, and “privilege of reshipping.”¹⁰

¹ *Illinois etc. R. R. Co. v. Smyser*, 38 Ill. 354; 87 Am. Dec. 301; *The Pacific*, 1 Deady, 71; *Coxe v. Heisley*, 19 Pa. St. 243; *Clyde v. Graver*, 54 Pa. St. 251; *Garey v. Meagher*, 33 Ala. 630; *Evansville etc. R. R. Co. v. Young*, 28 Ind. 516; *United States Express Co. v. Rush*, 24 Ind. 403; *Patton v. Magrath*, *Dudley (S. C.)* 159; 31 Am. Dec. 552; *Pitre v. Offutt*, 21 La. Ann. 679; 99 Am. Dec. 749; *Cranwell v. The Fanny Fosdick*, 15 La. Ann. 436; 77 Am. Dec. 190.

² *Illinois etc. R. R. Co. v. Smyser*, 38 Ill. 354; 87 Am. Dec. 301.

³ *The Pacific*, 1 Deady, 17.

⁴ *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Erie etc. Trans. Co. v. Dater*, 91 Ill. 195; 33 Am. Rep. 51.

⁵ *McClure v. Cox*, 32 Ala. 617; 70 Am. Dec. 522; *Bissell v. Campbell*, 54 N. Y. 353; *Hooper v. R. R. Co.*, 27 Wis. 81; 9 Am. Rep. 439.

⁶ *Higgins v. United States Mail Steamship Co.*, 3 Blatchf. 282; *Cochran v. Retberg*, 3 Esp. 121.

⁷ *Balfour v. Wilkins*, 5 Saw. 429.

⁸ *Connecticut etc. R. R. Co. v. Baxter*, 32 Vt. 805.

⁹ *Noyes v. Campbell*, 29 Vt. 79.

¹⁰ *Broadwell v. Butler*, 6 McLean, 296.

CHAPTER XCIII.

CONNECTING CARRIERS.

- § 1864. Carriers may agree to carry beyond their own routes.
 § 1865. Or may stipulate for non-liability beyond their route.
 § 1866. Presumption from receipt of goods marked beyond route—The English rule—The American rule.
 § 1867. Construction of contracts as to liability beyond own route.
 § 1868. Rights and liabilities of connecting carrier—When connecting carrier may and may not have benefit of exemptions in contract with first carrier.

§ 1864. Carriers may Agree to Carry beyond their Own Routes.—A common carrier may agree to carry goods beyond the terminus of his own line,—such a contract is not *ultra vires*.¹ Such a liability may be established by express contract, or by evidence that the carrier held himself out as a common carrier for the entire distance, or other circumstances indicating an understanding that the contract was for through transportation.² Where a carrier has contracted for the carrying of goods over another line beyond his route, a stipulation that his responsibility is to terminate at the end of his own line will be of no effect.³ Where a railroad company contracts to convey goods over its own and connecting lines, and to deliver them at their destination, at a place beyond its terminus, within a certain time, it is liable to the shipper for losses caused by delays in transportation over the connecting roads.⁴

§ 1865. Or may Stipulate for Non-liability beyond their Route.—But as the law does not require a common car-

¹ Redfield on Carriers, secs. 190-197; Green's Brice on Ultra Vires, app. iii. 673; Hill Mfg. Co. v. R. R. Co., 104 Mass. 122; 6 Am. Rep. 262; Wheeler v. R. R. Co., 31 Cal. 46; 89 Am. Dec. 147.

² Root v. R. R. Co., 45 N. Y. 524.

³ Cincinnati etc. R. R. Co. v. Pontius, 19 Ohio St. 221; 2 Am. Rep. 391; Condict v. R. R. Co., 54 N. Y. 500.

⁴ Persira v. R. R. Co., 66 Cal. 92.

rier to transport beyond his own line,¹ he may, therefore, stipulate that he shall not be liable for any loss or damage except such as may occur on his own route,—in other words, he may undertake simply to deliver the goods to the connecting carrier,—in which event his liability will cease with such delivery, he having done all either the law or his agreement requires him to do.² But his liability is not terminated by simply notifying the second carrier to take the goods.³ While in the absence of a special agreement a carrier is only liable to the extent of his route, and for safe storage and delivery to the next carrier, yet if he store the goods in his own warehouse at the end of his line without delivery or notice, or attempt to deliver to the next carrier, his liability as a carrier will continue.⁴ Through bills of lading impose on the railroad company, as carrier, the obligation to pro-

¹ *Pitts. etc. R. R. Co. v. Morton*, 61 Ind. 539; 28 Am. Rep. 682; *Lotsperch v. R. R. Co.*, 73 Ala. 306.

² *R. R. Co. v. Androscoggin Mills*, 22 Wall. 594; *R. R. Co. v. Pratt*, 22 Wall. 123; *Mulligan v. R. R. Co.*, 36 Iowa, 180; 14 Am. Rep. 514; *Babcock v. R. R. Co.*, 49 N. Y. 491; 43 How. Pr. 317; *Ætna Ins. Co. v. Wheeler*, 43 How. Pr. 616; *American Express Co. v. Second National Bank*, 69 Pa. St. 394; 8 Am. Rep. 268; *Reed v. United States Express Co.*, 48 N. Y. 462; 8 Am. Rep. 561; *Lamb v. R. R. Co.*, 46 N. Y. 271; 7 Am. Rep. 327; *Hall v. R. R. Co.*, L. R. 10 Q. B. 437; *Ill. Cent. R. R. Co. v. Frankenberg*, 54 Ill. 88; 5 Am. Rep. 92; *Cincinnati etc. R. R. Co. v. Pontius*, 19 Ohio St. 221; 2 Am. Rep. 391; *Burroughs v. R. R. Co.*, 100 Mass. 26; 1 Am. Rep. 78; *Honkley v. R. R. Co.*, 3 Thomp. & C. 281; *St. Louis etc. R. R. Co. v. Piper*, 13 Kan. 505; *Aldridge v. R. R. Co.*, 15 Com. B., N. S., 582; *Fowles v. R. R. Co.*, 7 Exch. 699; *Kent v. R. R. Co.*, L. R. 10 Q. B. 1; *Martin v. American Express Co.*, 19 Wis. 336; *Oakey v. Gordon*, 7 La. Ann. 235; *Sullivan v. Thompson*, 99 Mass. 259; *Witbeck v. Holland*, 55 Barb. 443; *Pendergast v. Adams Express Co.*, 101 Mass. 120; *Pemberton Co. v. R. R. Co.*, 104 Mass. 144; *Whal v. Holt*, 26 Wis. 703; *Moriarty v. Harnden's Express*, 1 Daly, 227; *United States Express Co. v. Rush*, 24 Ind. 403; *Chicago etc. R. R. Co. v. Montford*, 60 Ill. 175; *Maghee v. R. R. Co.*, 45 N. Y. 514; 6 Am. Rep. 124; *St. John v. Express Co.*, 1 Woods, 615; *Ricketts v. R. R. Co.*, 4 Lans. 446; 61 Barb. 18; *Camden etc. R. R. Co. v. Forsyth*, 61 Pa. St. 81; *Pennsylvania R. R. Co. v. Schwarzenberger*, 45 Pa. St. 208; 84 Am. Dec. 490; *Farmers' etc. Bank v. Champlain Trans. Co.*, 23 Vt. 186; 56 Am. Dec. 68; *Taylor v. R. R. Co.*, 32 Ark. 393; 29 Am. Rep. 1; *United States Express Co. v. Haines*, 67 Ill. 137; *Erie R. R. Co. v. Wilcox*, 84 Ill. 239; 25 Am. Rep. 451; *Gibson v. American Express Co.*, 1 Hun, 387; *Phifer v. R. R. Co.*, 89 N. C. 311; 45 Am. Rep. 687; *East Tenn. R. R. Co. v. Brumley*, 5 Lea, 401; *Chicago etc. R. R. Co. v. Church*, 12 Ill. App. 17; *Piedmont Mfg. Co. v. R. R. Co.*, 19 S. C. 353; *Berg v. R. R. Co.*, 30 Kan. 561; *Goldsmith v. R. R. Co.*, 12 Mo. App. 479.

³ *Goold v. Chapin*, 20 N. Y. 259; 75 Am. Dec. 398; *Selma etc. R. R. Co. v. Butts*, 43 Ala. 385; 94 Am. Dec. 694.

⁴ *Lawrence v. R. R. Co.*, 15 Minn. 390; 2 Am. Rep. 130.

vide means of transportation to the ultimate destination without delay, and it is no excuse for the non-performance of this duty that it could not procure transportation by boat by reason of a previous accumulation of freight, of which it was advised when it received the goods.¹ A carrier is not discharged of his liability where he receives goods for transportation to a point beyond the end of his route, and there are public means of transportation from the end of his route to the place of destination, by delivering them to a mere wharfinger at the end of his route (in the absence of an established usage to that effect), but he must deliver them to some proper carrier to be taken farther.² Nor is his liability ended by placing the goods carried in a depot used by him and a connecting road in common; but it must be shown that they were placed on the platform of the connecting company, or had been in some manner given over to it.³ He will still be liable for negligence for failing to deliver the goods to the connecting carrier with reasonable dispatch,⁴ and likewise for any injury which occurs beyond his route through his own neglect, as by furnishing defective cars.⁵

ILLUSTRATIONS. — Goods were shipped by the Illinois Central railroad, directed to a point beyond its terminus, to which they were to be taken by another carrier. The goods were, at such terminus, placed in the warehouse of the Illinois Central Railroad Company, until such second carrier, which had no regular time of departure, should take them. While in the warehouse they were destroyed by fire. *Held*, that the Illinois Central Railroad Company held the goods as carrier, and not as warehousemen, and was liable for the loss: *Illinois Central R. R. Co. v. Mitchell*, 68 Ill. 471; 18 Am. Rep. 564. A railroad company undertook to transport a lot of mules, to a point beyond its own line, on the line of another company, and on arrival of the train at the

¹ *Bussey v. R. R. Co.*, 4 McCrary, 405.

² *Hermann v. Goodrich*, 21 Wis. 543; 94 Am. Dec. 562.

³ *Kent v. R. R. Co.*, L. R. 10 Q. B. 1; *Conkey v. R. R. Co.*, 31 Wis. 619; 11 Am. Rep. 630.

⁴ *Louisville etc. R. R. Co. v. Camp-*

bell, 7 Heisk. 253; *Rawson v. Holland*, 59 N. Y. 611; 17 Am. Rep. 394; *Irish v. R. R. Co.*, 19 Minn. 376; 18 Am. Rep. 340; *Bancroft v. R. R. Co.*, 47 Iowa, 262; 29 Am. Rep. 482; *Union etc. R. R. Co. v. Hurt*, 30 Ga. 798.

⁵ *Indianapolis etc. R. R. Co. v. Strain*, 81 Ill. 504.

junction it was found that they could not be forwarded immediately, and that they needed to be unloaded, fed, and watered. *Held*, that the duty of the first company to see that this was done could not be imposed on the owner; and this, although he was accompanying the mules under a contract that he should take care of them while in transit: *Dunn v. R. R. Co.*, 68 Mo. 268. The defendant, a railroad company, whose road extended from Cincinnati to Dayton, was engaged in shipping goods from Cincinnati to New York, under an agreement with other companies, whose roads extended from Dayton to New York, for rates of through freight to be fixed by the receiving company, and collected by the delivering company, and divided *pro rata* among them. The defendant received goods at Cincinnati consigned to New York, and gave a bill of lading therefor, stating therein that the goods were to be transported by its line to its terminus, and then delivered to the connecting line; it being further agreed that in case of loss during transportation, the company alone in whose custody they were at the time of the loss should be held liable. *Held*, that defendant contracted to carry the goods to Dayton only, and was not responsible for loss happening on the connecting line: *Cincinnati etc. R. R. Co. v. Pontius*, 19 Ohio St. 221; 2 Am. Rep. 391.

§ 1866. Presumption from Receipt of Goods Marked beyond Route — The English Rule — The American Rule.

—In England, a carrier who receives goods directed to a place beyond his own route, by the very act of acceptance engages to deliver them at their destination, wherever that may be, and is liable as such to the place of ultimate delivery.¹ He, and not the connecting carrier, must be sued, even where the loss takes place beyond his own line.² This rule is followed in Georgia,³ Alabama,⁴ Illinois, Tennessee, Iowa, Florida, and New Hampshire, except that in the last six states the action may also be brought against that carrier in whose custody the goods were when they were lost or damaged.⁵ But in the other states it is

¹ *Muschamp v. R. R. Co.*, 8 Mees. & W. 421; *Collins v. R. R. Co.*, 11 Ex. 800; *Coxon v. R. R. Co.*, 5 Hurl. & N. 274.

² *Id.*; *Scothorn v. R. R. Co.*, 8 Ex. 341; *Lawson on Contracts of Carriers*, sec. 239.

³ *Mosher v. Southern Express Co.*,

38 Ga. 37; *Cohen v. Southern Express Co.*, 45 Ga. 148; *Southern Express Co. v. Shea*, 38 Ga. 519; *Falvey v. R. R. Co.*, 76 Ga. 577; 2 Am. St. Rep. 58.

⁴ *Mobile etc. R. R. Co. v. Copeland*, 63 Ala. 219; 35 Am. Rep. 219.

⁵ *Illinois Central R. R. Co. v. Frankenberg*, 54 Ill. 88; 5 Am. Rep. 92;

regarded as the American doctrine that where a carrier receives goods marked for a particular destination, beyond the route for which he professes to carry, and beyond the terminus of his road, he is only bound to transport and deliver them according to the established usage of his business, and is not liable for losses beyond his own line.¹

§ 1867. **Construction of Contracts as to Liability beyond Own Route.**—But by the terms of the contract the first carrier may be liable for the defaults of connecting carriers.² So the facts of the case may raise an inference that the contract is one for through carriage; as the

Erie R. R. Co. v. Wilcox, 84 Ill. 239; 25 Am. Rep. 451; *Illinois Central R. Co. v. Copeland*, 24 Ill. 332; 76 Am. Dec. 749; *Chicago etc. R. R. Co. v. People*, 56 Ill. 365; 8 Am. Rep. 690; *U. S. Express Co. v. Haines*, 67 Ill. 137; *Milwaukee etc. R. R. Co. v. Smith*, 84 Ill. 239; *Field v. R. R. Co.*, 71 Ill. 458; *Illinois Central R. R. Co. v. Johnson*, 34 Ill. 389; *Adams Express Co. v. Wilson*, 81 Ill. 339; *Illinois Central R. R. Co. v. Cowles*, 32 Ill. 116; *Chicago etc. R. R. Co. v. Montfort*, 60 Ill. 175; *Louisville etc. R. R. Co. v. Campbell*, 7 Heisk. 253; *Western etc. R. R. Co. v. McElwee*, 6 Heisk. 208; *Carter v. Hough*, 4 Sneed, 203; *East Tennessee R. R. Co. v. Nelson*, 1 Cold. 272; *East Tennessee R. R. Co. v. Rogers*, 6 Heisk. 143; 19 Am. Rep. 589; *Mulligan v. R. R. Co.*, 36 Iowa, 181; 14 Am. Rep. 514; *Angle v. R. R. Co.*, 9 Iowa, 403; *Bennett v. Filyaw*, 1 Fla. 403; *Lock Co. v. R. R. Co.*, 48 N. H. 339; *Gray v. Jackson*, 51 N. H. 9; 12 Am. Rep. 1.

¹ *Burroughs v. R. R. Co.*, 100 Mass. 26; 1 Am. Rep. 78; *Babcock v. R. R. Co.*, 49 N. Y. 491; *Root v. R. R. Co.*, 45 N. Y. 524; *Reed v. United States Enpress Co.*, 48 N. Y. 462; 7 Am. Rep. 561; *Jenneson v. R. R. Co.*, 4 Am. Law Reg. 235; *Farmers' etc. Bank v. Champlain Trans. Co.*, 16 Vt. 52; 42 Am. Dec. 491; *Cutts v. Brainerd*, 42 Vt. 566; 1 Am. Rep. 353; *Condict v. R. R. Co.*, 59 N. Y. 500; *St. John v. Van Santvoord*, 25 Wend. 660; 6 Hill, 157; *Converse v. R. R. Co.*, 33 Conn. 166; *Lamb v. R. R. Co.*, 46 N. Y. 271;

7 Am. Rep. 327; *Darling v. R. R. Co.*, 11 Allen, 295; *Phillips v. R. R. Co.*, 78 N. C. 294; *Hood v. R. R. Co.*, 22 Conn. 502; *R. R. Co. v. Pratt*, 22 Wall. 123; *R. R. Co. v. Mfg. Co.*, 16 Wall. 318; *Crawford v. Southern R. Association*, 51 Miss. 222; 24 Am. Rep. 626; *Camden etc. R. R. Co. v. Forsyth*, 61 Pa. St. 81; *Irish v. R. R. Co.*, 19 Minn. 376; 18 Am. Rep. 340; *Elmore v. R. R. Co.*, 23 Conn. 457; 63 Am. Dec. 143; *Baltimore etc. R. R. Co. v. Schumacher*, 29 Md. 168; 96 Am. Dec. 510; *McMillan v. R. R. Co.*, 16 Mich. 79; 93 Am. Dec. 208; *Brintnall v. R. R. Co.*, 32 Vt. 665; *Inhabitants v. Hall*, 61 Me. 517; *Skinner v. Hall*, 60 Me. 477; *Perkins v. R. R. Co.*, 47 Me. 573; 74 Am. Dec. 507; *Nutting v. R. R. Co.*, 1 Gray, 502; *Gray v. Jackson*, 51 N. H. 9; 12 Am. Rep. 1; *Grover and Baker Mach. Co. v. R. R. Co.*, 70 Mo. 672; 35 Am. Rep. 444; *Hadd v. U. S. Express Co.*, 52 Vt. 335; 36 Am. Rep. 747; *Stewart v. R. R. Co.*, 10 Rep. 618; 1 McCrary, 312; *Knight v. R. R. Co.*, 13 R. I. 572; 43 Am. Rep. 46; *Detroit etc. R. R. Co. v. McKenzie*, 43 Mich. 609; *Knott v. R. R. Co.*, 98 N. C. 73; 2 Am. St. Rep. 321; *St. Louis etc. R. R. Co. v. Weakly*, 50 Ark. 379; 7 Am. St. Rep. 104.

² *Lawson on Contracts of Carriers*, sec. 242; *Kyle v. R. R. Co.*, 10 Rich. 382; 70 Am. Dec. 231; *Perkins v. R. R. Co.*, 47 Me. 573; 74 Am. Dec. 507; *Southwestern R. R. Co. v. Thornton*, 71 Ga. 61.

receipt by the first carrier of payment for the entire distance.¹ Where there exists a partnership between a number of carriers, by which they are to divide the profits and losses of the entire traffic, any one of them may be made liable for a loss or damage occurring on any part of the associated line.² Where connecting railroad corporations through their agent contract to carry goods, the liability is ordinarily joint, and this, notwithstanding clauses in the bill of lading from which it might with plausibility be argued that it was intended that the liability should be several.³ Where owners of several steamboats do not use them in common, nor share profit and loss, but let them be advertised as forming a line

¹ *Weed v. R. R. Co.*, 19 Wend. 534; *R. R. Co. v. Androsceggins Mills*, 22 Wall. 594; *Berg v. Steam. Co.*, 5 Daly, 394; *Candee v. R. R. Co.*, 21 Wis. 582; 94 Am. Dec. 566; *St. John v. Express Co.*, 1 Woods, 612.

² Where one railroad company agrees with another for a complete system of interchange of traffic from all the stations of one company, and beyond its limits to all parts of the other company, and beyond its limits with through-tickets, through-rates, and invoices, and interchange of stock at junctions, the stock of the two companies to be treated as one stock, and that they should assist each other in every way as if the whole concerns of the two companies were amalgamated, either company will be held as the agent of the other for making contracts as to carriage of freight over its road: *Gill v. R. R. Co.*, L. R. 8 Q. B. 136. If two express companies running as carriers over one continuous route, and dividing profits, employ one messenger who has the goods in charge during the whole transit, and who, by agreement between the companies, is regarded as the agent of one company only up to a certain point on the line, and as the agent of the other company from thence to the end of the line, it would seem that the first company could not relieve itself from responsibility by giving a receipt to the consignor stipulating that the liability of the company should cease

on delivery of the goods receipted for to another carrier, claiming that the two companies were different, and that the messenger ceased to be the agent of the first carrier at the point mentioned, and became the agent of the second company from that time, and that the loss occurred beyond the point on the line thus agreed upon as being the dividing point between the two companies: *Schutter v. Adams Express Co.*, 5 Mo. App. 316, and see *Wilson v. R. R. Co.*, 21 Cratt. 654; *Carter v. Peck*, 4 Sneed, 203; 67 Am. Dec. 604; *Montgomery etc. R. R. Co. v. Moore*, 51 Ala. 394; *Ellsworth v. Tartt*, 26 Ala. 733; 62 Am. Dec. 749; *Briggs v. Vanderbilt*, 19 Barb. 222; *Gass v. R. R. Co.*, 99 Mass. 220; 96 Am. Dec. 742; *Weyland v. Elkins*, Holt N. P. 227; 1 Stark. 272; *Laugher v. Painter*, 5 Barn. & C. 547; *Cobb v. Abbot*, 14 Pick. 289; *Pattison v. Blanchard*, 5 N. Y. 186; *Converse v. Norwich etc. Trans. Co.*, 33 Conn. 166; *Cincinnati etc. R. R. Co. v. Spratt*, 2 Duvall, 4; *Hart v. R. R. Co.*, 8 N. Y. 37; 59 Am. Dec. 447; *Bostwick v. Champion*, 11 Wend. 571; *Champion v. Bostwick*, 18 Wend. 175; 31 Am. Dec. 376; *Fromont v. Coupland*, 2 Bing. 170; *Nashua Lock Co. v. R. R. Co.*, 48 N. H. 339; 2 Am. Rep. 242; *Barter v. Wheeler*, 49 N. H. 9; 6 Am. Rep. 434.

³ *Milne v. Douglas*, 4 McCrary, 368.

under a common name, and employ a common agent, who transacts business for all alike, no boat or its owner is liable for the contracts or torts of the others. A bill of lading issued by one boat in her own name is notice to the shipper that she alone is bound.¹ An association of carriers to form a continuous line for transportation of freight and proportionate division of receipts does not constitute them partners nor jointly liable.²

ILLUSTRATIONS.—By a written contract between an express company and a railroad, the latter agreed to “receive, load and unload, deliver, and way-bill” all freight sent by the former; and other railroads, forming a continuous line with the first, made similar agreements, each to be responsible for all loss or damage to the goods while in its possession, and the last road to deduct its charges and account to the preceding, and so on to the first. *Held*, that the different railroads did not become partners, and that each was liable only for its own negligence: *St. Louis Ins. Co. v. R. R. Co.*, 104 U. S. 146. A bill of lading executed at New York described the goods as marked “D. W. Mott & Bros., Memphis, Tenn., to be transported to Philadelphia, and there delivered to the Penn. R. R., all rail to Cincinnati, Ohio.” *Held*, that, in the absence of any indication to the contrary, the ultimate destination was Memphis, and that the agents of the Pennsylvania railroad, who at Cincinnati had forwarded them thither by steamboat, were not liable for their loss: *Brown v. Mott*, 22 Ohio St. 149. Goods, in the bill of lading, were marked, “To be forwarded to East St. Louis station.” Under the heading “Marks and destination” was written, after the consignee’s name, “St. Louis, Mo.” *Held*, in an action for their loss between East St. Louis and St. Louis, that the undertaking was to carry to St. Louis: *Wabash etc. R. R. Co. v. Jaggerman*, 115 Ill. 407. Plaintiff delivered to defendant at New York goods addressed to the consignee at Bloomington, Illinois. The defendant gave a bill of lading acknowledging the receipt of the goods thus addressed, but specifying that they were to be forwarded to “Chicago depot only.” It was proved that there was no other agreement, and that the plaintiff was in the habit of shipping goods in like manner, and receiving similar bills of lading. *Held*, that the presumption of an agreement to deliver the goods at Bloomington, raised by the acceptance of the goods so marked, was overcome by the express contract in the bill of

¹ *Citizens’ Insurance Co. v. Kountz*
Line, 4 Woods, 268.

² *Hot Springs R. R. Co. v. Trippe*,
42 Ark. 465; 48 Am. Rep. 65.

lading: *Merchants' etc. Trans. Co. v. Moore*, 88 Ill. 136; 30 Am. Rep. 541. Several railroad corporations having connecting lines between Boston and Chicago formed an association, under a specified name, for the transportation of goods between those places. An agent was appointed in Boston, with authority to give bills of lading. A bill of lading for the carriage of goods from Boston to Colorado mentioned only the name of the association. *Held*, that the corporations were liable jointly and severally for the loss of goods received by their agent: *Block v. R. R. Co.*, 139 Mass. 308. The St. Louis, Kansas City, and Northern Railroad Company, owning and operating a line of railroad from Kansas City to Mexico, and there connecting with another road running to Chicago, made a contract to "forward" certain cattle from Kansas City to Chicago, stipulating therein that the shipper should "take care of the cattle while on the trip," and that "it and connecting lines over which such freight might pass should not be responsible for any loss, damage, or injury which might happen in loading, forwarding, by suffocation, . . . or by any other cause, except gross negligence," and that "it and such connecting lines should be deemed merely forwarders, and not common carriers, and only liable for such loss . . . as might be gross negligence only, and not otherwise." *Held*, that said St. Louis, Kansas City, and Northern Railroad was liable as a carrier for the transportation the entire distance, and was responsible for any loss or injury occurring from ordinary negligence, whether such negligence was on its own or a connecting line: *St. Louis etc. R. R. Co. v. Piper*, 13 Kan. 505. A receipt from a railroad company, "Received from Paris Myrick, in apparent good order, consigned order Paris Myrick (notify J. & W. Blaker, Philadelphia, Pa.), 202 cattle, . . . marked and described as above, . . . for transportation by the Michigan Central R. Co. to the warehouse at —, William Geagan, agent," with a notice calling attention to the rule on the back that "goods consigned to any place off the company's line of road . . . will be sent forward by a carrier, when there are such, in the usual manner, the company acting, for the purpose of delivery to such carrier, as the agent of the consignor or consignee, and not as carrier." *Held*, not to render the company liable as carrier beyond its own line: *Myrick v. R. R. Co.*, 107 U. S. 102. In an action against a railroad company to recover for the loss of a box of goods, it appeared that the box, marked to the plaintiff at Washington, D. C., was delivered to the company at Peoria, Illinois, for which a receipt was given, headed "Through-freight contract," but stipulating that their responsibility should cease at the terminus of their road. Among the conditions attached to the bill of lading was the following: "The responsibility of

this company as a common carrier, under this bill of lading, . . . to terminate when the goods are unloaded from the cars at the place of delivery." The evidence showed that through-freight was never unloaded or delivered at the terminus of the company's road, but forwarded to its place of destination in the cars in which it was received. *Held*, that plaintiff could recover, whether the loss occurred on the company's road or beyond the terminus: *Toledo etc. R. R. Co. v. Merriman*, 52 Ill. 123; 4 Am. Rep. 590. The plaintiff delivered a note to the agent of the American Express Company at Brockport, in New York, with directions to take it to San Francisco, where the maker resided, present it for payment, and in case of non-payment to bring a suit at once and collect it, he supposing at the time that the line of that company extended to San Francisco. Such line did not extend to San Francisco, but only to New York. At the latter place the note was delivered to another express company (Wells, Fargo, & Co.'s), to be forwarded by it to the place of destination. *Held*, that this was not a mere contract to forward, but to carry the note to San Francisco, and present it for payment, and if not paid to have it sued at once; that Wells, Fargo, & Co.'s Express Company, on receiving the note, became the agent of the American Express Company, and the latter company was liable to the plaintiff for all damages resulting from the negligence of Wells, Fargo, & Co.'s Express Company in making collection according to the directions: *Palmer v. Holland*, 51 N. Y. 416; 10 Am. Rep. 616. A railroad company received at Pittsburgh goods to be transported to Wisconsin, guaranteeing on its behalf, and in behalf of the other companies and carriers constituting the entire route, that the through-freight should not exceed a certain sum, but expressly restricting its liability as carriers to its own route. The connecting companies, acting independently of each other, and having no knowledge of the guaranty, charged their regular rates, each paying to the previous carrier, according to the established custom, all back charges. The goods were transported to Hudson, and delivered to the defendant as warehouseman, by whom the back charges for transportation were paid, the sum exceeding that specified in the guaranty. The plaintiff tendered to defendant the amount due according to the guaranty, and demanded the possession of the goods, which was refused. In an action to recover possession, *held*, that the guaranty was not a "through-contract"; that each succeeding carrier after the first had a right to charge its usual rates, and to pay the usual back charges, and that the defendant had a lien upon the goods for the full amount of the back charges paid by him: *Schneider v. Evans*, 25 Wis. 241; 3 Am. Rep. 56. Three common carriers run lines of steamboat and railroad,

each covering a part, only, of a certain route, but which together formed a continuous line of through-transportation of goods over that route. A rate of freight fixed by mutual agreement was charged for the through-service, collected by the carrier whose line included the end of the route, and divided between the three in an agreed proportion. *Held*, that no partnership nor joint liability to shippers of goods was created by these facts: *Gass v. R. R. Co.*, 99 Mass. 220; 96 Am. Dec. 742.

§ 1868. Rights and Liabilities of Connecting Carriers — When Connecting Carriers may and may not have Benefit of Exemptions in Contract with First Carrier. —

A bill of lading may provide that its stipulations shall extend to and inure to the benefit of each and every company or person to whom the carrier issuing it may intrust or deliver the property, in which case its terms will define and limit the liability of every succeeding carrier.¹ And in the absence of an express provision to this effect, a connecting carrier who receives goods from another to be forwarded to their destination is entitled to the exceptions which the latter has made with the shipper, in case the contract with the original carrier was for the entire route.² A consignee by a line of connecting carriers may maintain an action for their loss against the carrier in whose hands the loss happens.³ Where a railroad company receives loaded cars from another road for transportation, it is liable as a common carrier in case they are destroyed *en route* by fire.⁴ The intermediate one of several successive carriers, whatever his liability may be to the carrier to whom the goods were delivered by the shipper, is not liable to the shipper for the negligence or overcharge of carriers subsequent to itself, the contract

¹ *U. S. Express Co. v. Harris*, 51 Ind. 127; *Levy v. South. Express Co.*, 4 S. C. 234; *Whitworth v. R. R. Co.*, 45 N. Y. Sup. Ct. 602.

² *Maghee v. R. R. Co.*, 45 N. Y. 514; 6 Am. Rep. 125; *Manhattan Oil Co. v. R. R. Co.*, 54 N. Y. 197; *Lamb v. R. R. Co.*, 2 Daly, 454; 46 N. Y. 271; 7 Am. Rep. 327; *R. R. Co. v. Andros-*

coggin Mills, 22 Wall. 594; *Halliday v. R. R. Co.*, 74 Mo. 159; 41 Am. Rep. 309; *St. Louis etc. R. R. Co. v. Weakly*, 50 Ark. 104; 7 Am. St. Rep. 104.

³ *Packard v. Taylor*, 35 Ark. 402; 37 Am. Rep. 37.

⁴ *Missouri Pacific R. R. Co. v. R. R. Co.*, 25 Fed. Rep. 317.

for carriage having been made by the shipper with the initial carrier.¹ The last of several common carriers forming a connecting line cannot be held for the negligent loss of goods by a prior carrier of the same line.² In the absence of any contract between the owners of two connecting railroads, one cannot maintain an action against the other for failing to ship cotton over the plaintiff's road which the other road had transported to the point of connection; and the fact that the owners of the cotton had contracted with the plaintiff to ship the cotton over its road does not give it a right of action against the defendant.³ A carrier receiving goods from another carrier, and discovering that the articles are such that the rates are higher than those named in the bill of lading issued by the first carrier, may transport them to their destination, and collect the increased rate.⁴ Where a railroad company receives goods from a connecting road to be transported to the owners, it cannot justify their detention on the ground that, by its regulations, goods so received are not to be forwarded until the receipt of a bill of back charges, and that no such bill accompanied the goods.⁵ When goods are delivered by one carrier to another, the liability of the second commences only when that of the first terminates. If there be no relation of partnership between them, one cannot receive and accept the goods for transportation until the other has completed the delivery of them to him, and discharged himself from the custody or control of them. So where a fire breaks out during the delivery of goods, and destroys them all, the second carrier is at most liable only for such goods as he had actually received before the fire for transportation.⁶

To none of the exceptions contained in the contract

¹ Hill v. R. R. Co., 60 Iowa, 196.

² Lowenburg v. Jones, 56 Miss. 688; 31 Am. Rep. 379.

³ Wilmington etc. R. R. Co. v. R. R. Co., 9 S. C. 325; 30 Am. Rep. 23.

⁴ Sumner v. R. R. Co., 7 Baxt. 345; 32 Am. Rep. 565.

⁵ Dunham v. R. R. Co., 70 Me. 164; 35 Am. Rep. 314.

⁶ Gass v. R. R. Co., 90 Mass. 220; 96 Am. Dec. 743.

between the first carrier and the shipper which are intended solely for the protection of the former has the connecting carrier any claim.¹ When the carrier has simply contracted to transport over his own line, and then deliver to another, the latter is not entitled to the benefit of the first contract, nor has the first carrier any authority to enter into a special contract on behalf of the owner with the connecting carrier limiting his common-law liability.² If a bill of lading specifies certain railroads over which goods are to be carried, and the goods are sent a part of the way by a road not thus mentioned, such road will not be entitled to its exceptions.³ Where goods are shipped on a through-line under a contract with the first company, and they are lost on a second and connecting line, the contract of the company receiving the goods will not be modified by any rules and regulations of the second company, though such rules may have been publicly posted in the station-house of the receiving company, where the shipper had often been.⁴

ILLUSTRATIONS. — The owner of goods about to arrive at a depot in C. wished them carried from thence to R., and an express company, by their agent at C., undertook to remove and deposit such goods in their warehouse as soon as possible on the arrival of the goods in C., and to carry them from C. to R.,

¹ *Bancroft v. Merchants' Dispatch Trans. Co.*, 47 Iowa, 262; 29 Am. Rep. 482.

² *Babcock v. R. R. Co.*, 49 N. Y. 491; *Martin v. American Ex. Co.*, 19 Wis. 336; *Camden etc. R. R. Co. v. Forsyth*, 61 Pa. St. 81; *Merchants' Dispatch Trans. Co. v. Bolles*, 80 Ill. 473; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616. But see *Lamb v. R. R. Co.*, 46 N. Y. 271; 7 Am. Rep. 327; *Hinkley v. R. R. Co.*, 3 Thomp. & C. 281. In *Babcock v. R. R. Co.*, 49 N. Y. 491, the court say: "Carriers who are not named in the contract for the carriage of goods, and who are not formal parties to it, may, under certain circumstances, have the benefit of it. Such is the case when a contract is made by one of several carriers upon

connecting lines or routes for the carriage of property over the several routes for an agreed price by authority, express or implied, of all the carriers. So, too, in the absence of any authority in advance, or any usage from which an authority might be inferred, a contract by one carrier for the transportation of goods over his own and connecting lines, adopted and acted upon by the other carriers, would inure to the benefit of all thus ratifying it, and performing service under it. But in such and the like cases the contract has respect to and provides for the services of the carriers upon the connecting routes."

³ *Merchants' Dispatch Trans. Co. v. Bolles*, 80 Ill. 473.

⁴ *R. R. Co. v. Pratt*, 22 Wall. 123.

within a reasonable time, for a certain sum, which was paid. The goods arrived at C., and the express company received notice of their arrival. *Held*, that the goods were delivered to the company as common carriers: *South. Exp. Co. v. McVeigh*, 20 Gratt. 264. Goods were shipped under a bill of lading given by the first of several connecting lines of carriers, with a stipulation against liability for loss by fire, but not guaranteeing a through-rate of freight. *Held*, that the stipulation did not inure to the benefit of a carrier beyond the place to which the rate of freight was guaranteed: *Taylor v. R. R. Co.*, 39 Ark. 148. W. shipped cotton at Memphis for Liverpool, under through-contracts with certain dispatch companies to carry to Jersey City, and with certain steamboat companies. Under the bills of lading the companies "and their connections" were not to be liable for loss or damage by fire to the cotton while in transit or deposit, or places of transshipment, or at depots or landings at points of delivery. *Held*, that the E. railroad company, which was not a member of the dispatch companies, and in whose freight-house at Jersey City part of the cotton was, without any negligence of the company, destroyed by fire, was entitled to the benefit of said restrictive clauses: *Whitworth v. R. R. Co.*, 87 N. Y. 413. A steamboat received freight from railroad company and delivered it to consignees, and collected the freight charges due itself and also due the railroad company, under a contract to deliver the freight entered into between the railroad company and the officers of the boat. *Held*, that the boat was liable for the amounts so collected: *Chicago etc. R. R. Co. v. The Woodsides*, 10 Iowa, 465; 77 Am. Dec. 125.

CHAPTER XCIV.

CARRIERS OF PASSENGERS.

- § 1869. Who are common carriers of passengers.
- § 1870. Carrier bound to carry all.
- § 1871. Exceptions — Persons previously ejected for cause.
- § 1872. Persons for whom he has no room.
- § 1873. Thieves—Drunken and disorderly persons.
- § 1874. Objects not carriage — Conflicting interests.
- § 1875. Wrong vehicles or wrong time.
- § 1876. Other cases.
- § 1877. Waiver by receiving passenger.
- § 1878. Who are passengers — Persons on conveyance by fraud.
- § 1879. Persons carrying on business on conveyances.
- § 1880. Employees of carrier, when passengers.
- § 1881. Persons temporarily absent from conveyance.
- § 1882. Persons meeting or leaving passengers.
- § 1883. Persons riding free.
- § 1884. At what time relation commences and ends.
- § 1885. Status of a ticket.
- § 1886. Duty to run trains according to time-tables — Delay.
- § 1887. Special contracts with passengers — Contract to carry to particular place.
- § 1888. Limited tickets.
- § 1889. Continuous passage.
- § 1890. Passenger entitled to seat.
- § 1891. Must give time for refreshment.
- § 1892. Name of station must be announced.
- § 1893. Invitation to alight, express or implied.
- § 1894. Time must be given to alight or get aboard.
- § 1895. Car overshooting or falling short of platform.
- § 1896. Carrying passenger beyond destination.
- § 1897. Carrier may establish reasonable regulations — Right to eject passenger.
- § 1898. No right to imprison passenger.
- § 1899. At what place passenger may be ejected.
- § 1900. Excessive force must not be used.
- § 1901. Right of passenger to resist ejection.
- § 1902. Discrimination by carrier — As to sex, color, etc.
- § 1903. Passenger must have ticket, or pay fare.
- § 1904. Must purchase ticket before entering car.
- § 1905. Passenger must show ticket.
- § 1906. Power to eject drunken, disorderly, and dangerous passengers.
- § 1907. Carrier of passengers not an insurer.

- § 1908. Presumption of negligence from accident.
- § 1909. Duty as to vehicles and appliances.
- § 1910. Duty as to roadway.
- § 1911. Negligence of manufacturer or contractor.
- § 1912. Duty of carrier as to platforms, stations, etc.
- § 1913. To what persons this duty due.
- § 1914. Regulations as to admission to stations.
- § 1915. Passengers upon freight trains.
- § 1916. Injuries to passengers on tracks.
- § 1917. Liability of carrier for assault on passenger by fellow-passenger.
- § 1918. Carrier cannot release himself from liability for negligence.
- § 1919. Conflict as to free passengers.
- § 1920. Who not gratuitous passengers.
- § 1921. Conditions limiting liability in tickets.
- § 1922. Contributory negligence of passenger.
- § 1923. Arm or head out of window.
- § 1924. Riding in dangerous place— On platform.
- § 1925. Jumping from or upon train while in motion.
- § 1926. Exception— Escaping threatened danger.
- § 1927. Other instances of negligence.
- § 1928. Duty of carrier as to persons under physical or mental disability.
- § 1929. Imputed negligence— Negligence of person in charge of infant.
- § 1930. Negligence of carrier.
- § 1931. Concurrent negligence of carrier and third person.
- § 1932. Liability of carrier for acts of servant within scope of employment.
- § 1933. And for willful and malicious acts of servants.
- § 1934. Liability of carrier using another's line or means of transportation.
- § 1935. Liability for acts of another carrier using its line or appliances.
- § 1936. Connecting lines— Liability of first carrier.
- § 1937. Liability of carrier on whose line loss occurred.
- § 1938. Right to restrict liability to his own line.
- § 1939. Duties and liabilities of carriers by stage.
- § 1940. Street-car companies.
- § 1941. Carriers by water.
- § 1942. Receiving and landing passengers.
- § 1943. Authority of master over passengers.
- § 1944. Carriers by water— Duty as to treatment of passengers.
- § 1945. Duty as to accommodation of passengers.
- § 1946. United States statutes as to carriers by water.

§ 1869. Who are Common Carriers of Passengers.—

“A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage. To constitute one a common carrier, it is necessary that he should hold himself out as such. This

may be done not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment. Railroad companies, the owners of ships, steamboats, ferries, omnibuses, street-cars, and stage-coaches, are usually common carriers of passengers.¹ The common carrier may transport his passengers only within the limits of a town; as the owner of an omnibus or other vehicle plying between a railroad depot and a hotel,² or street-cars running upon a line whose terminal points are within the limits of the same city; or he may carry between adjacent or remote cities in the same country;³ or the place to which he holds himself out to carry his passengers may be in a foreign country.⁴ The passenger's destination is immaterial in deciding whether the carrier is a common carrier of passengers, or whether he is a private or special carrier. The carrier may be both a common carrier of passengers and a common carrier of goods by the same conveyance and at the same time. And he may also make reasonable rules by which he carries goods in one conveyance and passengers in another, in which case he is a common carrier of passengers or of goods only in the respective conveyances which he has assigned to those purposes. Thus in the case of railroad companies, if as a general rule they confine the transportation of goods to what are called freight trains, and the conveyance of passengers to regular passenger trains, they are common carriers of goods as to the former, and of passengers as to the latter. Yet they may by usage or practice become common carriers of goods on passenger trains, and common carriers of passengers on

¹ *Nashville etc. R. R. Co. v. Messino*, 1 Sneed, 220; *Hanley v. R. R. Co.*, 1 Edm. Sel. Cas. 359; *Peixotti v. McLaughlin*, 1 Strob. 468; 47 Am. Dec. 563; *Slimmer v. Merry*, 23 Iowa, 90; *Richards v. Westcott*, 2 Bosw. 589; *Jencks v. Coleman*, 2 Sum. 221; *Bretherton v. Wood*, 3 Brod. & B. 54; 9 Price, 408; *Hollister v. Nowlen*, 19

Wend. 234; 32 Am. Dec. 455; *Bennett v. Dutton*, 10 N. H. 481; *Lovett v. Hobbs*, 2 Show. 127.

² *Parmelee v. Lowitz*, 74 Ill. 116; 24 Am. Rep. 276.

³ *Richards v. Westcott*, 2 Bosw. 589.

⁴ *Benett v. Peninsular etc. Steamboat Co.*, 6 Com. B. 775.

freight trains, although these trains may be used mainly for the purposes for which they were originally intended. Thus if they are in the habit of carrying passengers for hire, such as emigrants or drovers, or any other class of persons, upon freight trains, they become common carriers of that class of passengers by freight trains,¹ and thereby assume the liabilities of common carriers indifferently both of persons or property by such trains."² A contractor building a railroad who runs a construction train for his workmen is not a common carrier of passengers.³ A person on a carrier's conveyance is presumed to be lawfully there as a passenger.⁴

§ 1870. Carrier Bound to Carry All.—A common carrier is bound to carry all persons who apply for carriage, unless there is a legal excuse for their rejection.⁵ As to what is a legal excuse, see the next sections.

ILLUSTRATIONS.—Defendant was a proprietor and the driver of a stage-coach running daily between Amherst and Nashua, which connected at the latter place with another coach running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst and onward to Francestown. A third person ran a coach to and from Nashua and Lowell; and the defendant agreed with the proprietor of the coach connecting with his line that he would not receive passengers who came from Lowell to Nashua in the coach of such third person on the same day they applied for a passage to places above Nashua. The plaintiff was notified at Lowell of this arrangement, but, notwithstanding, came from Lowell to Nashua in that coach, and then demanded a passage

¹ *Flinn v. R. R. Co.*, 1 *Houst.* 469; *McGee v. R. R. Co.*, 92 *Mo.* 208; 1 *Am. St. Rep.* 706.

² *Thompson on Carriers of Passengers*, 26.

³ *Shoemaker v. Kingsbury*, 12 *Wall.* 369. See *Nashville etc. R. R. Co. v. Messino*, 1 *Sneed*, 220.

⁴ *Pennsylvania R. R. Co. v. Books*, 57 *Pa. St.* 339; 98 *Am. Dec.* 229; *Creed v. R. R. Co.*, 86 *Pa. St.* 139; 27 *Am. Rep.* 693.

⁵ *Bennett v. Dutton*, 10 *N. H.* 481; *Wheeler v. R. R. Co.*, 31 *Cal.* 46; 89

Am. Dec. 147; *Westchester R. R. Co. v. Miles*, 55 *Pa. St.* 209; 93 *Am. Dec.* 744; *Stokes v. Saltonstall*, 13 *Pet.* 181; *Day v. Owen*, 5 *Mich.* 520; 72 *Am. Dec.* 62; *Pleasants v. R. R. Co.*, 34 *Cal.* 586; *Tarbell v. R. R. Co.*, 34 *Cal.* 616; *Hannibal etc. R. R. Co. v. Swift*, 12 *Wall.* 263; *Sanford v. R. R. Co.*, 2 *Phila.* 107; *Benett v. Steam Co.*, 6 *Com. B.* 775; *Hollister v. Nowlen*, 19 *Wend.* 234; 32 *Am. Dec.* 455. To refuse wrongfully to carry a passenger is an actionable tort: *Lake Erie etc. R. R. Co. v. Acres*, 108 *Ind.* 548.

in the defendant's coach to Amherst, tendering the regular fare. *Held*, that the defendant was bound to receive him: *Bennett v. Dutton*, 10 N. H. 481. The owner of a commutation-ticket, not having it with him one day, refused to pay fare. *Held*, that this did not justify the railroad company in afterwards refusing to sell him commutation tickets: *State v. R. R. Co.*, 48 N. J. L. 55; 57 Am. Rep. 543.

§ 1871. **Exceptions — Persons Previously Ejected for Cause.** — Thus if a person refuses to pay his fare, he may be ejected, and he cannot by immediately after tendering his fare claim a right to continue his journey.¹

§ 1872. **Persons for Whom He has No Room.** — A carrier of passengers is bound to furnish reasonable accommodations. It is no answer to an action for refusing to carry that the carrier had not room for the passenger; for this is exactly what the carrier is bound to provide.² Nevertheless, if after doing his best to provide accommodations for all, an extraordinary and unprecedented number of passengers should present themselves beyond his means to furnish carriage, he might justify his refusal to carry upon this ground.³ A railroad company is not bound to receive an unusual number of passengers beyond what it may be bound to provide with safe accommodations; but if it does receive them without condition or notice of its inability to provide for their safety, it assumes all the obligations usually incumbent upon a carrier of passengers.⁴ Where a railroad company has issued a ticket stipulating to run trains in a certain manner within a certain time, it cannot excuse itself from transporting

¹ *O'Brien v. R. R. Co.*, 15 Gray, 20; 77 Am. Dec. 347; *Stone v. R. R. Co.*, 47 Iowa, 82; 29 Am. Rep. 458. But see *O'Brien v. R. R. Co.*, 80 N. Y. 236.

² *Quinn v. R. R. Co.*, 51 Ill. 495. In *Hawcroft v. R. R. Co.*, 21 L. J. Q. B. 178, it was said that a railroad company are not excused from carrying passengers according to their contract upon the ground that

there is no room for them in the train; but in order to avail themselves of this answer, they should make their contract conditional upon there being room.

³ *Chicago etc. R. R. Co. v. Carroll*, 5 Bradw. App. 200; *The Pacific*, 1 Blatchf. 569.

⁴ *Evansville etc. R. R. Co. v. Duncan*, 28 Ind. 441; 92 Am. Dec. 323.

a purchaser of such a ticket at the time he applies for passage within the terms of the ticket, or at a reasonable time thereafter, on the ground that there is no room for him on the train.¹ If a vessel is full, or so full that those who have gone on board while there was room would be incommoded by the addition of other passengers, the carrier may decline to receive them. Passengers who have contracted for carriage, and upon going aboard find that the vessel is so full as to seriously inconvenience them, may recover back the passage-money already paid, and any damages they may have suffered by reason of preparing themselves for a voyage upon that vessel, or by reason of having to wait for another.²

§ 1873. Thieves—Drunken and Disorderly Persons.—He may refuse to carry a suspected thief;³ a gambler who intends to carry on his trade on the train;⁴ a person so gross in his behavior and obscene in his language as to be a public nuisance;⁵ a drunken person;⁶ or one whose person or clothing is filthy and disgusting, or who is infected with vermin or with a contagious disease.⁷ But he cannot refuse to carry a woman because she is a prostitute, unless her conduct is offensive.⁸

§ 1874. Objects not Carriage—Interests Conflicting with Those of Carrier.—He may refuse a person whose object in coming on his vehicle is not carriage, but trade;⁹ or one whose object is to interfere with the interests of the carrier; as, for instance, the agent of a rival line who intends to solicit custom.¹⁰

¹ *Hawcroft v. R. R. Co.*, 16 Jur. 196.

² *The Pacific*, 1 Blatchf. 569.

³ *Jencks v. Coleman*, 2 Sum. 221.

⁴ *Thurston v. R. R. Co.*, 4 Dill. 321.

⁵ *Jencks v. Coleman*, 2 Sum. 221.

⁶ *Jencks v. Coleman*, 2 Sum. 221; *Vinton v. R. R. Co.*, 11 Allen, 304; 87 Am. Dec. 715; *Pittsburg etc. R. R. Co. v. Pillow*, 76 Pa. St. 510; 18 Am. Rep. 424; *Railroad Co. v. Hinds*, 53

Pa. St. 512; *Flint v. R. R. Co.*, 34 Conn. 554; *Pittsburg etc. R. R. Co. v. Vandyne*, 57 Ind. 576; 26 Am. Rep. 68.

⁷ *Walsh v. R. R. Co.*, 42 Wis. 23; 24 Am. Rep. 376; *Thurston v. R. R. Co.*, 4 Dill. 321.

⁸ *Brown v. R. R. Co.*, 7 Fed. Rep. 51.

⁹ *The Pacific*, 1 Blatchf. 569.

¹⁰ *Jencks v. Coleman*, 2 Sum. 221.

§ 1875. **Wrong Vehicles and Wrong Time.**—He may refuse to carry on conveyances not devoted to the carriage of passengers; as, for example, freight trains.¹ So he may refuse to carry on Sunday.

§ 1876. **Other Cases.**—It has been held that the carrier may refuse a person whom he knows will be attacked or whose life will be in danger at the place of destination.²

§ 1877. **Waiver by Receiving Passenger.**—If a carrier, knowing that a good ground for refusing to carry a person exists, nevertheless receives him, he cannot afterwards eject him for the same cause.³ Thus while the carrier is not bound to receive an unusual number of passengers beyond the number he might reasonably be required to provide for, if he does receive them without condition or notice of his inability to provide for them, he assumes all the obligations incumbent on such carriers.⁴

§ 1878. **Who are Passengers—Persons on Conveyances by Fraud.**—A person who is on a train or boat by fraud is not a passenger; as a stowaway, or one stealing a ride.⁵ So of one who is riding free by permission of the conductor, but in violation of the rules of the company.⁶ So of one who, against the rules of the company, induces or bribes the driver to let him ride on the engine.⁷ So of a person

¹ Ill. Cent. R. R. Co. v. Nelson, 59 Ill. 112; Ill. Cent. R. R. Co. v. Johnson, 67 Ill. 314; Arnold v. R. R. Co., 83 Ill. 273; 25 Am. Rep. 386.

² Pearson v. Duane, 4 Wall. 605.

³ Pearson v. Duane, 4 Wall. 605; Tarbell v. R. R. Co., 34 Cal. 616; Coffin v. Brathwaite, 8 Jur. 875.

⁴ Evansville etc. R. R. Co. v. Duncan, 28 Ind. 441; 92 Am. Dec. 322.

⁵ Thompson on Carriers of Passengers, 43. See Sanford v. R. R. Co., 23 N. Y. 343; 80 Am. Dec. 286.

⁶ Toledo etc. R. R. Co. v. Brooks, 81 Ill. 245; Brown v. R. R. Co., 64 Mo. 536; Eaton v. R. R. Co., 57 N. Y. 382; 15 Am. Rep. 513; Houston

etc. R. R. Co. v. Moore, 49 Tex. 31; 30 Am. Rep. 98. But the fact that an agent of the carrier violates his duty, and invites a person to ride free, without a collusion on his part with the agent to defraud the carrier, will not deprive him of his remedy as a passenger, if he is injured through the carelessness of the carrier's agents: Wilton v. R. R. Co., 107 Mass. 108; 9 Am. Rep. 11; Washburn v. R. R. Co., 3 Head, 638; Austin v. R. R. Co., 8 Best & S. 327. See Dunn v. R. R. Co., 58 Me. 187; 4 Am. Rep. 267.

⁷ Chicago etc. R. R. Co. v. Michie, 83 Ill. 427; Rucker v. R. R. Co., 61 Tex. 499.

traveling upon a pass or commutation-ticket issued to another person which was not transferable, and passing himself for the person therein named.¹ In the absence of proof that a railroad company is accustomed to carry passengers upon hand-cars, one who is injured while thus riding has no cause of action against the company, although invited thus to ride by the section-foreman.² One lawfully in the cab of a freight train treating with the conductor for passage, as was frequently done, is entitled to damages from the company for the unnecessary violence of the conductor in evicting him, although the conductor had a right to refuse him passage.³ One who, by mistake, gets on a passenger train other than the one he intended to take passage upon, is nevertheless a passenger upon the train he is on, and the relation of passenger and carrier exists between him and the company.⁴ A common carrier of passengers is bound to exercise only ordinary care towards trespassers and persons refusing to pay fare.⁵ Where the master of a vessel had taken on board, without the knowledge of the owners, his wife and her father, who paid no fare, it was held that they were not passengers.⁶ Every one riding in a railroad car is presumed to be there lawfully as a passenger, and the *onus* is upon the carrier to prove that he was a trespasser.⁷

ILLUSTRATIONS.—An infant rode upon a freight-car in a freight train without the consent of his parents, and without the knowledge of the conductor, and without paying fare. The rules of the company prohibited the carrying of passengers without fare, or on freight trains, except in the caboose. The conductor knowingly suffered him to remain on the freight-car. A brakeman, without authority, set him at a dangerous service

¹ Toledo etc. R. R. Co. v. Beggs, 85 Ill. 80; 28 Am. Rep. 613; Way v. R. R. Co., 64 Iowa, 48; 52 Am. Rep. 431. But see Great North. R. R. Co. v. Harrison, 12 Com. B. 576.

² Hoar v. R. R. Co., 70 Me. 65; 35 Am. Rep. 299.

³ Western and Atlantic R. R. Co. v. Turner, 72 Ga. 292; 53 Am. Rep. 842.

⁴ Columbus etc. R. R. Co. v. Powell, 40 Ind. 37; Cincinnati etc. R. R. Co. v. Carper, 112 Ind. 26; 2 Am. St. Rep. 145.

⁵ Higley v. Gilmer, 3 Mont. 90; 35 Am. Rep. 450.

⁶ The Lion, L. R. 2 Adm. 102.

⁷ Pennsylvania R. R. Co. v. Books, 57 Pa. St. 339; 98 Am. Dec. 230.

on the car, in trying to perform which he was injured. *Held*, that the company was not liable: *Sherman v. R. R. Co.*, 72 Mo. 62; 37 Am. Rep. 423. A negro gave the fireman fifty cents to let him ride on the pilot of the locomotive, and while so riding (against the rules) was injured by collision with a hand-car. *Held*, that the railroad company was not liable: *Rucker v. R. R. Co.*, 61 Tex. 499. Plaintiff, after crossing on the ferry-boat of the defendant, paying therefor the usual fare, instead of leaving the boat, remained on board and returned, paying no more fare. On entering the ferry-slip she received an injury through the negligence of defendant's agents. *Held*, that she might recover: *Doran v. Ferry Co.*, 3 Lans. 105. Plaintiff, desiring to have his horse transported by defendant's railroad, induced A, who had several horses to go by the same train, to include his and have it billed as A's. It was the defendant's rule that only one person could go free with stock, and when A told the conductor there might be another person to accompany him, he replied that he would have to pay fare. The defendant had no knowledge of the plaintiff's intention to go on the train. The plaintiff got no ticket, but intended to pay his fare on the train. Before he could pay there was a collision by the defendant's negligence, and he was injured. *Held*, that he could not recover: *Gardner v. R. R. Co.*, 51 Conn. 143; 50 Am. Rep. 12.

§ 1879. Persons Carrying on Business on Conveyances.

—Persons traveling on trains or boats for the purpose of carrying on business for themselves or others are passengers, though they pay nothing for their passage; as, for example, a government mail agent;¹ an express messenger, or one supplying his place.² A person leasing the bar upon a steamboat, for the purpose of selling liquors, cigars, etc., and paying for the privilege a certain sum per month, is a passenger, notwithstanding he does not pay anything specifically as passage-money.³ So where a railroad company, in consideration of the payment to them by a person of a certain sum of money per year in quarterly installments, and of his agreement to supply the

¹ *Collett v. R. R. Co.*, 15 Jur. 1053; *Hammond v. R. R. Co.*, 6 S. C. 130; 24 Am. Dec. 467; *Nolton v. R. R. Co.*, 15 N. Y. 444; 69 Am. Dec. 623; *Seybolt v. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75. *Contra*, *Penn. R. R. Co. v. Price*, 96 Pa. St. 256.

² *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71; *Blair v. R. R. Co.*, 66 N. Y. 313; 23 Am. Rep. 55. But see *Union Pac. R. R. Co. v. Nichols*, 8 Kan. 505; 12 Am. Rep. 475.

³ *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

passengers on one of their trains with iced water, issued season-tickets to him quarterly for his passage on any of their regular trains, and permitted him to sell popped corn on all their trains, it was held that while traveling on their road under this contract he was a passenger.¹ The same is held of a person employed on or in charge of a private car which is attached to and being drawn by a railroad company; he is entitled to the rights of a passenger of the railroad.² But a boy selling newspapers on the street, and accustomed to board street-cars, with the acquiescence of the servants of the company, for the purpose of supplying the passengers with papers, is not a passenger, and the company is not charged with the duty of looking after his safety, or of seeing that he does not run into danger, or of stopping or slackening the speed of the car for him to leave it, whether requested so to do or not.³

ILLUSTRATIONS.—A passenger on a steamboat, chartered for an excursion and picnic party, undertook, without permission, to sell refreshments on the boat. The captain forbade the sale, and put the articles in the baggage-room. On arriving at the landing, owing to the crowd, the captain was unable to deliver the articles to her in season for her to convey them to the picnic-grounds, and she thus lost the sale. *Held*, that no action would lie: *Smallman v. Whilter*, 87 Ill. 545; 29 Am. Rep. 76. Defendant, a carrier, established on its steamboat an agency for the delivery of carrier's baggage. Plaintiff, an express-man, traveled over defendant's line for the purpose of soliciting and receiving orders from passengers in competition with such agency. Defendant notified him to desist, and afterward, on his refusal to desist, ejected him, although he had a ticket, and afterwards refused him passage. In an action for damages, *held*, that defendant's action was justifiable, and that plaintiff had no cause of action: *Barry v. Steam Co.*, 67 N. Y. 301; 23 Am. Rep. 115.

¹ *Com. v. R. R. Co.*, 108 Mass. 7; 11 Am. Rep. 301.

² *Lockhart v. Lichtenthaler*, 46 Pa. St. 151; *Lackawanna R. R. Co. v. Chenewith*, 52 Pa. St. 382; 91 Am. Dec. 168; *Cumberland Valley R. R. Co. v. Myers*, 55 Pa. St. 288.

³ *Fleming v. R. R. Co.*, 1 Abb. N. C. 433. Such a boy, if on the train against the rules of the company, but with the consent of the conductor, is a trespasser to whom the company owes no duty at all: *Duff v. R. R. Co.*, 91 Pa. St. 458; 36 Am. Rep. 675.

§ 1880. **Employees of Carrier, when Passengers.**—An employee of the carrier traveling on his employer's conveyance on his own (the employee's) business is a passenger.¹ But a servant of the carrier riding on his master's business, on his master's conveyance, though not in charge of or necessary to the running of the conveyance, is a servant, and not a passenger. In several cases the plaintiff was an employee of the carrier, and while riding free on a gravel train to his work was injured. It was held that he was not a passenger.² Although the presumption of law is that a person riding on a construction train by permission of an employee of a railroad company is not lawfully thereon, this presumption may be overcome by showing that the company is in the habit of allowing its employees to ride on such trains to and from their work or their homes.³

§ 1881. **Persons Temporarily Absent from Conveyance.**—A person who has started on the carrier's conveyance may be a passenger, though at the time temporarily absent from it;⁴ as where a passenger is walking on a platform of a depot provided for the convenience of passengers while the train is stopping for refreshments.⁵

¹ Ohio etc. R. R. Co. v. Muhling, 30 Ill. 9; 81 Am. Dec. 336. The effect of the person being considered as a passenger or a servant, in an action for an injury received while on the vehicle, is very important. If the *status* of the person is that of a passenger, the carrier is answerable to him for any injury happening through very slight negligence, or a want of the very highest degree of care; whereas if his *status* is that of servant, the carrier owes to him but ordinary care. Again, if he is a passenger, the carrier is answerable to him for injuries done to him by the servants of the latter, in conformity with the rule of *respondet superior*. But if he is a servant of the carrier, this rule does not apply so as to make the latter responsible for injuries done to him by other servants of the carrier, engaged in the same

common employment with him, and of such a grade as to be denominated "fellow-servants" of his: See *ante*, Title Principal and Agent—Master and Servant.

² Ryan v. R. R. Co., 23 Pa. St. 384; Gillshannon v. R. R. Co., 10 Cush. 228; Russell v. R. R. Co., 17 N. Y. 134; Tunney v. R. R. Co., L. R. 1 Com. P. 291; Seaver v. R. R. Co., 14 Gray, 466. *Contra*, Fitzpatrick v. R. R. Co., 7 Ind. 436; Gillenwater v. R. R. Co., 5 Ind. 339; 61 Am. Dec. 101. And see O'Donnell v. R. R. Co., 59 Pa. St. 239; 98 Am. Dec. 336; 50 Pa. St. 490.

³ Rosenbaum v. R. R. Co., 38 Minn. 173; 8 Am. St. Rep. 653.

⁴ Keokuk etc. Packet Co. v. True, 88 Ill. 608; Clusman v. R. R. Co., 9 Hun, 618; affirmed 73 N. Y. 606.

⁵ Jeffersonville etc. R. R. Co. v. Riley, 39 Ind. 568.

So he may be a passenger, although at the time he has left one conveyance and is walking to get on another.¹ But if the person has left the conveyance with no intention of returning, and is not pursuing, as it were, a continuous line of travel, the relation of passenger and carrier ceases with the passenger's departure from the conveyance,—certainly when he has left the wharf or depot connecting therewith,²—and the going back to the conveyance after having left it, for some purpose of his own, with no intention to continue his journey, would not revive the relation of passenger and carrier which had terminated by his leaving it.³ At a stopping-place a person has a right to alight and return to the car if he wishes.⁴ It is not necessary that a person should be on

¹ *Hulbert v. R. R. Co.*, 40 N. Y. 145; *Northrup v. Railway Passengers' Assur. Co.*, 43 N. Y. 516; 3 Am. Rep. 724.

² *Platt v. R. R. Co.*, 4 Thomp. & C. 406.

³ *Pittsburgh etc. R. R. Co. v. Krouse*, 30 Ohio St. 222.

⁴ *In State v. R. R. Co.*, 58 Me. 176, 4 Am. Rep. 259, the court said: "When a train stops at one of its stations to discharge and receive passengers belonging to that particular station, the company is bound to see that proper modes of egress and ingress are provided for such passengers. But the other passengers may leave the cars, unless notified not to do so; but it must, to a certain extent, be at their own risk, so far as the usual modes of egress and ingress are in question. And the same rule applies more strongly when a train stops on a side-track, awaiting the passing of another train out of time. In such a case the duty and the safety of the passengers both concur in saying to those who are not destined for that station, that they should remain in the car. That is the place of safety. The uncertainty as to the time when the other train may pass, and as to its rate of speed, and the danger of standing on or near the track, or in passing across it, are all suggestive of risk, and of the necessity of great care and

caution to avoid injury. If, however, no objection being made, or notice given, a passenger, who properly ought not, does leave the car when thus stopping, does no illegal act, but he for the time surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence. He may return to his seat and resume his place and rights as a passenger on that train before it starts. But while thus 'his own man,' he may be injured or killed as other persons not passengers may be, 'by the negligence or carelessness of the railroad or its agents,' and the corporation may be liable for such negligence or carelessness. A question may arise as to the duties of the servants or agents of the road, when such passengers have left the cars without objection, and are on the platform or near the track when the train is about to start, or the coming train has signaled its approach. We think it but reasonable, in such cases, to require that the proper officer or servant of the corporation should give reasonable notice in time for such passengers to return to the cars which they left, safely, by using due and proper diligence, caution, and care. But they are not bound or required to go after those who have gone away, and out of sight and out of reach of the voice, which gives the usual loud

the carrier's vehicle in order to be regarded as a passenger. As a passenger, it is said in an Indiana case, he has the right to stand or walk on the platforms provided at stations for the convenience of passengers while the train is stopping for refreshments, and in a street alongside of the track and platform; and the servants of the railroad company are bound to exercise the care of a reasonable and prudent man in the discharge of their duties on said platforms and street, and have no right to throw sticks of wood from the train upon such platforms or street, without first ascertaining whether such action would endanger any passenger standing or walking there.¹

ILLUSTRATIONS. — A passenger who had considerable baggage on a train, for which he had no check, alighted from the train to assist in the transfer of that baggage. *Held*, not to sever the relation of passenger and carrier, nor to make him a servant of the company, he having the right to identify his property: *Ormond v. Hayes*, 60 Tex. 180.

§ 1882. **Persons Meeting or Leaving Passengers.** — A person who enters a station or car to see another off, or to meet a coming guest or friend, is not a trespasser, but is there by right, and the carrier is responsible for a negligent injury to such person.²

and distinct notice for all to repair on board. If there be an established signal, by blowing the whistle for passengers to take the places in the cars, that should also be sounded. But if a passenger goes beyond this limit, and does not, in fact, hear the summons, it is his fault or misfortune. The road has done its duty in this particular. We do not mean to say that even in such a case he may not be killed or injured by the negligence or carelessness of the corporation within the meaning of the statute."

¹ *Jeffersonville etc. R. R. Co. v. Riley*, 39 Ind. 568.

² *Doss v. R. R. Co.*, 59 Mo. 27; 21 Am. Rep. 371. *Contra*, *Lucas v. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406. In a Pennsylvania case, where a depot platform gave way on account of a

great crowd which had assembled to hear the President of the United States speak, and many persons were thereby injured and some killed, the court said: "Had it been the hour for the arrival or departure of a train, and he [the plaintiff] had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of the defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who stand on it; as to all others, they were liable only for wanton or intentional in-

ILLUSTRATIONS.—A man waiting at a railroad station for his wife, whom he expected by train, having a call of nature, and no special resort being provided, stepped off a walk on the grounds in the dark, and fell into a hole and was hurt. *Held*, that the company was liable: *McKone v. R. R. Co.*, 51 Mich. 601; 47 Am. Rep. 596.

§ 1883. Persons Riding Free.—Common carriers are required to exercise the same degree of care in carrying persons free as in carrying them for hire.¹

ILLUSTRATIONS.—The plaintiff, traveling on a free ticket, which had on its back an indorsement containing certain conditions for his signature, tendered such ticket to the conductor, but the latter declined to accept it unless the plaintiff signed the indorsement, and on his refusal either to sign or to pay fare, ejected him from the train. *Held*, that the discretion of the court below setting aside a verdict for five thousand dollars damages should not be revised: *Elliott v. R. R. Co.*, 58 Ga. 454.

§ 1884. At What Time Relation of Carrier and Passenger Commences and Ends.—The relation of carrier and passenger may commence before he pays his fare or enters the vehicle.² He is a passenger who, a street-car

jury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendants had nothing to do with that": *Gillis v. R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317.

¹ *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468; *The New World v. King*, 16 How. 469; *Flint etc. R. R. Co. v. Weir*, 37 Mich. 111; 26 Am. Rep. 499; *Fay v. The New World*, 1 Cal. 348; *Gordon v. R. R.*, 40 Barb. 546; *Indiana R. R. Co. v. Mundy*, 21 Ind. 48; 83 Am. Dec. 339; *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336; *Illinois Cent. R. R. Co. v. Read*, 37 Ill. 484; 87 Am. Dec. 260; *Perkins v. R. R. Co.*, 24 N. Y. 196; 82 Am. Dec. 281; *Flinn v. R. R. Co.*, 1 *Houst.* 469; *Todd v. R. R. Co.*, 3 Allen, 18; 80 Am. Dec. 49; 7 Allen, 207; *Lemon v. Chanslor*, 68 Mo. 340; 30 Am. Rep. 799; *Gillenwater v. R. R. Co.*, 5 Ind. 339; 61 Am. Dec. 101; *Ohio etc. R. R. Co. v. Nickless*, 71 Ind. 271. See *Blair v. R. R. Co.*, 66 N. Y. 313;

23 Am. Rep. 55. In *Phila. etc. R. R. Co. v. Derby*, 14 How. 468, Mr. Justice Grier said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" A railroad company may be liable for an injury sustained by one permitted to ride free on a hand-car: *Prince v. R. R. Co.*, 64 Tex. 144. A free pass is revoked by the leasing of the railroad to another company: *Turner v. R. R. Co.*, 70 N. C. 1.

² *Brien v. Bennett*, 8 Car. & P. 724; *Davis v. R. R. Co.*, 10 How. Pr. 330; *Cleveland v. New Jersey Steam Co.*, 68 N. Y. 306; *Central R. R. Co. v. Perry*, 58 Ga. 461.

having stopped for him, is in the act of stepping on the platform.¹ He is a passenger while waiting in the depot or waiting-room for the coach or train to come,² provided his intention in being there is to become a passenger;³ or when, having purchased his ticket, he is passing from the office to the train;⁴ or while he is in a coach owned by the company on his way to take a train, though he has not bought his ticket or announced his intention of traveling anywhere.⁵ In an action against a railroad company for an injury caused by the negligence of its servants, it is no defense that plaintiff entered the train before it was ready for passengers, defendant's servants having notified plaintiff that the train was ready.⁶ But when a passenger alights from the train, and starts away from the station, he ceases to be a passenger.⁷ So one remaining at a railroad station three or four minutes after he knows that the train which he wished to take had already gone, when there was nothing to detain him except his wish to take a street-car which would soon arrive at such station, ceases to have the rights of an intending passenger.⁸ One does not cease to be a passenger because he leaves a train on the wrong side, if the company has negligently failed to notify him that his act is dangerous.⁹

¹ *McDonough v. R. R. Co.*, 137 Mass. 210; *Smith v. R. R. Co.*, 32 Minn. 1.

² *Gordan v. R. R. Co.*, 40 Barb. 546; *Allender v. R. R. Co.*, 37 Iowa, 264. In *Indiana etc. R. R. Co. v. Hudelson*, 13 Ind. 325, 74 Am. Dec. 255, a person who had not purchased a ticket, in passing from the ticket-office to the station platform, was injured while crossing a track for the purpose of taking a train. He was held not a passenger.

³ *Id.* See *Merrill v. R. R. Co.*, 139 Mass. 238, 52 Am. Rep. 705, where a person jumped on a train after it had started, but while on the car platform was thrown out by the swaying of the car. It was held that he was not a passenger, though "if he had reached

a place of safety and seated himself inside the car, the bailment of his person to the defendant would have been accomplished so that he would not have been prevented from asserting such rights because of his improper way of getting upon the train."

⁴ *Warren v. R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700.

⁵ *Buffet v. R. R. Co.*, 40 N. Y. 168.

⁶ *Hannibal etc. R. R. Co. v. Martin*, 11 Ill. App. 386.

⁷ *Allerton v. R. R. Co.*, 146 Mass. 241.

⁸ *Heinlein v. R. R. Co.*, 147 Mass. 136; 9 Am. St. Rep. 676.

⁹ *McKimble v. R. R. Co.*, 139 Mass. 542.

ILLUSTRATIONS. — The plaintiff held up his finger to the driver of an omnibus, who stopped to take him up, and just as he was putting his foot on the step of the omnibus, the driver drove on, and he fell on his face to the ground. *Held*, that he was a passenger: *Brien v. Bennett*, 8 Car. & P. 724. The conductor of an elevated-railroad car, without having rung a bell or given a signal, attempted to close the gate before the train started, and while a passenger was in the act of stepping on. The passenger was severely injured by this act. *Held*, that he could maintain an action against the corporation: *McQuade v. R. R. Co.*, 53 N. Y. Sup. Ct. 91. Plaintiff reached a railroad station late. She bought a ticket, and hurried to the train. All the passengers and the conductor and brakeman had gone on board, and as plaintiff attempted to board it, it started, and she was thrown down and injured. Plaintiff knew she was late. *Held*, that an instruction implying that she had the right to board the train, and should have been given the opportunity to get on board, was erroneous: *Paulitsch v. R. R. Co.*, 102 N. Y. 280.

§ 1885. **Status of a Ticket.** — Steamboat, railroad, and other kinds of tickets are not contracts. They are rather in the nature of vouchers or receipts that the party or holder has paid a certain sum of money and is entitled to a certain privilege.¹ The contract for transportation may therefore be proved independent of the ticket.² But the ticket constitutes the evidence agreed upon by the parties, by which the company should thereafter recognize the rights of the purchaser in his contract, and is conclusive upon the subject.³ The possession of a ticket is *prima facie* evidence that the holder has paid the regular price for it, and of his right to be transported according to its terms.⁴ The sale of a ticket to a certain point, made by the ticket-agent when the train is approaching the station, is not a representation that that particular train will stop

¹ *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Rawson v. R. R. Co.*, 48 N. Y. 212; 8 Am. Rep. 543; *Brown v. R. R. Co.*, 11 Cush. 97; *Malone v. R. R. Co.*, 12 Gray, 388; 74 Am. Dec. 598; *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469; *Wilson v. R. R. Co.*, 21 Gratt. 654; *Burnham v. R. R. Co.*, 63 Me. 298; 18 Am. Rep. 220;

Kent v. R. R. Co., 45 Ohio St. 284; 4 Am. St. Rep. 539.

² *Van Buskirk v. Roberts*, 31 N. Y. 661.

³ *Hufford v. R. R. Co.*, 64 Mich. 631; 8 Am. St. Rep. 859.

⁴ *Pier v. Finch*, 24 Barb. 514; *Davis v. R. R. Co.*, 20 U. C. Q. B. 27.

at the point to which the ticket is sold. It is the duty of the purchaser to satisfy himself on this head before boarding the train.¹ If the ticket-seller of a railroad sells a punched ticket, assuring the purchaser that it is good, when in fact it is not, and the passenger is expelled for non-payment of fare, he may recover damages against the company.² If one conductor takes the passenger's ticket from him by mistake, a second conductor will be justified in ejecting him,³ but the company will be liable for the mistake of the first conductor.⁴

ILLUSTRATIONS.—Two tickets had been issued to a passenger from New York to San Francisco via the Isthmus of Panama,—one from New York to Chagres, and the other from Panama to San Francisco. Parol evidence held admissible to show that there was one entire contract for carriage: *Van Buskirk v. Roberts*, 31 N. Y. 661; *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469. A passenger bought a round-trip railroad ticket, and surrendered it to a brakeman who came around and demanded it (the conductor being in hiding on the engine), and who tore it in two, keeping one part and giving back the other, supposing one half was good for either way. On his return, the passenger offered the said portion of the ticket, but the conductor refused it, and notwithstanding the passenger's explanation, ejected him for refusing to pay fare. *Held*, that the passenger could recover damages of the company: *Lake Erie etc. R. R. Co. v. Fix*, 88 Ind. 381; 45 Am. Rep. 464. A passenger on a railroad train who had paid his fare to a point beyond that evidenced by his ticket, refused, on the demand of the conductor, to pay the regular additional fare, and was consequently ejected from the train. *Held*, that he could not maintain an action of trespass on the case against the railroad company for such expulsion. *Seem*, that his remedy was an action for breach of contract: *Frederick v. R. R. Co.*, 37 Mich. 342; 26 Am. Rep. 531. The conductor of a street-car mistakenly gave a passenger

¹ *Duling v. R. R. Co.*, 66 Md. 120.

² *Murdock v. R. R. Co.*, 137 Mass. 293; 50 Am. Rep. 307.

³ *Shelton v. R. R. Co.*, 29 Ohio St. 214; *Townsend v. R. R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419.

⁴ *Townsend v. R. R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419. If a passenger has received a conductor's check in exchange for his ticket, and gets upon

another train by the direction of the company's servant, and on the assurance of the conductor that such check will be received upon the other train, the company will be responsible for the act of the conductor in refusing to recognize such check and expelling the passenger from the train: *Toledo etc. R. R. Co. v. McDonough*, 53 Ind. 289.

a wrong transfer-ticket, and the conductor of the second car, refusing it, and the passenger declining to pay his fare, ejected him. *Held*, that he had no cause of action against the company in trespass for the ejection: *Bradshaw v. R. R. Co.*, 135 Mass. 407; 46 Am. Rep. 481. A bought for his wife a non-transferable ticket, which, with his knowledge, was made out to Mrs. E. B. Upon presentation of it by him for his wife's fare, the conductor refused to receive it, though both asserted it was bought for her, and she offered to sign it according to its conditions. *Held*, that upon her refusal to pay the regular fare the conductor had a right to put her off the train: *Chicago and Northwestern R. R. Co. v. Bannerman*, 15 Ill. App. 100.

§ 1886. **Duty to Run Trains According to Time-tables** — **Delay.** — Railroad companies are not insurers that trains shall arrive and depart as advertised in time-tables. But they are obliged to use diligence and foresight in carrying out the provisions of the time-tables.¹ Where the train of the defendants was, on account of extraordinary circumstances, greatly overloaded, so that it was necessary to drive past one of its stations, on an up-grade, without stopping, whereby the plaintiff, a season-ticket holder, failed to get transportation as usual, it was held that the company was not liable, especially as an extra train had been sent back for the accommodation of the plaintiff and others who had been inconvenienced.² A railroad company, by advertising times when its trains run, agrees with holders of ticket that its trains will run at the times advertised, but with an implied reservation of a power to change the times upon giving reasonable notice. Reasonable notice of a change of time as advertised in newspapers when a railroad train will run is not given, to one who previously purchased tickets in accordance with the advertisement, by posting up handbills in the cars and stations, without his knowledge, announcing the change.³ When a common carrier advertises to stop

¹ Thompson on Carriers of Passengers, 67; Savannah R. R. Co. v. Bannard, 58 Ga. 180.

² Gordon v. R. R. Co., 52 N. H. 596; 13 Am. Rep. 97.

³ Sears v. R. R. Co., 14 Allen, 433; 92 Am. Dec. 780.

at a certain station and take up passengers, he is bound by the rules of the common law to perform his undertaking, and no consideration other than the general legal obligation resting upon him from the nature of his business need be shown by one who has been injured by his acts. Unless good and sufficient reason be shown, any individual injured by a violation of his obligations may maintain an action for the injury.¹ It is no excuse on the part of a carrier of mails and passengers, who has failed to keep his obligation to stop for passengers at a certain time and point, to say that had he done so he would have been unable to perform his contract to deliver the mails on time.² It is the duty of a passenger upon a railroad to inform himself beforehand of the regulations of the company for running its trains, and the fact that a ticket for a certain station is sold to him by the company without notice, and that he is permitted to enter the first train leaving thereafter, does not entitle him to require that the train be stopped at such station, if it is not in accordance with the regulations for running trains.³ For a negligent delay of their servants they are responsible.⁴ A railroad company which advertises to transport passengers between two given points within certain hours of each day, knowing that it cannot so transport passengers owing to the discontinuance of a train on a connecting line, must pay to a person who on the faith of such advertisement has come to its station to be so transported the damages he has sustained by reason of the delay.⁵

ILLUSTRATIONS. — A railroad train, running three quarters of an hour behind time, was upset by a gust of wind, and plaintiff was injured. The wind did not extend to that part of the road where the train would have been if running on time. *Held*, that the negligence of the company in running behind time was

¹ *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588. zum, 50 Ind. 141; 19 Am. Rep. 703.

² *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588. ⁴ *Weed v. R. R. Co.*, 17 N. Y. 362; 72 Am. Dec. 474.

³ *Pittsburgh etc. R. R. Co. v. Nu-* ⁵ *Denton v. R. R. Co.*, 5 El. & B. 860.

not the proximate cause of the injury, and that it was not liable therefor: *McClary v. R. R. Co.*, 3 Neb. 44; 19 Am. Rep. 631. An arrangement between a railroad company and a committee of a peach-growers' convention to run a special train during a peach season, so as to connect by a certain hour with another road, *held*, not to constitute a special contract with any peach-grower to transport peaches by such train, nor to render the company liable for any peaches not accepted for transportation by such train: *Reed v. R. R. Co.*, 3 Houst. 176; compare *Truax v. R. R. Co.*, 3 Houst. 233. A line of steamers conveyed the mails and passengers between two points. They occasionally stopped at intermediate stations, first giving notice of their intention so to do. The question was, whether the company were under a legal obligation to stop at a certain station at a specified time, and take on passengers. It was shown that the company wrote a letter to the postmaster at this station telling him to have a mail ready at this time, as they were going to stop one of their boats there to receive the same. They also directed him in this letter to "advise all who might feel interested" of this fact. He posted the letter in a conspicuous place. *Held*, that the request above quoted extended to persons desiring to take passage upon the boat, as well as those interested in the mail: *Heirn v. McCaughan*, 32 Miss. 17; 66 Am. Dec. 588.

§ 1887. **Special Contracts with Passengers—Contract to Carry to Particular Place.**—The failure to transport the passenger according to contract gives him a right of action for damages.¹ If a passenger has contracted for a particular seat, he cannot be compelled to take another,² and he may take his seat at any time during the journey, and the carrier's agent is not justified in filling his place with another passenger.³ While a passenger has no right to insist upon being put off a train at a place not a regular station, a contract to put him off there may be implied from custom.⁴ The carrier must transport the passenger to the port to which he has contracted to carry him. When passengers are conveyed, without their consent, to

¹ *Howard v. Cobb*, 19 L. R. 377; *Indianapolis etc. R. R. Co. v. Birney*, 71 Ill. 391; *Hawcroft v. R. R. Co.*, 21 L. J. Q. B. 178; *Hobbs v. R. R. Co.*, L. R. 10 Q. B. 111; *Heirn v. McCaughan*, 32 Miss. 17; *New Orleans etc. R. R. Co. v. Hurst*, 36 Miss. 660; 74

Am. Dec. 785; *Porter v. The New England*, 17 Mo. 290; *Florida etc. R. R. Co. v. Katz*, 23 Fla. 139.

² *Long v. Horne*, 1 Car. & P. 610.

³ *Ker v. Mountain*, 1 Esp. 27.

⁴ *Hull v. R. R. Co.*, 66 Tex. 619.

a different port from that agreed upon at the time of sailing, no recovery can be had by the carrier for the amount of their passage-money;¹ and if they have suffered damage by reason of not being carried to the proper port, they may recover compensation in an action therefor,² whether they made the contract for passage with the master of the ship or with a ship agent, if the action of the master in reference to the matter is such as to impliedly ratify the acts of the ship agent, and they are received on board as passengers to the port to which they contracted to be carried.³ If the carrier contracts to carry a passenger to a particular point, with a knowledge of the danger of effecting a landing at that point, such danger will not excuse him for a failure to comply with the contract.⁴ Where the owner of a line of vessels agrees to transport a person from one place to another by a particular line of vessels, and at the same time the agreement is made, but unknown to the proprietor, one of the connecting vessels of the line is a total wreck, it is his duty to provide another with all reasonable diligence.⁵ In such a case, the act of God does not wholly excuse the carrier from the performance of his contract. And the master of a vessel will not be excused from completing the contract of transportation by taking his passengers into another and foreign port and leaving them there, without their consent, because he has learned that another vessel has been compelled to abandon the line on account of hostilities existing at the point of connection.⁶ And in all such cases the passage-money may be recovered back.⁷ And if the carrier agrees to carry a passenger on Sunday, he must do

¹ *McGloin v. Henderson*, 6 La. 715.

² *The Canadian*, 1 Brown Adm. 11; *Coppin v. Brathwaite*, 8 Jur. 875; *Sunday v. Gordon*, 1 Blatchf. & H. 569.

³ *Dennison v. The Wataga*, 1 Phila. 468.

⁴ *Porter v. Str. New England*, 17 Mo. 290.

⁶ *Williams v. Vanderbilt*, 28 N. Y.

217; 84 Am. Dec. 333; affirming 29 Barb. 491, and overruling *Briggs v. Vanderbilt*, 19 Barb. 222, and *Bonsteel v. Vanderbilt*, 21 Barb. 26. See also *Ward v. Vanderbilt*, 4 Abb. App. 521.

⁶ *West v. Str. Uncle Sam*, 1 McAll. 505.

⁷ *Brown v. Harris*, 2 Gray, 359; *Watson v. Duykinck*, 3 Johns. 335.

so.¹ A passenger with a ticket for a station at which the train does not stop has the right to ride to an intermediate station at which it does stop.² A ticket marked "good on passenger trains only" does not imply that all the passenger trains of the railroad company issuing it will stop at the station designated on it, nor impose on the company any obligation to stop there, contrary to its rules.³ In an action against a railroad for damages for failure to stop a train at a certain place at which there is no station, the plaintiff cannot show that such place was treated as a station, by means of a time-schedule, which on its face shows that it was for the government and information of the employees only, and that the company reserved the right to vary therefrom at pleasure, though it states that the train is due at such place at a certain time.⁴

ILLUSTRATIONS.—A passenger insisted upon being left at B, where the conductor told him the train did not and would not stop. The train reached A, the last station at which it stopped this side of B, and upon the refusal of the passenger to pay fare to a station beyond, the conductor put him off the train. *Held*, that the conductor was justified in so doing: *Logan v. R. R. Co.*, 77 Mo. 663. Plaintiff entered defendant's cars and paid his fare to B. The train did not stop there, but ran by two miles to a water-tank. Plaintiff demanded that the train should return to B, but the conductor gave him the option to ride to the next station and return to B by the first train free of charge, or to leave the train at the tank. He chose the first alternative, and thus reached B after some three hours' delay. Plaintiff sustained no bodily injury, mental suffering, insult, oppression, or pecuniary loss. *Held*, that the plaintiff had a cause of action against the defendants for failing to set him down at B, but that he could not recover punitive damages: *Thompson v. R. R. Co.*, 50 Miss. 315; 19 Am. Rep. 12. A passenger on an express train held a ticket for a station at which the train stopped occasionally, and not regularly, and refused to pay additional fare to the regular stopping-place next beyond,

¹ *Walsh v. R. R. Co.*, 42 Wis. 23; 24 Am. Rep. 376.

² *Richmond etc. R. R. Co. v. Ashby*, 79 Va. 130; 52 Am. Rep. 620.

³ *Ohio etc. R. R. Co. v. Swarthout*, 67 Ind. 567; 33 Am. Rep. 104.

⁴ *Beauchamp v. R. R. Co.*, 56 Tex. 239.

Held, that the conductor was justified in expelling him from the train before he had reached the station for which he had actually bought and held his ticket: *Fink v. R. R. Co.*, 4 Lans. 147. The plaintiff took tickets for himself, his servants, and horses by a particular train on the defendants' railway. The train was afterwards divided into two. The plaintiff traveled in the first part of the train, taking all the tickets with him. When the second train, with the servants and horses, was about to start, the plaintiff's servants were required to produce their tickets, and on their being unable to do so, the defendants refused to carry them. A by-law of the defendants provided that "no passenger will be allowed to enter any carriage without having first paid his fare and obtained a ticket. Each passenger, on payment of his fare, will be furnished with a ticket, which such passenger is to show when required, and to deliver up before leaving the company's premises, upon demand." *Held*, in an action by the plaintiff for not carrying his servants, that as the defendants contracted with the plaintiff, and delivered the tickets to him, and not to the servants, they were not in a position to enforce the by-law: *Jennings v. R. R. Co.*, L. R. 1 Q. B. 7. Plaintiff, at Jacksonville, bought a ticket on the defendant's railroad to Elkhart, and entered a train pointed out to him by the ticket-seller. The conductor accepted the ticket, but immediately notified him that the train did not stop at Elkhart, and that he could get off at Palestine, and there resume his journey for Elkhart. He refused to get off, and was ejected. *Held*, proper: *International etc. R. R. Co. v. Hassell*, 62 Tex. 256; 50 Am. Rep. 525. Plaintiff purchased a ticket from Sing Sing to Rhinebeck, a station beyond Poughkeepsie, upon defendant's railroad. The train upon which he took passage went no farther than Poughkeepsie. The ticket was taken up by a conductor before the train reached Poughkeepsie. At that place plaintiff took passage upon another train going to Rhinebeck, which was the usual way for passengers coming on trains going only to Poughkeepsie. Having no ticket he was ejected from the train. *Held*, that defendant was liable for the actual damage done to plaintiff by the ejection from the train and refusal to carry him to Rhinebeck: *Townsend v. R. R. Co.*, 6 Thomp. & C. 495; 9 Hun, 217.

§ 1888. **Limited Tickets.**—A condition that the ticket will not be received for passage after a certain day is good; and after the expiration of that time the holder can obtain no rights under it.¹ Where the ticket contains the stipu-

¹ *Hill v. R. R. Co.*, 63 N. Y. 101; 427; *Elmore v. Sands*, 54 N. Y. 512; *Farewell v. R. R. Co.*, 15 U. C. C. P. 13 Am. Rep. 617; *Barker v. Codin*, 31

lation, "Good for this day only," the mere verbal declarations of the company's ticket-agent, made subsequent to the purchase of such ticket, as to its being good at any time thereafter, will not constitute a valid contract in the absence of proof that the agent had authority to make an oral contract for the company varying the one indicated by the ticket.¹ A commutation-ticket good for a certain number of miles of travel, but limited by its terms to be used within a certain time, is worthless after the expiration of such time, and the holder cannot claim transportation under it, although the number of miles of travel guaranteed by it have not yet been exhausted.² It does not affect a mileage ticket, issued on condition that it should not be good on that part of the road where offered, that a similar ticket was used by another person without objection on the part of the railroad company.³ If a ticket has ceased to be good for the reason that it is a limited ticket, and the limitation has expired, or because the holder has forfeited his rights under it, the railroad company does not waive its right to refuse to carry the holder of it merely because the ticket has been afterwards punched by a baggage-man,⁴ or recognized by one of the conductors of the company, and the holder permitted to ride upon it.⁵ A condition in a ticket that it shall not be transferred is good; but where such a ticket is presented by one not the original purchaser, the conductor has no right to take it

Barb. 556; *Boice v. R. R. Co.*, 61 Barb. 611; *Boston etc. R. R. Co. v. Proctor*, 1 Allen, 267; 79 Am. Dec. 729; *Shedd v. R. R. Co.*, 40 Vt. 88; *State v. Campbell*, 32 N. J. L. 309; *Wentz v. R. R. Co.*, 5 Thomp. & C. 556; 3 Hun, 241; *Nelson v. R. R. Co.*, 7 Hun, 140; *Briggs v. R. R. Co.*, 24 U. C. Q. B. 510; *Pennington v. R. R. Co.*, 62 Md. 95; *Johnson v. R. R. Co.*, 46 N. H. 213; 88 Am. Dec. 199.

¹ *Boice v. R. R. Co.*, 61 Barb. 611.

² *Powell v. R. R. Co.*, 25 Ohio St. 70; *Sherman v. R. R. Co.*, 40 Iowa, 45; *Lillis v. R. R. Co.*, 64 Mo. 464; 27 Am. Rep. 255.

³ *Oppenheimer v. R. R. Co.*, 9 Col. 320.

⁴ *Wentz v. R. R. Co.*, 3 Hun, 241; 5 Thomp. & C. 556.

⁵ *Dietrich v. R. R. Co.*, 71 Pa. St. 432; 10 Am. Rep. 711; *Sherman v. R. R. Co.*, 40 Iowa, 45; *Wakefield v. R. R. Co.*, 117 Mass. 544; *Johnson v. R. R. Co.*, 46 N. H. 213; 88 Am. Dec. 199; *Hill v. R. R. Co.*, 63 N. Y. 101; *Nolan v. R. R. Co.*, 9 Jones & S. 541; *Stone v. R. R. Co.*, 47 Iowa, 82; 29 Am. Rep. 458; *Keeley v. R. R. Co.*, 67 Me. 163. But see *Cunningham v. R. R. Co.*, 9 Lower Canada Jur. 57.

up and then eject the passenger because it is provided in the ticket that if it is presented by any one but the original purchaser "the company may refuse to accept it."¹ If one without fraud, and without objection, travels on a non-transferable commutation-ticket not issued to him, the railroad company is liable if he is injured through its negligence.²

A round-trip ticket is good until used, in the absence of a stipulation to the contrary on the ticket, or notice to the buyer at the time of the purchase. He is not bound by a regulation to the contrary, of which he is not informed.³ So a regulation by a railroad company restricting the holder of a certain class of tickets to special trains, nothing of the kind appearing on the tickets, will not justify the expulsion of the holder of such a ticket from the regular trains, he having taken passage thereon without knowledge of the regulation.⁴ A round-trip ticket, punctured for the purpose of separation into two parts, and having on the going part the words "Not good for passage" on a line with the words "if detached" on the returning part, is good for a passage, where the parts have become accidentally separated, if they are in good faith both presented to the same conductor on the going trip.⁵ A ticket issued December 6th, and limited to two days, is good until midnight of December 8th.⁶ Where a limited ticket is issued, "Not good for passage after" a certain number of days from its date, or to be "used" by a certain day, the passenger need not have completed his journey by that date. It is sufficient that he has commenced it.⁷ A ticket having the words "Good this trip

¹ *Post v. R. R. Co.*, 14 Neb. 110; 45 Am. Rep. 100.

² *Robostelli v. R. R. Co.*, 33 Fed. Rep. 796.

³ *Pennsylvania R. R. Co. v. Spicker*, 105 Pa. St. 142.

⁴ *Maroney v. R. R. Co.*, 106 Mass. 153; 8 Am. Rep. 305.

⁵ *Wightman v. R. R. Co.*, 73 Wis. 169; 9 Am. St. Rep. 778.

⁶ *Georgia Southern R. R. Co. v. Bigelow*, 68 Ga. 219.

⁷ *Lundy v. R. R. Co.*, 66 Cal. 191; 56 Am. Rep. 100; *Auerbach v. R. R. Co.*, 89 N. Y. 281; 42 Am. Rep. 290; *Evans v. R. R. Co.*, 11 Mo. App. 463.

only" upon its face entitles the holder to a passage on a subsequent day as well as the day it bears date. Such words do not relate to time, but to a journey.¹ A ticket which, on its face, purports to be for the exclusive use of a man and family, authorizes a son who is residing with the father as a member of his family to ride upon the road, notwithstanding he may be over twenty-one years of age. A son or daughter residing with the father does not cease to be a member of his family by the mere fact of arriving at the age of twenty-one or eighteen.² The holder of a special excursion railroad ticket for a round trip, surrendering it, and receiving instead a regular ticket substituted by the company for its own convenience, gets no right to return upon any other than the excursion train.³ A "stop-over" ticket from New York to St. Louis, good for thirty days, does not give an unlimited right to stop at intermediate stations on connecting roads. Where the holder of such a ticket secured a check good for a ten days' stop at such a station, it was held that he was properly ejected from the train after ten days, though within the thirty, for a refusal to pay fare from such station to the terminus of that road.⁴ Where a railroad ticket over connecting lines is limited to a specified number of days, the last day falling on Sunday, and the last line runs no train on that day, the passenger is entitled to passage on the next day.⁵ Where a return ticket stipulates that the passenger shall identify himself to the satisfaction of the ticket-agent and have his ticket stamped, the agent alone, and not the court or jury, is to decide as to the sufficiency of the identification.⁶ But

¹ *Pier v. Finch*, 24 Barb. 514.

² *Chicago etc. R. R. Co. v. Chisholm*, 79 Ill. 584.

³ *McRae v. R. R. Co.*, 88 N. C. 526; 43 Am. Rep. 745.

⁴ *Kelsey v. R. R. Co.*, 28 Hun, 460.

⁵ *Little Rock etc. R. R. Co. v. Dean*, 43 Ark. 529; 51 Am. Rep. 584.

But in Ohio, where a ticket was limited to expire on a certain date, it was held that a passenger was not entitled to ride on a train after that date, though by a delay of the company that was the first one he could take: *Pennsylvania Co. v. Hine*, 41 Ohio St. 276.

⁶ *Bethea v. R. R. Co.*, 26 S. C. 91.

this requirement may be waived by identification before another agent at another station, and by obtaining his stamp.¹ A railroad company selling a ticket over a road not within its control must refund the money paid if its acceptance is refused; it is immaterial that it was presented by another than the purchaser, there being on the ticket no limitation of the right of transfer.²

ILLUSTRATIONS. — By the express terms of a "round-trip" ticket over connecting roads, the passenger, before beginning the return trip, was to sign it in the presence of the ticket agent of the first road. *Held*, that a waiver of this condition by conductors of that and other roads was not binding upon a subsequent connecting road: *Cloud v. R. R. Co.*, 14 Mo. App. 136. A bought a return-ticket good over other roads. It was stipulated that defendant should not be responsible beyond its own line, and that A should identify himself to the ticket-agent of another line, at the point where his return journey began, and should have his ticket stamped by the agent. A was prepared so to identify himself, but found no agent at the station when he presented himself there before beginning his journey; whereupon he began his journey, and was put off defendant's train, because he insisted on riding on the ticket. *Held*, that he had no right of action: *Mosher v. R. R. Co.*, 17 Fed. Rep. 880; 23 Fed. Rep. 326; 127 U. S. 390.

§ 1889. **Continuous Passage.**—A contract for carriage from A to B is, as a rule, an entire contract, and gives the passenger no right to leave the conveyance at an intermediate point, and afterwards resume the journey on another conveyance.³ And though it has been customary

¹ *Taylor v. R. R. Co.*, 99 N. C. 185; 6 Am. St. Rep. 509.

² *Hudson v. R. R. Co.*, 3 McCrary, 249.

³ *Stone v. R. R. Co.*, 47 Iowa, 82; 29 Am. Rep. 458; *Hamilton v. R. R. Co.*, 51 N. Y. 100; *Cheney v. R. R. Co.*, 11 Met. 121; 45 Am. Dec. 190; *Cleveland etc. R. R. Co. v. Bartram*, 11 Ohio St. 457; *State v. Overton*, 24 N. J. L. 435; 61 Am. Dec. 671; *Johnson v. R. R. Co.*, 46 N. H. 213; 88 Am. Dec. 199; *Beebe v. Ayers*, 28 Barb. 275; *Drew v. R. R. Co.*, 51 Cal. 425; *Briggs v. R. R. Co.*, 24 U. C.

Q. B. 510; *Craig v. R. R. Co.*, 24 U. C. Q. B. 504; *Barker v. Coffin*, 31 Barb. 556; *Breen v. R. R. Co.*, 50 Tex. 43; *Gale v. R. R. Co.*, 7 Hun, 670; *Oil Creek etc. R. R. Co. v. Clark*, 72 Pa. St. 231; *Terry v. R. R. Co.*, 13 Hun, 359; *Dunphy v. R. R. Co.*, 10 Jones & S. 128; *Dietrich v. R. R. Co.*, 71 Md. St. 432; 10 Am. Rep. 711; *Vankirk v. R. R. Co.*, 76 Pa. St. 66; 18 Am. Rep. 404; *Hatton v. R. R. Co.*, 39 Ohio St. 375; *Johnson v. R. R. Co.*, 63 Md. 106; *Roberts v. Koehler*, 30 Fed. Rep. 94; *Wyman v. R. R. Co.*, 34 Minn. 210. In Maine it is enacted (Pub.

to allow passengers to stop over at stations intermediate upon their journey without detriment to their right to resume travel upon the same ticket, yet the railroad company may at any time make a regulation to the contrary, and a passenger will be bound by such regulation, whether he has notice of it or not.¹ A conductor's check is evidence only that fare has been paid for a continuous journey.² The purchaser of a "train-check" given by the conductor to another passenger on a limited ticket, and reading on its face, "good for continuous passage only," is not entitled to finish the journey begun by such passenger, though within the limited time.³ A passenger who purchases and holds a through-ticket for a journey by railroad (in this case from Omaha to San Francisco), marked "not transferable," and bought by him subject to that restriction, cannot take a part of the journey, and then sell the ticket to another person so as to entitle him to take the rest of the trip, and this, although the assignee claims passage upon the same train.⁴ When the purchaser of a coupon ticket over connecting lines is not bound to make a continuous journey from his starting-point to his destination, he is obliged, if the contract so requires, to make a continuous journey between each of two points named on a coupon.⁵ A passenger who buys a through-ticket, indicating no particular route, on a railroad, is bound to pursue the usual and direct route from the place of starting to the place of destination, and is not entitled to take a circuitous route from one point

Laws 1871, c. 223) that no railroad company shall limit the right of a ticket-holder to any given train; but that such ticket-holder shall have the right to travel on any train, whether regular or express train, and to stop at any of the stations at which the train stops, and the ticket shall be good for passage for six years from the day it is first used: See *Dryden v. R. R. Co.*, 60 Me. 512.

¹ *Johnson v. R. R. Co.*, 46 N. H. 213; 88 Am. Dec. 199.

² *State v. Overton*, 24 N. J. L. 435; 61 Am. Dec. 671; *Cheney v. R. R. Co.*, 11 Met. 121; 45 Am. Dec. 190; *McClure v. R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345. See *Palmer v. R. R. Co.*, 3 S. C. 580; 16 Am. Rep. 750.

³ *Walker v. R. R. Co.*, 15 Mo. App. 333.

⁴ *Cody v. R. R. Co.*, 4 Saw. 114.

⁵ *Little Rock etc. R. R. Co. v. Dean*, 43 Ark. 529; 51 Am. Rep. 584.

to another between those places.¹ A ticket with the words "Portland to Boston" imprinted on it, purchased in Portland, does not entitle the holder to a passage in a direction the reverse of that indicated on the ticket.²

ILLUSTRATIONS. — Plaintiff held a ticket to A, good only on trains stopping there. He boarded a train which did not stop there, and the conductor allowed him to ride to the station next to A. There he boarded a train that did stop at A, and was put off. *Held*, that he was entitled to damages: *Kellett v. R. R. Co.*, 22 Mo. App. 356. A passenger purchased a ticket from W. to D. and return, and on his return journey from D. to W. went on to P., a station beyond, and refused to pay fare from W. to P., on the ground that a return ticket from P. to D. was the same price as a return ticket from W. to D. *Held*, that as soon as the passenger arrived on his return journey at W., the contract between him and the company was at an end, and he must pay the fare: *Great Western etc. R. R. Co. v. Pocock*, 28 Week. Rep. 49; 41 L. T., N. S., 415. Plaintiff, before purchasing a ticket at a railroad station for another station on the same line, informed the company's ticket agent that he wished to stop off at an intermediate station, and then resume his journey to its destination. The agent told him he could do so, and he then purchased a ticket to such destination, which contained a statement, "good for this day only." He stopped off at the intermediate station, and resumed his journey by another train. Upon refusing to pay fare to the conductor, who declined to accept the ticket, he was ejected from the train, no tender of the extra amount he had paid on his ticket being made. To within a few days previous to the time, stop-over tickets had been given by conductors, but the rule had been changed. *Held*, that, under the circumstances, the ejection was wrongful, and a verdict against the railroad company for damages therefor was sustained: *Burnham v. R. R. Co.*, 63 Me. 298; 18 Am. Rep. 220. Plaintiff purchased a ticket on defendant's railroad from N. to W. He left the train at an intermediate station, and resumed his journey by another train. The conductor on such train took up the ticket and demanded fare from plaintiff, but refused to return the ticket. *Held*, that plaintiff was entitled to a return of the ticket, and that by a refusal to return it defendant lost the right to seek to enforce the payment of fare, by an ejection of plaintiff: *Vankirk v. R. R. Co.*, 76 Pa. St. 66; 18 Am. Rep. 404. Plaintiff was a passenger on the cars of de-

¹ *Bennett v. R. R. Co.*, 69 N. Y. 24 Am. Rep. 19; *Coleman v. R. R. Co.*, 594; 25 Am. Rep. 250. 106 Mass. 160.

² *Keeley v. R. R. Co.*, 67 Me. 163;

defendants, a railroad company, under a contract to carry him from Charlotte, North Carolina, to Augusta, Georgia, with the privilege of stopping at Columbia. His ticket was a through-ticket from New York to Savannah, with coupons for the different roads, — for defendants' road there being two, one from Charlotte to Columbia, and one from Columbia to Augusta. On the passage from Charlotte to Columbia, W., the conductor on the train, detached both coupons, and gave plaintiff a conductor's check, which, by the rules of the company and the general usage of railroads, was good only for that trip. Plaintiff stopped at Columbia, and the next day took the train for Augusta, in charge of J., another conductor. On this train, his ticket was again demanded, and on his exhibiting the conductor's check, and his ticket without the coupon, to Augusta, was informed by J. that they did not answer, and that he must either pay the fare to Augusta or leave the train. He failed to pay, and was ejected from the train. *Held*, that the act of J., in ejecting plaintiff from the train, was wrongful, and that defendants were liable in damages therefor: *Palmer v. R. R. Co.*, 3 S. C. 580; 16 Am. Rep. 750.

§ 1890. **Passenger Entitled to Seat.** — The carrier must provide every passenger with a seat.¹ A passenger may decline to surrender his ticket or to pay his fare until he is provided with a seat.² If he rides on a train, and refuses to surrender his ticket or pay for want of a seat, and is ejected, he may not recover for the ejection, but only for breach of contract to furnish a seat.³ But the mere failure of the managers of a ferry-boat to provide a female passenger sixty-seven years old with a seat does not show negligence (the woman, while standing, having been thrown down by a sudden shock to the boat), it not appearing that the boat was provided with a less number of seats than ordinarily were demanded.⁴ If there be no

¹ *Bass v. R. R. Co.*, 36 Wis. 450; 39 Wis. 636; 42 Wis. 654; *Willis v. R. R. Co.*, 32 Barb. 399; 34 N. Y. 670. The passenger is not bound to find himself a seat; this is the carrier's duty. He has no right to have him stand in the aisle of the car: *Willis v. R. R. Co.*, 32 Barb. 399; 34 N. Y. 670.

² *Davis v. R. R. Co.*, 53 Mo. 317; 14 Am. Rep. 457; *Memphis v. R. R. Co.*,

85 Tenn. 627; 4 Am. St. Rep. 627. It seems the passenger has no right to ride standing; he should quit the train at the first station, and bring an action upon the contract: *Id.*

³ *St. Louis, Iron Mountain etc. R. R. Co. v. Leigh*, 45 Ark. 368; 55 Am. Rep. 558.

⁴ *Burton v. West Jersey Ferry Co.*, 114 U. S. 474.

seats in the other cars, it seems that a male passenger has a right to a seat in a car reserved for women, or men accompanying women.¹

ILLUSTRATIONS.—A passenger on defendant's railroad, finding no vacant seats in the ordinary coaches, the seats being occupied either by passengers or their baggage, proceeded to a drawing-room car, owned by a private individual, but forming part of the train, and regularly run with it by contract with the defendant, and there took a seat. When called on for extra fare for that seat, he refused, announcing his readiness to go into the other cars if a seat were provided for him there. Thereupon the porter of the drawing-room car, employed by its owner, attempted to eject him. *Held*, that the defendant was liable for this assault: *Thorpe v. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325. A passenger remained standing in an overcrowded car until after the train had started, and refused either to surrender his ticket or to go forward into the smoking-car, where there was room. The conductor put him off. *Held*, that no action lay: *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627.

§ 1891. Must Give Time for Refreshment.—Where the length of the journey makes it necessary, the carrier is bound to allow a reasonable time for meals at the customary places on the route,² and he must warn the passengers when the time has expired.³

¹ *Bass v. R. R. Co.*, 36 Wis. 450; 17 Am. Rep. 495; 39 Wis. 636; 42 Wis. 654.

² *Hutchinson on Carriers*, sec. 611; citing *Story on Bailments*, sec. 597.

³ *State v. R. R. Co.*, 58 Me. 176; 4 Am. Rep. 258; *Mitchell v. R. R. Co.*, 30 Ga. 22. In *Peniston v. R. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444, it is said: "In conveying passengers through long journeys, such as from Chicago to New Orleans, at great speed, and with rapidity, a common carrier is required, by humanity as well as by law, to provide its passengers with easy modes, and to allow them reasonable time for the purpose of sustaining life by means of food and necessary refreshments. Hence it is that on all such roads arrangements are made to enable passengers to obtain at least two meals a day, and that announcement is made in every passenger train

by employees of the road of the approach of a train to a station, where, under arrangements with the company, meals are prepared for the convenience of its passengers. . . . We hold that the defendant company is legally bound to furnish to its passengers an easy and safe mode of going to and from its trains, and such eating-stations as it may have provided for the wants and convenience of its passengers; and that for the purpose of enforcing this obligation, it is immaterial whether the eating-station is owned and kept by the company, or by another person with an understanding with the company as to the time of preparing and furnishing the meals. In our opinion, this obligation imposes upon the railway company the duty of having ample and sufficient lights for meals furnished at night, to safely guide their passengers to and from the hotel or

§ 1892. **Names of Stations must be Announced.**—The name of the station must be announced upon the arrival of the train,¹ and when the name of a station is called, a passenger may presume that the next stop is at that station.²

§ 1893. **Invitation to Alight—Express and Implied.**—The passenger is justified in attempting to alight, where he receives from the carrier or his servants an invitation to alight, either express or implied.³ Calling out the name of the station is not alone an invitation to alight,⁴ but calling out the station and then stopping is.⁵ Other circumstances may amount to an invitation to alight. In an English case⁶ the plaintiff was seated in the last compartment of the last carriage. The train arrived at a dimly lighted station on a dark night. A guard opened the door, and said nothing. The platform did not run alongside the track the whole length of the train, but curved away from the line at the point where the plaintiff's carriage stood. The plaintiff stepped out, expecting to alight upon the platform, but fell between the carriage and the platform, and was injured. The carrier was held liable. Where a railroad train is stopped on a dark

eating-station, and in case trains are removed from one track to another during the meal, to inform, by employees, the passengers on their egress from the eating or dining-room of the exact location of their respective trains."

¹ *Southern R. R. Co. v. Kendrick*, 40 Miss. 374; *Imhoff v. R. R. Co.*, 20 Wis. 344; *Keller v. R. R. Co.*, 2 Abb. App. 480; 17 How. Pr. 102; *Dickens v. R. R. Co.*, 1 Abb. App. 504; 28 Barb. 41; *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478; *Louisville etc. R. R. Co. v. Mask*, 64 Miss. 738; *Dorrah v. R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629.

² *Central R. R. Co. v. Von Horn*, 38 N. J. L. 183.

³ *Thompson on Carriers of Passengers*, 229.

⁴ *Lewis v. R. R. Co.*, L. R. 9 Q. B. 66; *Pennsylvania Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323.

⁵ *Bridges v. R. R. Co.*, L. R. 7 H. L. 213; *Weller v. R. R. Co.*, L. R. 9 Com. P. 126; *Taber v. R. R. Co.*, 71 N. Y. 489; *Central R. R. Co. v. Van Horn*, 38 N. J. L. 133; *Columbus etc. R. R. Co. v. Farrell*, 31 Ind. 408. *Contra*, *Pabst v. R. R. Co.*, 2 McAr. 42. This last decision is based upon the decision of the court of exchequer chamber in *Bridges v. R. R. Co.*, L. R. 6 Q. B. 377; which was, however, subsequently reversed in the house of lords: L. R. 7 H. L. 213.

⁶ *Praeger v. R. R. Co.*, 24 L. T., N. S., 105; and cited in *Cockle v. R. R. Co.*, L. R. 7 Com. P. 323, a similar case.

night, merely waiting for a train from the opposite direction to pass, at a place several rods from a passenger station, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and receives a personal injury by walking into an open cattle-guard cannot recover damages of the company therefor; and it makes no difference that he was misinformed by some individual not in the company's employment that he must go and see to having his baggage passed at the custom-house, supposed to have been reached by the train, or that the train was near a passenger station which was not the place of his destination.¹

ILLUSTRATIONS. — A railroad brakeman announced a station, and shortly after the train stopped, but short of the station, and in the dark. The plaintiff, supposing he had reached his destination, got off as soon as he could, but after the train had slowly started again, fell, and was injured. *Held*, that the company was liable: *Memphis etc. R. R. Co. v. Stringfellow*, 44 Ark. 322; 51 Am. Rep. 598. A passenger on a railroad train was aroused at ten o'clock at night by the conductor, and informed that his station was reached, and told by him and the brakeman to hurry and get off. The train moving very slowly, he stepped off, and as the train had overshot the platform, he fell and was injured. *Held*, that an action therefor was maintainable: *St. Louis etc. R. R. Co. v. Cantrell*, 37 Ark. 519; 40 Am. Rep. 105. A railroad train, approaching a station where there was a crossing of railroads, stopped, as required by law, several hundred feet before reaching the station. The name of the station had been called, and the plaintiff, a woman, hurriedly attempted to alight, and the train starting, she fell and was injured. It was daylight, and there was no appearance of any landing-place for passengers at that point. None of the employees knew that she was endeavoring to leave the car. *Held*, that the railroad company was not liable: *Mitchell v. R. R. Co.*, 51 Mich. 236; 47 Am. Rep. 566.

§ 1894. Time must be Given to Alight or Get Aboard.

—The passenger is entitled to a reasonable time to get off after the train arrives at the station.² So as to a passen-

¹ *Frost v. R. R. Co.*, 10 Allen, 387; 27 Wis. 158; *South. etc. R. R. Co. v. Kendrick*, 40 Miss. 374; *Dickens v. R.*

² *Curtis v. R. R. Co.*, 23 Wis. 152; *R. Co.*, 1 Abb. App. 504; *Fairmount*

ger on a street car.¹ When a railroad train has come to a full stop for the purpose of enabling passengers to alight, and, without notice, the train is suddenly moved, causing injury to those alighting, it is negligence, whether such motion is in a backward or forward direction.² If the train does not stop at a station, the passenger will not be justified in making an attempt to get on.³ But attempting to board a moving train is not in all cases negligence *per se*.⁴ A passenger has the right to expect, not only that the cars will remain stationary long enough for him to step from the train, but also that the servants of the defendant will be present to assist him in so doing, if necessary.⁵ But the servants of a railroad company cannot be expected to act with reference to a passenger's disabilities, unless made known to them.⁶ If, however, being informed, they do so act, the company will be responsible for their negligence in view of such knowledge.⁷ A conductor's duty does not require him to assist a female passenger to alight from the car with her two small children when she reaches her destination.⁸ But a passenger with his wife and minor children should, upon reaching their destination, be allowed reasonable time to remove them, together with their personal belongings and baggage, from the cars.⁹ The law imposes no duty upon a carrier of passengers as to require of its servants, after a reasonable time has been allowed passengers to leave its cars upon

etc. R. R. Co. v. Stutler, 54 Pa. St. 375; 93 Am. Dec. 714; Roberts v. Johnson, 58 N. Y. 613; 5 Jones & S. 157; Houston etc. R. R. Co. v. Gorbett, 49 Tex. 573; Mulhado v. R. R. Co., 30 N. Y. 370; Jeffersonville etc. R. R. Co. v. Parmalee, 51 Ind. 42; Toledo etc. R. R. Co. v. Baddeley, 54 Ill. 19; 5 Am. Rep. 71; Louisville etc. R. R. Co. v. Mask, 64 Miss. 738.

¹ Crissey v. R. R. Co., 75 Pa. St. 83; Poulin v. R. R. Co., 61 N. Y. 621.

² Milliman v. R. R. Co., 66 N. Y. 642; 6 Thomp. & C. 585.

³ Phillips v. R. R. Co., 49 N. Y. 177.

⁴ Johnson v. R. R. Co., 70 Pa. St. 357.

⁵ Jeffersonville etc. R. R. Co. v. Hendrick's Adm'r, 26 Ind. 228; 41 Ind. 49. *Contra*, New Orleans etc. R. R. Co. v. Statham, 42 Miss. 607; 97 Am. Dec. 478.

⁶ Toledo etc. R. R. Co. v. Baddeley, 54 Ill. 19; 5 Am. Rep. 71.

⁷ Columbus etc. R. R. Co. v. Powell, 40 Ind. 37.

⁸ Raben v. R. R. Co., 73 Iowa, 579; 5 Am. St. Rep. 708.

⁹ Hurt v. R. R. Co., 94 Mo. 255; 4 Am. St. Rep. 375.

arrival at their several destinations, to make personal inspection of or interrogate the remaining passengers to see whether they intend leaving the cars.¹ If the company have been in the habit of receiving and discharging passengers at a place other than their regular station, it is not negligence for a passenger to get on at that place while the train is standing still, and there is no apparent danger in so doing. It is the duty of the train-men to give the customary signals before starting away from such a place.² If the employees of a railroad willfully, recklessly, or capriciously fail to stop a train when signaled, exemplary damages are recoverable.³

§ 1895. Car Overshooting or Falling Short of Platform.—If the cars overshoot or fall short of the platform, and the passenger attempt to alight, and is injured, the carrier will be liable,⁴ unless the passenger has been negligent in making the attempt to alight.⁵ If a passenger is injured by alighting of his own accord from a car at a place where there is no platform, when, by passing forward, he could alight with safety on the platform, he is guilty of negligence, and cannot recover.⁶ But when a railroad train draws up at a platform, so that only the forward end of the smoking-car is at the platform, a woman passenger in a rear car is not bound to go through the smoking-car to alight, nor to alight from the front end of the rear car; and if she is injured in alighting from the rear end, in consequence of the position of the train, the company is liable.⁷ If its business so demands, a railroad company may run a freight train on which there are passengers past the depot platform,

¹ *Hurt v. R. R. Co.*, 94 Mo. 255; 4 Am. St. Rep. 374.

² *Keating v. R. R. Co.*, 49 N. Y. 673; *Mitchell v. R. R. Co.*, 30 Ga. 22.

³ *Wilson v. R. R. Co.*, 63 Miss. 352.

⁴ *Thompson on Carriers of Passen-*

gers, 228; *Terre Haute R. R. Co. v. Buck*, 96 Ind. 346; 49 Am. Rep. 168.

⁵ *Thompson on Carriers of Passengers*, 228, 229.

⁶ *Eckerd v. R. R. Co.*, 70 Iowa, 353.

⁷ *Cartwright v. R. R. Co.*, 52 Mich. 606; 50 Am. Rep. 274.

in the first instance, intending to back it up again, without negligence being imputable to it.¹

§ 1896. Carrying Passenger beyond Destination.—Carrying a passenger beyond his destination gives a good ground of action.² But it is the duty of a passenger to ascertain what trains stop at his destination,³ and to leave the train at the first station after he discovers the mistake.⁴ A railroad is not liable for the neglect of its conductor to fulfill his promise to wake a passenger, whereby he is carried beyond his destination.⁵

§ 1897. Carrier may Establish Reasonable Regulations—Right to Eject Passengers.—The carrier may establish reasonable regulations for the conduct of his business. Whether a particular regulation is or is not reasonable is a mixed question of law and fact.⁶ For a refusal to obey a reasonable regulation, the passenger may be expelled from the car or other vehicle. Judge Thompson sums up the grounds for the expulsion of the passenger as follows: "The conduct of the passenger may be in violation of lawful police regulations; or he may be a person known to be of a

¹ *Hemmingway v. R. R. Co.*, 67 Wis. 668.

² *New Orleans etc. R. R. Co. v. Hurst*, 36 Miss. 660; 74 Am. Dec. 785; *Sunday v. Gordon*, 1 Blatchf. & H. 569; *Pitts. etc. R. R. Co. v. Nuzum*, 50 Ind. 141; 19 Am. Rep. 703; *Mobile etc. R. R. Co. v. McArthur*, 43 Miss. 180; *Memphis etc. R. R. Co. v. Whitfield*, 44 Miss. 466; 7 Am. Rep. 699; *Thompson v. R. R. Co.*, 50 Miss. 315; 19 Am. Rep. 12.

³ *Pittsburgh etc. R. R. Co. v. Nuzum*, 50 Ind. 141; 19 Am. Rep. 703.

⁴ *Barker v. R. R. Co.*, 24 N. Y. 599; *Page v. R. R. Co.*, 6 Duer, 523.

⁵ *Nunn v. R. R. Co.*, 71 Ga. 710; 51 Am. Rep. 284. Both brakeman and conductor informed a passenger that the next station was X., her destination, when it was not, and she, stopping there, took a severe cold from unavoidable exposure. *Held*, that the

company was liable: *Pennsylvania Co. v. Hoagland*, 78 Ind. 203.

⁶ *Day v. Owen*, 5 Mich. 520; 72 Am. Dec. 62; *Du Laurens v. R. R. Co.*, 15 Minn. 49; 2 Am. Rep. 102. In *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62, it is said: "The reasonableness of a rule or regulation is a mixed question of law and fact to be found by the jury on the trial, under the instructions of the court. It may depend on a great variety of circumstances, and may not improperly be said to be in itself a fact to be deduced from other facts. It is not to be inferred from the rule or regulation itself, but must be shown positively." Some cases hold it a question of law: *Hibbard v. R. R. Co.*, 15 N. Y. 455; *Vedder v. Fellows*, 20 N. Y. 126; others, a question of fact: *State v. Overton*, 24 N. J. L. 435; 61 Am. Dec. 671.

disreputable and vicious character, and therefore disentitled to demand transportation. The passenger may refuse to exhibit or deliver up his ticket when properly requested; or insist that he shall ride upon an improper ticket; or a ticket the limitation of which has expired; or a ticket for which the company have received no consideration or has been otherwise unlawfully obtained; or without any ticket whatever; or without paying any fare whatever;¹ or the fare which may properly be demanded; or be guilty of a breach of other reasonable regulations of the carrier; or his conduct may amount to a breach of the contract of carriage."² These cases are referred to more in detail in the previous and succeeding sections of this chapter.

A regulation requiring passengers to surrender their tickets to the conductor when demanded is reasonable.³ So is a regulation that coupons will not be accepted unless detached by or in the presence of the conductor.⁴ So is a regulation forbidding conductors from passing any one on half-fare tickets, unless those exhibiting them should carry a permit from the proper officer of the road to travel in that manner.⁵ When a railroad company issues tickets with no special restrictions, but by a rule of the company the holders of such tickets can ride only on certain trains, a person purchasing such a ticket, and who is ignorant of the rule, cannot be lawfully expelled from a train on which he has taken passage contrary to such regulation.⁶ The agent of a ferry company has no right to expel a passenger from a ferry-boat for violating a regulation of the company requiring passengers to enter

¹ *Schular v. R. R. Co.*, 92 Mo. 339.

² *Thompson on Carriers of Passengers*, 376.

³ *Ill. Cent. R. R. Co. v. Whittemore*, 43 Ill. 420; 92 Am. Dec. 138.

⁴ *Boston and Maine R. R. Co. v. Chipman*, 146 Mass. 107; 4 Am. St. Rep. 293; *Norfolk etc. R. R. Co. v. Wysor*, 82 Va. 250. But a technical violation of it—as where the conductor

can readily see that the coupon is from the ticket—will not justify him in refusing to accept the coupon, though a willful refusal of the passenger to show the ticket and allow the conductor to examine the case will: *Louisville etc. R. R. Co. v. Harris*, 9 Lea, 180; 42 Am. Rep. 668.

⁵ *Goetz v. R. R. Co.*, 50 Mo. 472.

⁶ *Maroney v. R. R. Co.*, 106 Mass. 153; 8 Am. Rep. 305.

the boat through a certain gate, and deliver their tickets thereat, without first notifying such passenger of the existence of the regulation. Nor has such agent any right to touch the person of the passenger without first notifying him that unless he leaves the boat he will be put off by force.¹

If, in consequence of a fractious refusal to pay the fare demanded, the train is stopped for the sole purpose of putting him off, he is not entitled to insist on continuing his trip by paying the fare demanded.² But where the train stops at a regular stopping-place, the passenger, or others for him, may offer to pay the fare demanded, and then it will be illegal to eject him.³ And where the passenger's refusal is in good faith, he cannot, after agreeing to the conductor's demand, be ejected.⁴

¹ *Compton v. Van Volkenburgh*, 34 N. J. L. 134.

² *Hoffbauer v. R. R. Co.*, 52 Iowa, 279; 35 Am. Rep. 278; *O'Brien v. R. R. Co.*, 80 N. Y. 236; *State v. Campbell*, 32 N. J. L. 309; *Pease v. R. R. Co.*, 11 Daly, 350; *O'Brien v. R. R. Co.*, 15 Gray, 20; 77 Am. Dec. 347.

³ *O'Brien v. R. R. Co.*, 80 N. Y. 236. See *post*, § 1903. Passenger must have Ticket or Pay Fare.

⁴ *Texas etc. R. R. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532, illustrates this principle. The court said: "It is undoubtedly a general principle that 'a willful refusal to pay the proper fare justifies expulsion from the train': *Thompson on Carriers*, 340. The authorities seem to hold also that 'after a person has refused to pay his fare, and is being put off the train, he acquires no right to passage by then tendering the fare demanded': *Thompson on Carriers*, 340; *O'Brien v. R. R. Co.*, 15 Gray, 20; 77 Am. Dec. 347; *Hoffbauer v. R. R. Co.*, 52 Iowa, 342; 35 Am. Rep. 278. To bring a case within these principles, there must be a willful, or at least a positive, refusal to pay proper fare, or in other words, a boarding or remaining upon the train with the intention of defrauding the company or resisting demands for the payment of fare: *Thomp-*

son on Carriers, 340. The distinction between such a case and the present is very apparent. Bond did not enter the car with intent to defraud the company, or resist its demands for full pay. He went aboard of it expecting that he would be taken to Terrell for twenty cents, paid to the conductor as usual. He tendered that amount to the conductor in charge, with whom he had never traveled before, and upon being required to pay ten cents more, told the conductor that he had never been required to pay this additional amount; and when informed that the charge was four cents per mile when paid on the train, objected to paying it, and told the conductor good-humoredly if he would stop the train he would get off. This was a mere discussion between the parties, in which Bond was endeavoring to persuade the conductor to allow him to make the journey for twenty cents, and the conductor was attempting to convince Bond that he could not do so, but must have the full fare required when paid on the train. It was just such a discussion as is liable to take place frequently between a conductor and a passenger. It may arise as to the validity of a ticket, or the time when it expired, or upon like subjects, in which the conductor is expected to

ILLUSTRATIONS. — A bought a return ticket on which was a printed condition that he should be identified, and the ticket stamped by the agent of the other end of the route. A did not notice this, started on his return journey, and was forcibly, but civilly, ejected on his refusal to pay fare. *Held*, that he had no cause of action: *Moses v. R. R. Co.*, 73 Ga. 356. A bought a return ticket, and by mistake the conductor punched the return coupon when he took up the other one, and his indorsement of the fact of the mistake not being recognized by the conductor on the return trip, A was forcibly put off the train for a refusal to pay his fare. *Held*, that he was not confined to his action of contract against the company, but could maintain *vi et armis* for an unlawful interference with his person, and an indignity to his feelings; that, however, not having been ejected wantonly or maliciously, or with unnecessary force, he was not entitled to exemplary damages: *Philadelphia, Wilmington etc. R. R. Co. v. Rice*, 64 Md. 63. Plaintiff was ejected from defendant's cars for non-payment of fare after he had tendered what he claimed and what was afterwards held by the court to be the legal fare. On the trial, defendant offered evidence of plaintiff's declaration, subsequent to the ejection, that he took passage in order to test the question of fares and expecting to be ejected and to make money out of the transaction. *Held*, that the evidence was admissible, and such facts being shown, plaintiff was not entitled to exemplary damages: *Cincinnati etc. R. R. Co. v. Cole*, 29 Ohio St. 126; 23 Am. Rep. 729. The plaintiff bought a season ticket on a railroad, on which were indorsed: "Conditions. This ticket is not transferable, nor will any allowance be made in case it may not be used for the whole term for which it was issued. It is subject to inspection at any time by the conductor; a refusal to comply will necessitate collection of full fare each time. It is good only for a continuous passage between the points named. If lost or mislaid, it will not be replaced by the company. The holder will please return

see and know the difference between an attempt to impose upon him and a mere mistake of facts on the part of the passenger. The present conductor should have known from the character of his discussion with Bond the false impression as to what he would have to pay, under which the latter boarded the train, and the good-humored manner in which he asked to be put off, and the small amount in controversy, and then the great distance which Bond would have to walk if expelled from the cars, that he was no trespasser, and that he did not willfully

and would not persistently object to paying the fare exacted of him. He should have allowed him a reasonable time to consider as to paying the additional money, and not acted so hastily in pulling the bell and taking steps to eject the appellee from the cars. As he had acted thus hastily, and the appellee had tendered the money immediately upon the rope being pulled, — the first evidence he had that the conductor really intended to eject him, — the money should have been received, and the appellee restored to his rights as a passenger."

when renewing." Upon the face of the ticket the words, "For conditions, see other side," were printed, in small capitals. The plaintiff lost his ticket, refused to pay fare, and was put off the train. *Held*, that he was bound to know the conditions; that the conditions were lawful, reasonable, and proper regulations; and that he was rightfully put off the train: *Cresson v. R. R. Co.*, 11 Phila. 597. A rule of a railroad company, under a contract with the city requiring it to carry passengers over two sections of its line for one fare, and the passenger to show an undetached coupon ticket as a voucher of his right to continue beyond a given point, *held*, reasonable in law, and the company entitled to eject from the car one refusing to comply: *De Lucas v. R. R. Co.*, 38 La. Ann. 930.

§ 1898. **No Right to Imprison Passenger.**—A carrier whose rule is, that the ticket is to be produced or given up at the end of the journey has no right to detain or imprison a passenger who cannot produce the ticket because he has mislaid or lost it.¹ But the passenger may be held a reasonable time to examine into the circumstances of the case.²

§ 1899. **At What Places Persons may be Ejected.**—At common law the person may be ejected at any place not a dangerous one.³ By statute in England, and in some states, a passenger can be ejected only at a usual stopping-place or near some dwelling-house.⁴ Under such statutes trespassers or persons going upon a train with no intention of paying fare have been held not "passengers."⁵ A

¹ *Standish v. Steamboat Co.*, 111 Mass. 512; 15 Am. Rep. 67; *Lynch v. R. R. Co.*, 90 N. Y. 77; 43 Am. Rep. 141.

² *Standish v. Steamboat Co.*, 111 Mass. 512; 15 Am. Rep. 67.

³ *Thompson on Carriers of Passengers*, 377; *McClure v. R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Great West. R. R. Co. v. Miller*, 19 Mich. 305; *Jeffersonville etc. R. R. Co. v. Rogers*, 28 Ind. 1; 92 Am. Dec. 276; *Everett v. R. R. Co.*, 69 Iowa, 15; 58 Am. Rep. 207; *Wyman v. R. R. Co.*, 34 Minn. 210. *Contra*, *Maples v. R. R. Co.*, 38 Conn. 557; 9 Am. Rep. 434.

⁴ *Thompson on Carriers of Passengers*, 377; *Terre Haute R. R. Co. v.*

Vanatta, 21 Ill. 188; 74 Am. Dec. 96; *Illinois Cent. R. R. Co. v. Sutton*, 42 Ill. 438; 92 Am. Dec. 81; *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133. A statute providing that if any railroad passenger shall refuse to pay his fare, he may be ejected at any usual stopping-place, does not prohibit his ejection at any other safe point: *Toledo etc. R. R. Co. v. Wright*, 68 Ind. 586; 34 Am. Rep. 277.

⁵ *Lillis v. R. R. Co.*, 64 Mo. 464; 27 Am. Rep. 255; *Chicago etc. R. R. Co. v. Boger*, 1 Brad. App. 472. *Contra*, *Chicago etc. R. R. Co. v. Peacock*, 48 Ill. 253; *Chicago etc. R. R. Co. v. Roberts*, 40 Ill. 503.

passenger's refusal to surrender his ticket to a conductor when demanded does not constitute the same offense as the refusal to pay fare, and the statutory prohibition against the expulsion of a passenger for non-payment of fare, except at a regular station, does not apply to the former case.¹ A water-tank is not a "usual stopping-place."² And the train must be stopped before the passenger is put off.³

ILLUSTRATIONS. — An action was brought for damages resulting from the death of the plaintiff's intestate by his being thrown from a car of the defendant by the conductor while the car was in motion. The deceased refused to pay his fare. *Held*, the conductor had no right to expel him while the car was in motion, and the carrier was liable: *Sanford v. R. R. Co.*, 23 N. Y. 343; 80 Am. Dec. 286. A trespasser upon a railroad locomotive-engine was thrown off by the servants of the railroad company while the engine was moving at a dangerous speed, and run over and injured. *Held*, that the company was liable therefor: *Carter v. R. R. Co.*, 98 Ind. 552; 49 Am. Rep. 780. A helpless drunken passenger on a railroad train refusing to pay fare, the conductor, knowing his condition, expelled him, not at a station, and in the snow, by reason whereof the passenger was severely frozen. *Held*, that the company was liable: *Louisville etc. R. R. Co. v. Sullivan*, 81 Ky. 624; 50 Am. Rep. 186. Plaintiff bought a return ticket from Erie, Pennsylvania, to Cleveland, Ohio. As a matter of fact the ticket was not good on a certain night train from Cleveland. Plaintiff did not know this, although the company's posters, etc., would have informed him. The ticket did not. He boarded this train in good faith on his return, and when half a mile out, was ejected by the conductor, although he offered to pay fare, and begged to be carried to a station, if he was to be put off. The place where he was put off was very dangerous, and plaintiff was struck by a car or some unknown object, and severely and permanently injured. The jury, in his action against the company, gave him damages in the sum of forty-eight thousand dollars. *Held*, that a reversal would not be ordered, although the trial judge, in charging on the subject of exemplary damages, characterized the ejection as wrongful, wanton, inhuman, and wholly unjustified: *Lake Shore etc. R. R. Co. v. Rosenzweig*, 113 Pa. St. 519.

¹ *Illinois Central R. R. Co. v. Whittemore*, 43 Ill. 420; 92 Am. Dec. 138.

² *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133.

³ *State v. Kinney*, 34 Minn. 311.

§ 1900. **Excessive Force must not be Used.**—Where the carrier or his servants have a right to expel a passenger, they are liable if they do so in an improper manner, or use more force than is necessary.¹ In an action for damages for injuries sustained by a forcible ejection from a railroad-car while in motion, proof that the conductor ordered the plaintiff to get off, and accompanied such order with a show of force sufficient to impress him with the belief that it would be employed, thereby compelling him to jump from the car, is equivalent to proof of the employment of actual force.²

§ 1901. **Right of Passenger to Resist Ejection.**—The passenger has a right to resist an unlawful ejection, or a lawful ejection if attempted in a dangerous or unlawful manner.³ A passenger may refuse to leave a train when ordered by the conductor so to do, if his ticket entitle him to stay, notwithstanding the conductor's refusal to recognize it.⁴

§ 1902. **Discriminations by Carrier—According to Sex, Color, etc.**—A railroad company has a right to reserve a car for women, and men accompanying women, and to exclude others therefrom,⁵ provided there is sufficient room in the other cars.⁶ It has been held in Pennsyl-

¹ *Seymour v. Greenwood*, 7 Hurl. & N. 355; *Passenger R. R. Co. v. Young*, 21 Ohio St. 518; 8 Am. Rep. 78; *Ramsden v. R. R. Co.*, 104 Mass. 117; 6 Am. Rep. 200; *Peck v. R. R. Co.*, 70 N. Y. 587; *Rounds v. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Coleman v. R. R. Co.*, 106 Mass. 160; *Higgins v. R. R. Co.*, 46 N. Y. 23; 7 Am. Rep. 293; *Phila. etc. R. R. Co. v. Larkin*, 47 Md. 155; 28 Am. Rep. 442; *Penn. R. R. Co. v. Vandiver*, 42 Pa. St. 365; 82 Am. Dec. 520; *Illinois Cent. R. R. Co. v. Whittemore*, 43 Ill. 420; 92 Am. Dec. 138; *Louisville etc. R. R. Co. v. Whitman*, 79 Ala. 328.

² *Kline v. R. R. Co.*, 39 Cal. 587; 37 Cal. 400; 99 Am. Dec. 282.

³ *English v. R. R. Co.*, 66 N. Y. 454; 23 Am. Rep. 69; 4 Hun, 683; *Sanford v. R. R. Co.*, 23 N. Y. 343; 80 Am. Dec. 286.

⁴ *Hufford v. R. R. Co.*, 53 Mich. 118.

⁵ *Chicago etc. R. R. Co. v. Williams*, 55 Ill. 185; 8 Am. Rep. 641; *Bass v. R. R. Co.*, 36 Wis. 450; 17 Am. Rep. 495; 39 Wis. 636; 42 Wis. 654; *Peck v. R. R. Co.*, 70 N. Y. 587. See also *State v. Overton*, 24 N. J. L. 435, 441; 61 Am. Dec. 671; *Pittsburgh etc. R. R. Co. v. Hinds*, 53 Pa. St. 572; 91 Am. Dec. 224; *Memphis etc. R. R. Co. v. Benson*, 85 Tenn. 627; 4 Am. St. Rep. 776.

⁶ *Bass v. R. R. Co.*, 36 Wis. 450; 17 Am. Rep. 495.

vania that a rule of a railroad company requiring colored passengers to sit at one end of the car is reasonable and valid.¹ In Michigan it has been held that a carrier by water may make and enforce a regulation excluding negroes from the first cabin.² But in Iowa and Louisiana the contrary has been held.³

§ 1903. Passenger must Pay Fare or have Ticket.— For a willful refusal to pay fare the passenger may be ejected from the train.⁴ One who has refused to pay his fare may change his mind; in which case the conductor has no right to put him off the train, unless by his violence and abuse he has forfeited his right to remain.⁵ A carrier has no right to expel a passenger for non-payment of full fare without first returning the fare paid, the passenger having offered to pay the balance before expulsion, but after the train is stopped.⁶ A passenger who ignorantly and in good faith tenders a tax certificate for his fare may not be ejected as a trespasser; and if before ejection another person offers to pay his fare for him, the carrier must receive it and carry him; and if, notwithstanding, he ejects him, he is liable to punitive damages.⁷ A passenger, being responsible for the fare of a child under his charge, may be ejected for refusal to pay such

¹ *Westchester R. R. Co. v. Miles*, 55 Pa. St. 209; 93 Am. Dec. 744. In an earlier case in the same state a regulation of a street-car company confining negroes to the front platform exclusively was held reasonable, and justified expelling from the car the plaintiff, a colored man, who insisted upon having a seat inside: *Goines v. McCandless*, 4 Phila. 255. But see *Central R. R. Co. v. Green*, 82 Pa. St. 426; 86 Pa. St. 427.

² *Day v. Owen*, 5 Mich. 520; 72 Am. Dec. 62.

³ *Coger v. Packet Co.*, 37 Iowa, 145; *De Cuir v. Benson*, 27 La. Ann. 1. Reversed in *Hall v. De Cuir*, 95 U. S. 485.

⁴ *Great Western R. R. Co. v. Miller*, 19 Mich. 305; *Haley v. R. R. Co.*, 21

Iowa, 15; *Chicago etc. R. R. Co. v. Boger*, 1 Brad. App. 472; *Lillis v. R. R. Co.*, 64 Mo. 464; 27 Am. Rep. 255; *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336; *O'Brien v. R. R. Co.*, 15 Gray, 20; 77 Am. Dec. 347.

⁵ *Gould v. R. R. Co.*, 18 Fed. Rep. 155; 5 *McCrary*, 502. Where a conductor ejects a passenger for refusing to pay his fare, and before the train starts the passenger offers to pay, the conductor is bound to receive it; otherwise if when the passenger makes the offer the train has started: *South Carolina R. R. Co. v. Nix*, 68 Ga. 572.

⁶ *Bland v. R. R. Co.*, 55 Cal. 570; 36 Am. Rep. 50.

⁷ *Louisville R. R. Co. v. Garrett*, 8 Lea, 438; 41 Am. Rep. 640.

fare, though he has paid his own fare.¹ As between the passenger and the conductor, the ticket is the only evidence of the passenger's right to ride. The conductor is not obliged to take the passenger's explanation as to why he has no ticket.² If the passenger has paid for three tickets for himself and companions, and received only two, the production of these two, with an explanation as to the failure to procure the third, cannot excuse the payment of fare demanded.³ But it has been held that any writing by the ticket agent to the effect that a passenger has paid his fare is as good and valid as the usual printed ticket.⁴ The carrier may refuse to take a ticket obtained without consideration, as, for example, with counterfeit money,⁵ or a railroad pass obtained by fraud.⁶

ILLUSTRATIONS. — A passenger on a train refused to pay fare, and told the conductor that he should sue the company if ejected. He was forcibly ejected at a place where the train was required to stop before crossing another road, and when he got as far as the car-door he said that he would pay. *Held*, that, notwithstanding, the conductor had a right to put him off: *Pease v. R. R. Co.*, 101 N. Y. 367; 54 Am. Rep. 699. The plaintiff took passage on the defendant's railroad for a station four

¹ *Philadelphia etc. R. R. Co. v. Hoeftich*, 62 Md. 300.

² *Townsend v. R. R. Co.*, 56 N. Y. 295; 15 Am. Rep. 419; *Frederick v. R. R.*, 37 Mich. 342; 26 Am. Rep. 531; 6 Rep. 116; *Shelton v. R. R. Co.*, 29 Ohio St. 214; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; 20 Am. Rep. 232; *Weaver v. R. R. Co.*, 3 Thomp. & C. 270; *Jerome v. Smith*, 48 Vt. 230; 21 Am. Rep. 125; *Downs v. R. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77; *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499. But see *Hamilton v. R. R. Co.*, 53 N. Y. 25.

³ *Weaver v. R. R. Co.*, 3 Thomp. & C. 470.

⁴ *St. Louis etc. R. R. Co. v. Dalby*, 19 Ill. 353. In another case the plaintiff purchased a ticket for a berth in a sleeping-car, which he exhibited to the porter, who showed him his berth, which the plaintiff made preparations to occupy, and afterwards the ticket was demanded by the conductor of the

car. The ticket could not be found, having been lost in the mean time by the passenger. The train had not yet left the station where the ticket was purchased, and the plaintiff procured from the defendant's agent a writing certifying that he had paid for the berth he was occupying. The conductor refused to accept this or any explanations in lieu of the ticket, and he was accordingly ejected from the sleeping-car. It was held that he was entitled to recover the price paid for his ticket, and reasonable compensation for the trouble and inconvenience occasioned by being deprived of his berth in the sleeping-car: *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; 20 Am. Rep. 232.

⁵ *Memphis etc. R. R. Co. v. Chastine*, 54 Miss. 503; *Davis v. R. R. Co.*, 20 U. C. Q. B. 27.

⁶ *Brown v. R. R. Co.*, 64 Mo. 536; *Turner v. R. R. Co.*, 70 N. C. 1.

miles distant. He depended on a friend taking passage at the same time to pay his fare, but that person got into another car. When the conductor demanded his ticket, he told him he had neither ticket nor money, but would go into the other car and get the money from his friend. The train was midway between the stations. The conductor refused to delay, and put him off. *Held*, that he could recover damages: *Clark v. R. R. Co.*, 91 N. C. 506; 49 Am. Rep. 647. A passenger in a bob-tailed car, by mistake, deposited an extra fare in the box, and on appealing to the driver for redress, was told to go to the office of the company, whereupon he took the fare which another passenger was about to deposit in the box and put it in his pocket. The driver caused his arrest. *Held*, that he could maintain an action against the railroad company for false imprisonment: *Corbett v. R. R. Co.*, 42 Hun, 587.

§ 1904. Must Purchase Ticket before Entering Car.—

A regulation that tickets must be purchased before entering the train, or an extra price will be charged if the fare is collected by the conductor, is reasonable.¹ But the carrier must give passengers a reasonable opportunity to purchase tickets, by keeping an office open, etc., before the train starts.² It is sufficient, however, if the office is

¹ *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; *St. Louis etc. R. R. Co. v. Dalby*, 19 Ill. 353; *Stephen v. Smith*, 29 Vt. 160; *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103; *Crocker v. R. R. Co.*, 24 Conn. 249; *Porter v. R. R. Co.*, 34 Barb. 353; *Bordeaux v. R. R. Co.*, 8 Hun, 579; *State v. Chovin*, 7 Iowa, 204; *Du Laurans v. R. R. Co.*, 15 Minn. 49; 2 Am. Rep. 102; *Indianapolis etc. R. R. Co. v. Rinard*, 46 Ind. 293; *Jeffersonville etc. R. R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103; 28 Ind. 1; 92 Am. Dec. 276; *Hilliard v. Goold*, 34 N. H. 230; 66 Am. Dec. 765; *People v. Jillson*, 3 Park. Cr. 234; *State v. Goold*, 53 Me. 279, 281; *Toledo etc. R. R. Co. v. Wright*, 68 Ind. 586; 34 Am. Dec. 277; *State v. Overton*, 24 N. J. L. 671; 61 Am. Dec. 435; *Cincinnati etc. R. R. Co. v. Skillman*, 39 Ohio St. 444; *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133. See *Pittsburgh etc. R. R. Co. v. Vandyne*, 57 Ind. 576; 26 Am. Rep. 69. The conductor cannot retain the

money tendered and eject the passenger for not paying the penalty: *Du Laurans v. R. R. Co.*, 15 Minn. 49; 2 Am. Rep. 102.

² *Porter v. R. R. Co.*, 34 Barb. 353; *Nellis v. R. R. Co.*, 30 N. Y. 505; *Du Laurans v. R. R. Co.*, 15 Minn. 49; 2 Am. Rep. 102; *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103; *St. Louis etc. R. R. Co. v. Dalby*, 19 Ill. 352; *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; *Jeffersonville etc. R. R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103; 28 Ind. 1; 92 Am. Dec. 276; *Indianapolis etc. R. R. Co. v. Rinard*, 46 Ind. 293; *Chose v. R. R. Co.*, 26 N. Y. 523; *Forsee v. R. R. Co.*, 63 Miss. 66; 56 Am. Rep. 801. In *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562, it is said: "To justify the company in making this discrimination in the fare against the passenger who neglects to purchase a ticket at the company's office, the company must see to it that the fault was not that of its own agent, instead of the passenger.

kept open until the advertised time for starting.¹ It is the duty of a ticket agent to exercise reasonable care in delivering a ticket to a purchaser, and if the latter, after applying for his ticket, and putting down money for it, is called away, it would be no delivery to put the ticket on the counter in his absence, if it did not in fact come to his possession.²

ILLUSTRATIONS.—Where a railroad company fixed a ticket-rate and a car-rate of passenger fare, the former below and the latter above the rate authorized by law, *held*, not to be necessary, in order to entitle a passenger to remain on the train, to tender more than the ticket-rate: *Smith v. R. R. Co.*, 23 Ohio St. 10. Plaintiff had not procured a ticket previous to entering the train, but handed the conductor a ten-dollar bill to pay his fare of \$6.20. In making the change, the conductor returned to him five dollars too much. Plaintiff refused to examine his change to ascertain if the conductor's claim of mistake was correct. When he had ridden as far as \$1.20 entitled him to ride, he was directed to leave the train, and did so. *Held*, that, having the means at hand to determine whether or not the mistake had been made, and failing to use them, he was not entitled to damages for expulsion from the train: *McCarthy v. R. R. Co.*, 41 Iowa, 432. A passenger went to the station ticket-office a rea-

To justify this discrimination, every reasonable and proper facility must be afforded the passenger to procure his ticket. They must furnish a convenient and accessible place for the sale of the tickets, with a competent person in attendance ready to sell them, which should be open and accessible to all passengers for a reasonable time before the departure of each train, and up to the time of its actual departure, so that it shall really be a case of neglect, and not of necessity, on the part of the passenger, and not the fault of the company. If a company will keep its ticket-office closed till a crowd of clamorous passengers have gathered around, so as to make it dangerous or inconvenient for females or infirm persons to get tickets, surely the fault is not theirs, but the company's, if they do not procure tickets; and, under such circumstances, to charge them more than the price established for tickets would be but an imposition and an outrage which the

law cannot sanction." Under Texas act of April 10, 1883, there is no exception to the rule that unless a railroad company keeps its ticket-office open for thirty minutes before the departure of a train, it cannot collect extra fare from a passenger having no ticket: *Missouri etc. R. R. Co. v. McClanahan*, 66 Tex. 530.

¹ *Swan v. R. R. Co.*, 132 Mass. 116; 42 Am. Rep. 432; *Everett v. R. R. Co.*, 69 Iowa, 15; 58 Am. Rep. 207; *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176; 92 Am. Dec. 103. A railroad company which duly provides passenger trains may enforce a rule that passengers shall ride on freight trains only on tickets purchased before entering the train, and may eject a passenger who did not procure a ticket because there was no opportunity to procure, and who tendered his fare in cash: *Jones v. R. R. Co.*, 17 Mo. App. 158.

² *Quigley v. R. R. Co.*, 5 Saw. 107.

sonable time before the departure of the train, but found it closed, and so informed the conductor, who told him to get on the train, which he did, and was willing to pay the regular price of a ticket, fifty-five cents, together with an advance of ten cents, but refused to pay the dollar which the conductor demanded, whereupon he was ejected. *Held*, that the company was liable: *White v. R. R. Co.*, 26 W. Va. 800.

§ 1905. **Passenger must Show Ticket.**—If the ticket requires the passenger to produce it, or deliver it up whenever requested, he must do so.¹ A passenger who has mislaid his ticket is entitled to a reasonable length of time in which to search for it. He is not obliged to have his ticket ready in hand the moment the conductor may demand that it shall be exhibited.² While a person who refuses to produce a ticket or pay fare may be ejected from a train, yet if he is over eighty years old, ignorant of traveling, and partially paralyzed, and asserts truly that he has a ticket in a certain pocket, and the conductor searches for it so perfunctorily as to overlook it, the company may be liable in exemplary damages for the act of the conductor in ejecting the passenger from the train.³ It is not unreasonable to demand of the passenger the surrender of his ticket in exchange for a conductor's check.⁴ But a passenger ought not to be compelled to give up his ticket without such a check in return, at a considerable distance from his destination, when there are intervening stations at which the train stops.⁵ A passenger has no right, however, to demand a conductor's check in exchange for his ticket after the train has left

¹ *Bennett v. R. R. Co.*, 7 Phila. 11; *Downs v. R. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77; *Crawford v. R. R. Co.*, 26 Ohio St. 580; *Ripley v. New Jersey Trans. Co.*, 31 N. J. L. 388; *People v. Caryl*, 3 Park. Cr. 326; *Baltimore etc. R. R. Co. v. Blocher*, 27 Md. 277; *State v. Campbell*, 32 N. J. L. 309; *Hibbard v. R. R. Co.*, 15 N. Y. 455; *Loring v. Aborn*, 4 Cush. 608. See *Maples v. R. R. Co.*, 38 Conn. 557; 9 Am. Rep. 434.

² *Curtis v. R. R. Co.*, 12 U. C. C. P. 89; *Maples v. R. R. Co.*, 38 Conn. 557; 9 Am. Rep. 434; *Int. etc. R. R. Co. v. Wilkes*, 68 Tex. 617; 2 Am. St. Rep. 515.

³ *Louisville etc. R. R. Co. v. Fleming*, 14 Lea, 128.

⁴ *Northern etc. R. R. Co. v. Page*, 22 Barb. 130.

⁵ *State v. Thompson*, 20 N. H. 251; *Pittsburgh etc. R. R. Co. v. Hennigh*, 39 Ind. 509.

the station immediately preceding that to which his ticket entitles him to be carried.¹ Persons holding commutation or season tickets may be required to exhibit them whenever requested, and on refusal to do so may be compelled to pay the regular fare as transient passengers, without liability on the part of the company to repay the same.² And on refusal to pay the regular fare, the commuter may be ejected from the train at the next station.³ But if the conductor of the train knows that a person unable to produce his ticket is a commuter, and that his ticket has not expired, he must be allowed to ride as long as there is any reasonable expectation of finding it. Although such passenger has signed a receipt by which he agreed to show his ticket to the conductor in the same manner as other passengers, when required, yet, in the absence of an express stipulation in the contract that the plaintiff should pay his fare unless the ticket should be produced, his failure to produce the ticket was not such a breach of the contract as to justify the defendants in rescinding it, and treating the plaintiff as a trespasser on the train.⁴

ILLUSTRATIONS.—Plaintiff bought a ticket over defendant's road, with coupons attached. A conductor detached one of the coupons and gave him instead a conductor's check. Before reaching the point for which such check was given, another conductor took the train and demanded the check. Plaintiff could not find it, but tendered him the ticket with the remaining coupons, which was refused, and plaintiff was ejected, without unnecessary force. *Held*, that defendants were justified: *Jerome v. Smith*, 48 Vt. 230; 21 Am. Rep. 125.

§ 1906. Power to Eject Drunken, Disorderly, and Dangerous Passengers.—The carrier has a right to eject a passenger whose conduct is such as to seriously interfere

¹ Ill. etc. R. R. Co. v. Whittemore, 43 Ill. 420; 12 Am. Dec. 138.

² Bennett v. R. R. Co., 7 Phila. 11; Ripley v. New Jersey etc. Trans. Co., 31 N. J. L. 388; Woodward v. R. R. Co., 30 L. J. M. C. 196.

³ Downs v. R. R. Co., 36 Conn. 287; 4 Am. Rep. 77.

⁴ Maples v. R. R. Co., 38 Conn. 557; 9 Am. Rep. 434.

with the comfort or safety of other passengers.¹ Thus he may expel a grossly intoxicated person;² or a disorderly person using profane and indecent language.³ The conductor of a railroad train may cause to be disarmed and confined a passenger who is dangerous because he is on the verge of *delirium tremens*;⁴ or he may be removed at a station and put in charge of an overseer of the poor.⁵ The carrier will be responsible for the act of his servant in expelling a passenger from his vehicle under a mistake of fact or of judgment as to the misconduct of the latter.⁶ No more force can be used than is adequate for the purpose of expulsion.⁷

ILLUSTRATIONS.—A drunken man expelled from one train was run over by another. *Held*, that the carrier was not liable: *Railroad Co. v. Valleley*, 32 Ohio St. 345; 30 Am. Rep. 601.

§ 1907. **Carrier of Passengers not an Insurer.**—A carrier of passengers is not, like a carrier of goods, an in-

¹ Hutchinson on Carriers, sec. 546. Judge Thompson says (Thompson on Carriers on Passengers, 302): "It is not perceived why, according to the principle of *Vinton v. R. R. Co.*, 11 Allen, 304, 87 Am. Dec. 714, gamblers, pickpockets, sneak-thieves, and persons whose notoriously vicious character renders it extremely probable that their presence will result in the robbery or swindling of other passengers, may not be excluded even after they have taken passage upon the train, and before they have begun to ply their vocation. The circumstance that large numbers of the traveling public are defenseless persons, and that their property while on the journey is quite insecure, would seem to be a sufficient reason for vesting the carrier's servants with the power and duty of summarily expelling such notorious law-breakers at any time from a railroad train, steamboat, street-car, or other public conveyance."

² *Vinton v. R. R. Co.*, 11 Allen, 304; 87 Am. Dec. 714; *Murphy v. R. R. Co.*, 118 Mass. 228; *State v. Ross*,

26 N. J. L. 224; *Hendricks v. R. R. Co.*, 12 Jones & S. 8; *Railroad Co. v. Valleley*, 32 Ohio St. 345; 30 Am. Rep. 601. Slight intoxication is not a good ground for ejection: *Putnam v. R. R. Co.*, 55 N. Y. 108; *Pittsburgh etc. R. R. Co. v. Vandyne*, 57 Ind. 576; 26 Am. Rep. 68. Nor bad manners: *Prendergast v. Compton*, 8 Car. & P. 454. A passenger in a street-railroad car who is unable to sit up, and is sick to vomiting, may lawfully be expelled, whether his sickness proceeds from drunkenness or not: *Lemont v. R. R. Co.*, 1 Mackey, 180; 47 Am. Rep. 238.

³ *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499.

⁴ *King v. R. R. Co.*, 22 Fed. Rep. 413.

⁵ *Atchison etc. R. R. Co. v. Weber*, 33 Kan. 543; 52 Am. Rep. 543.

⁶ *Higgins v. R. R. Co.*, 46 N. Y. 23; 7 Am. Rep. 293.

⁷ *State v. Ross*, 26 N. J. L. 224; *Murphy v. R. R. Co.*, 118 Mass. 228; *Seymour v. Greenwood*, 7 Hurl. & N. 355; 6 Hurl. & N. 359; *Railroad Co. v. Valleley*, 32 Ohio St. 345; 30 Am. Rep. 601.

suror. He is liable for any injury to the passenger caused by his failing to use extraordinary care in the selection of his vehicles and the prosecution of the journey.¹ Where a party injured by a railroad is not a passenger, the carrier is not required to exercise that degree of vigilance required of parties bearing a relation of trust and confidence or bailment towards each other. In such case the carrier is only required to use such care and diligence as would be exercised by skillful, prudent, and discreet persons having the control and management of such business regarding their duty to the interests of all concerned.²

§ 1908. Presumption of Negligence from Accident.—From an injury happening to a passenger a presumption of negligence on the part of the carrier arises.³ That

¹ *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455; *Camden etc. R. R. Co. v. Burke*, 13 Wend. 611; 28 Am. Dec. 488; *Frink v. Coe*, 4 G. Greene, 555; 61 Am. Dec. 141; *Peters v. Rylands*, 20 Pa. St. 497; 59 Am. Dec. 746; *Hegeman v. R. R. Co.*, 13 N. Y. 9; 64 Am. Dec. 517; *Edwards v. Lord*, 49 Me. 279; *Taylor v. R. R. Co.*, 48 N. H. 304; 2 Am. Rep. 229; *Sales v. West. Stage Co.*, 4 Iowa, 547; *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431; 26 Am. Rep. 384; *McElroy v. R. R. Co.*, 4 Cush. 400; 50 Am. Dec. 794; *Warren v. R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700; *Thayer v. R. R. Co.*, 22 Ind. 26; 85 Am. Dec. 409; *State v. R. R. Co.*, 24 Md. 84; 87 Am. Dec. 600; *Deyo v. R. R. Co.*, 34 N. Y. 9; 88 Am. Dec. 418; *Johnson v. R. R. Co.*, 11 Minn. 296; 88 Am. Dec. 83; *Hulsenkamp v. R. R. Co.*, 37 Mo. 547; 90 Am. Dec. 399; *Morrissey v. Wiggins's Ferry Co.*, 43 Mo. 380; 97 Am. Dec. 402; *Moore v. R. R. Co.*, 69 Iowa, 491; *Knight v. R. R. Co.*, 56 Me. 234; 96 Am. Dec. 449; *Simmons v. Steamboat Co.*, 97 Mass. 361; 93 Am. Dec. 99; *Bowen v. R. R. Co.*, 18 N. Y. 408; 72 Am. Dec. 529; *Brown v. R. R. Co.*, 34 N. Y. 404; *Seymour v. R. R. Co.*, 3 Biss. 43; *Redhead v. R. R. Co.*, L. R. 2 Q. B. 412; *Christie v. Griggs*, 2 Camp. 79; *Ingalls v. Bills*,

9 Met. 1; 43 Am. Dec. 346; *Boyce v. Anderson*, 2 Pet. 150; *McKinney v. Neil*, 1 McLean, 540; *McPadden v. R. R. Co.*, 44 N. Y. 478; 4 Am. Rep. 705; reversing 47 Barb. 247; *Ford v. R. R. Co.*, 2 Fost. & F. 730; *Israel v. Clark*, 4 Esp. 259; *Burns v. R. R. Co.*, I. R. 13 C. L., N. S., 543; *Pym v. R. R. Co.*, 2 Fost. & F. 619, 621; *Maury v. Talmadge*, 2 McLean, 157; *Carroll v. R. R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221; *Croghan v. R. R. Co.*, 18 Alb. L. J. 70; *Sullivan v. R. R. Co.*, 30 Pa. St. 234; 72 Am. Dec. 698; *Meier v. R. R. Co.*, 64 Pa. St. 225; 3 Am. Rep. 581; *Stockton v. Frey*, 4 Gill, 406; 45 Am. Dec. 138; *Frink v. Potter*, 17 Ill. 406; *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228, 231; *Fairchild v. California Stage Co.*, 13 Cal. 599; *McClary v. R. R. Co.*, 3 Neb. 45; 19 Am. Rep. 631; *Sawyer v. R. R. Co.*, 37 Mo. 240; 90 Am. Dec. 382; *Keith v. Pinkham*, 43 Me. 501; 69 Am. Dec. 80; *White v. Boulton*, 1 Peake, 113; *Galena R. R. Co. v. Fay*, 16 Ill. 558; 63 Am. Dec. 323; *Nashville etc. R. R. Co. v. Elliott*, 1 Cold. 611; 78 Am. Dec. 506.

² *State v. R. R. Co.*, 24 Md. 84; 87 Am. Dec. 600.

³ *Christie v. Griggs*, 2 Camp. 79; *Carpue v. R. R. Co.*, 5 Q. B. 747; *Skinner v. R. R. Co.*, 2 El. & E. 360; 5 Ex. 787; *Boyce v. California Stage*

railroad-cars run off the track is evidence of negligence.¹ So is a collision.² When a steamboat is putting passengers ashore at a wharf, the fall of the landing-plank while a passenger is carefully walking over it is presumptive evidence of negligence on the part of the steamboat proprietor.³ Where a passenger falls off a street-car, when in full motion, in front of the wheels, and the servants in charge of the same know that he is off the car, and holding on to the iron rail to save himself from being run over, it is culpable negligence if they do not stop the car, and thereby save him from injury.⁴ Railroads may fix the rate of speed as they think best, if the increase thereof adds nothing to the risks of the traveling public. Whether the rate is dangerous is to be determined by the circumstances.⁵

ILLUSTRATIONS. — A passenger on a street-car is walking down the aisle to find a seat. The car gives a sudden jerk, and he is precipitated forward, his hand, in his effort to save himself, going through a window. *Held*, evidence of negligence on the part of the carrier: *Dougherty v. R. R. Co.*, 81 Mo. 325; 51 Am. Rep. 239. A passenger in an omnibus was injured by the bursting of a lamp. In an action for damages against the owners, *held*, that the

Co., 25 Cal. 460; *Transportation Co. v. Downer*, 11 Wall. 129; *Farish v. Reigle*, 11 Gratt. 697; 62 Am. Dec. 666; *Brehm v. R. R. Co.*, 34 Barb. 256; *McKinney v. Neil*, 1 McLean, 540; *Stockton v. Frey*, 4 Gill, 406; 45 Am. Dec. 138; *Stokes v. Saltonstall*, 13 Pet. 181; *Lygo v. Newbold*, 9 Ex. 302; *Curtis v. R. R. Co.*, 18 N. Y. 534; 75 Am. Dec. 258; *Laing v. Colder*, 8 Pa. St. 479; 49 Am. Dec. 533; *Galena etc. R. R. Co. v. Yarwood*, 17 Ill. 509; 65 Am. Dec. 682. Three exceptions to this rule are stated by Judge Thompson, as follows, viz.: 1. Where the defect, etc., in the carrier's means of transportation or accommodation which was the occasion of the accident was visible to and known by the passenger; 2. Where the occasion of the hurt of the passenger was an active, voluntary movement on his part, combined with some alleged deficiency in the carrier's means of transportation

or accommodation; 3. Where the plaintiff's evidence shows that the accident was caused by something so wholly disconnected with the operation of the carrier's business as not to involve the safety or sufficiency of his instrumentalities, or the negligence of his servants: See *Curtis v. R. R. Co.*, 18 N. Y. 534; 75 Am. Dec. 258.

¹ *Feital v. R. R. Co.*, 109 Mass. 398; 12 Am. Rep. 720; *Seybolt v. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75.

² *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418; 38 Am. Rep. 597; *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 242; 75 Am. Dec. 98. So of a collision of horse-cars: *Smith v. R. R. Co.*, 32 Minn. 1; 50 Am. Rep. 550.

³ *Eagle Packet Co. v. Defries*, 94 Ill. 598; 34 Am. Rep. 245.

⁴ *Chicago etc. R. R. Co. v. Hughes*, 69 Ill. 170.

⁵ *Indianapolis R. R. Co. v. Hall*, 106 Ill. 371.

burden of proof was on them to show affirmatively that the fluid used in the lamp was a safe and proper article: *Wilkie v. Bolster*, 3 E. D. Smith, 327. A public sleigh was proceeding at a moderate degree of speed on a good, level road, and without any apparent cause suddenly turned to one side and threw a passenger from his seat, injuring him, without any fault on his part. *Held*, that a *prima facie* case of negligence is established by proof of these facts: *Ryan v. Gilmer*, 2 Mont. 517; 25 Am. Rep. 744. In an action against a railroad company for personal injury received by the plaintiff, by reason of the train in which he was a passenger having struck a cow which suddenly ran upon the track, throwing the cars from the rails, it appeared that cattle were in the habit of resorting to the station where the accident happened, being attracted there by the corn liable to be scattered upon the ground, and that a few days before this accident, a train had run over a cow at that station. There was no watchman to keep the track clear, and the train was passing the station with more than ordinary speed. With the known liability to such accidents at that place, *held*, that this was inexcusable negligence: *Chicago etc. R. R. Co. v. McCara*, 52 Ill. 296.

§ 1909. Duty as to Vehicles and Appliances.—So the carrier is not a warrantor of the safety of his vehicles and appliances. He is liable for an injury arising from a defect which he, by diligence and care, might have discovered.¹ But he is not liable for latent defects which an examination would not have revealed.²

¹ *Hegeman v. R. R. Co.*, 13 N. Y. 9; 64 Am. Dec. 517; *Curtis v. R. R. Co.*, 18 N. Y. 534; 74 Am. Dec. 258.

² *Peoria etc. R. R. Co. v. Thompson*, 56 Ill. 138; *Meier v. R. R. Co.*, 64 Pa. St. 225; 3 Am. Rep. 581. In *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346, the court say: "Carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the

owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense." In *Alden v. R. R. Co.*, 26 N. Y. 102, 82 Am. Dec. 401, the carrier was said to be an insurer of the safety of its cars, and was held responsible for a defect in an axle, although it could not possibly have been discovered by any available means.

§ 1910. **Duty as to Roadway.**—A railroad company, being the owner of its road as well as of its carriages, is bound to the same degree of diligence and skill as to the condition and construction of its road as it is with reference to the condition and construction of its carriages.¹ In an action for injuries sustained by a passenger on a train which fell with the breaking down of a bridge undergoing repairs, it is not enough for the company to show that it used the means and appliances ordinarily employed by prudent persons in making such repairs, without a showing that they were ordinarily sufficient, and without discoverable defect, and were used with the utmost practical care and diligence.² But the carrier is not liable for an injury happening through latent defects in his roadway, bridges, or other permanent structures, where he has bestowed the highest measure of care upon the construction, the inspection, and the reparation of them.³

ILLUSTRATIONS.—An injury was caused by the overturning of a train through sudden weakening of the track by a violent storm. *Held*, that the company was not liable, unless the engineer had reason to suspect the weakness, and omitted to test it: *Ellet v. R. R. Co.*, 76 Mo. 518. A passenger by railroad is injured by an accident caused by the washing away of the embankment. *Held*, that the carrier is not relieved from liability, although the embankment was constructed by a competent engineer, and the washing away was the result of an unprecedented storm, provided the provision for drainage at the point in question was defective: *Philadelphia etc. R. R. Co. v. Anderson*, 94 Pa. St. 351; 39 Am. Rep. 787. By a sudden and extraordinarily heavy rain-fall, about dark, confined to a limited locality, a portion of a railroad-bed was so undermined that it gave way under the weight of a train three or four hours afterward, and a passenger was injured. The railroad-bed was in safe condition before the rain-fall; a train had safely

¹ *Hanley v. R. R. Co.*, Edm. Sel. Cas. 359; *Tyrrell v. R. R. Co.*, 111 Mass. 546; *McElroy v. R. R. Co.*, 4 Cush. 400; 50 Am. Dec. 794; *McPadden v. R. R. Co.*, 44 N. Y. 478; 4 Am. Rep. 705.

² *Louisville etc. R. R. Co. v. Pedigo*, 108 Ind. 481.

³ *Hanley v. R. R. Co.*, Edm. Sel. Cas. 359; *McPadden v. R. R. Co.*, 44 N. Y. 478; 4 Am. Rep. 705.

passed over it two hours before the accident; and it had been inspected between the time of the passage of that train and the time of the accident, and was apparently in safe condition. The defect was not visible at the time of the accident. The train in question was carefully run at half speed at the time in question. *Held*, that no action would lie against the company: *R. R. Co. v. Halloren*, 53 Tex. 46; 37 Am. Rep. 744.

§ 1911. **Negligence of Manufacturer or Contractor.** — The carrier is responsible for defects in his vehicle, appliances, or roadway which are the fault of the manufacturer or contractor.¹

§ 1912. **Duty of Carrier as to Platform, Stations, Approaches, etc.** — Carriers are bound to keep in a safe condition all portions of their platforms, and approaches thereto, to which the public resort, and all portions of their station-grounds reasonably near to the platforms, where passengers, or those who have purchased tickets with a view to take passage on their cars, or persons leaving the cars, are likely to go.² It is negligence to allow snow and ice to accumulate upon the platform of a station.³

¹ *Hegeman v. R. R. Co.*, 13 N. Y. 9; 64 Am. Dec. 517; *Caldwell v. Steam Co.*, 47 N. Y. 282; *Carroll v. R. R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221; *Burns v. R. R. Co.*, 1 R. 13 C. L., N. S., 543; *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Curtis v. R. R. Co.*, 18 N. Y. 538; 75 Am. Dec. 258; *Perkins v. R. R. Co.*, 24 N. Y. 219; 82 Am. Dec. 281; *Bissell v. R. R. Co.*, 25 N. Y. 445; 82 Am. Dec. 369; *Brown v. R. R. Co.*, 34 N. Y. 408; *Steinweg v. R. R. Co.*, 43 N. Y. 123; 3 Am. Rep. 673. *Contra*, *Grand Rapids R. R. Co. v. Huntley*, 38 Mich. 537; 31 Am. Rep. 321; *Nashville etc. R. R. Co. v. Jones*, 9 Heisk. 27. A passenger was injured in consequence of the breaking of the tire to a wheel of a railroad carriage. The tire broke in consequence of an air-bubble, which had remained there in its original manufacture. It was shown that the occasional presence of air-bubbles in the tires of railroad-car wheels could not be prevented by any means known to the manufacturer of

such wheels, and that their existence could not be discovered by any known tests. *Held* that the railroad company was not responsible: *Readhead v. R. R. Co.*, L. R. 2 Q. B. 42; 4 Q. B. 379.

² *McDonald v. R. R. Co.*, 26 Iowa, 125; 96 Am. Dec. 114; 29 Iowa, 170; *Liscomb v. R. R. Co.*, 6 Lans. 75; *Hulbert v. R. R. Co.*, 40 N. Y. 145; *Knight v. R. R. Co.*, 56 Me. 234; 96 Am. Dec. 449; *Louisville etc. R. R. Co. v. Wolfe*, 80 Ky. 82; *Van Ostran v. R. R. Co.*, 35 Hun. 590; *Caswell v. R. R. Co.*, 98 Mass. 194; 93 Am. Dec. 151; *New York etc. R. R. Co. v. Doane*, 115 Ind. 435; 7 Am. St. Rep. 451; *Reed v. Axtell*, 84 Va. 231. A railroad company may be compelled to furnish and maintain stations for passengers and freight at all proper points on the line: *State v. R. R. Co.*, 17 Neb. 647; 52 Am. Rep. 424.

³ *Weston v. R. R. Co.*, 10 Jones & S. 156; *Seymour v. R. R. Co.*, 3 Biss. 43.

It is negligent to have a station platform higher than the car-steps, and to require passengers to board the trains from a baggage-car.¹ A railroad company inviting a passenger to alight after dark at a freight-depot, instead of a regular passenger-depot, is bound to keep the platform and approaches in a safe condition for the passenger's reception and egress, and to provide lights, if necessary to his safety.² Where a passenger is required by the railroad company to leave the train and cross the track for the purpose of entering another train, he has the right to suppose the track to have been made safe by the company, and in a suit to recover for injuries sustained by being struck by another train while crossing the track, he is not bound to show that he looked, stopped, and listened before crossing.³ To permit a train to pass on a track between a depot and another track, on which a passenger train is standing while discharging and receiving passengers, just as passengers are passing from the depot to take that train, and across which track they are obliged to walk to reach their train, without any provision being made on the part of the company to avert danger, is actionable negligence.⁴ The carrier is not liable for injuries occasioned by its buildings or structures being blown down by storms, where it has used that care and skill in their structure and maintenance which men of ordinary prudence and skill usually employ.⁵ It is the duty of the corporation to have its stations open and lighted, and its servants present, for the accommodation of those who may wish to leave its trains, or depart by the same.⁶ If the waiting-room of a sta-

¹ *Turner v. R. R. Co.*, 37 La. Ann. 648; 55 Am. Rep. 514.

² *Stewart v. R. R. Co.*, 53 Tex. 289; 67 Am. Rep. 753.

³ *Baltimore etc. R. R. Co. v. State*, 60 Md. 449.

⁴ *Klein v. Jewett*, 26 N. J. Eq. 474.

⁵ *Pittsburgh R. R. Co. v. Brigham*, 29 Ohio St. 374; 23 Am. Rep. 751.

⁶ *Beard v. R. R. Co.*, 48 Vt. 101; *Patten v. R. R. Co.*, 32 Wis. 524;

Hulbert v. R. R. Co., 40 N. Y. 145; *Knight v. R. R. Co.*, 56 Me. 234; 96 Am. Dec. 449; *Nicholson v. R. R. Co.*, 3 Hurl. & C. 534; *Martin v. R. R. Co.*, 16 Com. B. 179; *Osborn v. Union Ferry Co.*, 53 Barb. 629; *Vicksburg etc. R. R. Co. v. Howe*, 52 Miss. 202; *Fordyce v. Merrill*, 49 Ark. 277. In *Knight v. R. R. Co.*, 56 Me. 234, 96 Am. Dec. 449, the plaintiff's ticket entitled her to passage over the defendant's road

tion is full, or intolerably offensive by reason of tobacco-smoke, it will justify a passenger in endeavoring to enter the cars at as early a period as possible; and if in so doing he receives an injury from the unsafe and dangerous condition of the platform or steps, at a place where passengers would naturally go, the company is liable therefor, if the passenger used proper care, and violated no rule or regulation of the company of which he had actual knowledge, or which, as a reasonable man, he would be bound to presume to have existed.¹ Having provided a telegraph-office at one of its stations for the use of its patrons, the company will be responsible to one of its passengers who is injured solely because of the company's negligence in failing to keep in

to Portland, and by steamboat from Portland to Belfast. The defendant's depot was distant from the steamboat-landing about forty rods. The defendants owned the wharf, and had built their track upon it down to the steamboat-landing. Trains were formerly run upon it for the accommodation of passengers, but had been discontinued; baggage-cars were, however, still run as before. Passengers were directed to use the wharf as a passage-way to the steamboat, and they did so use it. The plaintiff in this case, though directed by none of the officers of the railroad or steamboat, proceeded, in company with other passengers, from the depot to the place of embarkation, until within a few feet of the edge of the wharf, when she fell into a hole, and sustained injury, for which the defendants were held responsible. Said Appleton, C. J.: "The train arrives in the evening. Passengers from the cars to the boat pass rapidly over the intervening distance. The wharf should be lighted. The servants of the defendant corporation should be in readiness to point out the way. The wharf should be safe. The defendants should be justly held responsible for any neglect of their servants, or for any deficiencies in the wharf, which with due care might be avoided. If the defendants had carried the plaintiff over the wharf as heretofore in their cars, and she had

been injured in consequence of the neglect of the defendants, she would have been entitled to recover. Her rights are none the less because she walks over the wharf to reach the steamboat than if she had been borne over it, if on the way she is injured through the negligence of the defendants by leaving the wharf in an unsafe and dangerous condition. The defendants are not released from liability because for their convenience she used her own limbs, when she might be entitled to the use of their cars. Their liability did not cease the moment the cars reached the depot. It continued equally as if at the depot while she was on her way over the defendant's wharf, and by their direction, to the steamboat, and until in the ordinary course of her passage she should reach the point where the liability of the steamboat company commences. The passage contracted for was from Lawrence to Belfast. The plaintiff was *in itinere* from the point of departure to the destined point of arrival. The defendants must, at any rate, be deemed liable from the place where they received the passenger to the place where she was to be transferred to the next agent in the course of transmission to the place of her destination."

¹ McDonald v. R. R. Co., 26 Iowa, 124; 95 Am. Dec. 114.

proper condition the platform erected by them over which a passenger, in alighting from the cars, must pass to reach the telegraph-office.¹

ILLUSTRATIONS.—Plaintiff, a passenger, was set down at a station after dark on the side of the line opposite to the station and place of egress. The train was detained more than ten minutes at this place, and from its length blocked up the ordinary crossing to the station, which is on the level. The ticket collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to "pass on." The plaintiff passed down the train to cross behind it, and from the want of light stumbled over some of the hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railroad company. *Held*, to be evidence for the jury of negligence on the part of the company: *Nicholson v. R. R. Co.*, 3 Hurl. & C. 534. A, while waiting on a railroad platform for a train, was struck by a mail-bag thrown by a United States postal clerk to the platform from a passing train, and injured. *Held*, that the company was liable: *Carpenter v. R. R. Co.*, 97 N. Y. 494; 49 Am. Rep. 540; *Snow v. R. R. Co.*, 136 Mass. 40; 49 Am. Rep. 40. The plaintiff, in attempting to get upon the defendant's train, fell through a bridge over a highway sixteen feet below. The bridge was under the control of the defendants, and in the immediate vicinity of their track. The bridge happened to be temporarily uncovered for repairs. The defendants were held responsible for this injury: *Chicago etc. R. R. Co. v. Fillmore*, 57 Ill. 265. A railroad company, for the more convenient access of passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous. *Held*, that the company were liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about one hundred yards farther around, which the deceased might have used: *Longmore v. R. R. Co.*, 19 Com. B., N. S., 183. A train of cars was extended entirely across the street, and there was no way for one who wished to take passage in the train to reach the depot except by passing over the platform of the cars, or by waiting till they were removed. *Held*, that he might enter the train from the street where he was standing, and that in case of an injury to him from the sudden starting of the train, he could not be considered guilty of contributory negligence: *Keating v. R. R. Co.*, 3 Lans. 469. Defendant's train of cars, a freight and passenger train, on which plaintiff was a passenger, having

¹ *Clussman v. R. R. Co.*, 9 Hun, 618.

reached the station at which plaintiff was to alight, passed several hundred yards beyond the depot, stopping at an unusual place, where it was low and icy. Plaintiff demanded of the conductor that the train should be backed, which was refused. In attempting to alight, plaintiff dislocated his knee. The jury found negligence in defendant, and a verdict for plaintiff. *Held*, on appeal, that defendant had no ground for exception: *Memphis etc. R. R. Co. v. Whitfield*, 44 Miss. 466; 7 Am. Rep. 699. A railroad company allowed a weighing-machine to stand upon its platform, quite out of the course of travel, for the purpose of weighing baggage, over which the plaintiff was pressed and injured by the crush of a large crowd upon a holiday. *Held*, that the company was not liable: *Cornman v. R. R. Co.*, 4 Hurl. & N. 781. An illiterate person, in the night-time, in search of the water-closet, passed by the door having a light over it and the words "For gentlemen," and opening a door having over it the sign "Lamp-room," but no light above it, fell down some steps which led downwards immediately from the threshold. *Held*, that the company was not liable: *Toomey v. R. R. Co.*, 3 Com. B., N. S., 146. The plaintiff was bitten by a stray dog at a railroad station, while waiting for a train. Early in the evening the dog snapped at and tore the dress of another woman on the platform; an hour and a half afterwards he attacked a cat in the signal-box, near the station, where he was kicked out by the porter, who saw no more of him. Ten minutes later, the dog made his appearance on the platform, where he bit the plaintiff. *Held*, no evidence of negligence on the part of the company: *Smith v. R. R. Co.*, L. R. 2 Com. P. 4.

§ 1913. **To What Persons This Duty is Due.**—The carrier owes this duty not only to passengers, but to all persons who have duties to perform incidental to the arrival and departure of trains, or persons having business with the carrier, as shippers or consignees of freight.¹ This duty, however, is not towards every one. Persons resorting to the stations for their own convenience, and not as intending passengers, or to do business with the carrier, can hold the carrier responsible only for a wanton or a willful injury.² Thus persons simply taking

¹ *Tobin v. R. R. Co.*, 59 Me. 183; 8 Am. Rep. 415; *Holmes v. R. R. Co.*, L. R. 4 Ex. 254; L. R. 6 Ex. 123. A hackman carrying a passenger to the depot is within this rule: *Tobin v.*

R. R. Co., 59 Me. 183; 8 Am. Rep. 415.

² *Illinois Cent. R. R. Co. v. Godfrey*, 71 Ill. 500; 22 Am. Rep. 112; *Pittsburgh etc. R. R. Co. v. Bingham*,

refuge from a storm cannot hold the company responsible for injuries received by the station-house being partially blown down, although ordinary care was not used in its construction.¹ So a crowd having gathered at a railroad station to witness a passing parade, the company was held not liable for injury to one of this number by the breaking down of the platform, even though the floor was not in a proper state of repair for its ordinary use.²

ILLUSTRATIONS.—The plaintiff, without invitation or business, intruded upon a visibly ruinous but uninclosed freight-house of the defendants, used only for storage, and while there a sudden storm blew a fragment of the building upon him and injured him. *Held*, that he was remediless: *Lary v. R. R. Co.*, 78 Ind. 323; 41 Am. Rep. 572. A boy five or six years old went for his own amusement on the platform of a railroad station, and stood at the edge to watch an approaching train. The train drew up at the rate of three or four miles an hour, and an iron step, bent and projecting a few inches outward, struck and injured him. *Held*, that he could not recover therefor: *Baltimore etc. R. R. Co. v. Schwindling*, 101 Pa. St. 258; 47 Am. Rep. 706. A woman waiting for a train received from the station agent permission to sit in a certain car while the waiting-room was being cleaned, he assuring her that the car would remain there. While she was sitting there the car started, and she jumped out and was injured. *Held*, that the railroad was liable: *Shannon v. R. R. Co.*, 78 Me. 52. Plaintiff, while standing on the station platform waiting to see her friends depart, was struck by a trunk which railroad hands permitted to slide toward her out of a straight line. *Held*, that she had a right of action against the company: *Atchison etc. R. R. Co. v. Johns*, 36 Kan. 769.

§ 1914. Regulations as to Admission to Stations.—

The carrier has a right to exclude from his premises persons not passengers.³ A regulation by a railroad

29 Ohio St. 364; 23 Am. Rep. 751; *Gillis v. R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 316. A railroad company is not bound to keep its track clear for those who pursue the cars while leaving a station. The company is only bound to ordinary diligence as to a passenger needlessly neglecting its signals, and trying unseasonably to

board the train: *Perry v. R. R. Co.*, 66 Ga. 746.

¹ *Pittsburgh etc. R. R. Co. v. Bingham*, 29 Ohio St. 364; 23 Am. Rep. 751.

² *Gillis v. R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317.

³ *Jencks v. Coleman*, 2 Sum. 221; *Commonwealth v. Power*, 7 Met.

forbidding hackmen, peddlers, express-men, and loafers from entering a passenger-room at the station is valid, but a hackman with a check for baggage may enter the baggage-room therefor.¹ A station-keeper has no right to eject a passenger from the station for spitting on the floor.²

§ 1915. **Passengers upon Freight Trains.**—Though not required to do so, yet a railroad may carry passengers upon freight trains.³ A railroad company, having passenger trains sufficient to accommodate the public, is under no legal obligation to carry passengers on its freight trains; but where it undertakes to do so, that undertaking and the extra care and expense involved in it form a sufficient consideration for a general contract, made with all passengers thus carried, limiting its liability.⁴ A regulation that passengers going on board freight trains must first procure tickets at the company's office, otherwise they will not be carried, is reasonable;⁵ provided the office is kept open and proper facilities are given for such purpose.⁶ Though the regulations of the

596; 41 Am. Dec. 465; *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337; *Barker v. R. R. Co.*, 18 Com. B. 46; *Markham v. Brown*, 8 N. H. 523; 31 Am. Dec. 209; *Landrigan v. State*, 31 Ark. 50; 25 Am. Dec. 547.

¹ *Summitt v. State*, 8 Lea, 413; 41 Am. Rep. 637.

² *People v. McKay*, 46 Mich. 439; 41 Am. Rep. 169.

³ *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; *Hazard v. R. R. Co.*, 1 Biss. 503; *Mobile etc. R. R. Co. v. McArthur*, 43 Miss. 180. A railroad company carrying passengers on construction trains is held to the same diligence as in the case of regular passenger trains: *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336.

⁴ *Arnold v. R. R. Co.*, 83 Ill. 273; 25 Am. Rep. 383.

⁵ *Cleveland etc. R. R. Co. v. Bartram*, 11 Ohio St. 457; *St. Louis etc. R. R. Co. v. Myrtle*, 51 Ind. 566; *Lake Shore etc. R. R. Co. v. Greenwood*, 79

Pa. St. 373; *Evans v. R. R. Co.*, 56 Ala. 246; 28 Am. Rep. 771; *Kansas etc. R. R. Co. v. Kessler*, 18 Kan. 523; *Illinois etc. R. R. Co. v. Johnson*, 67 Ill. 312; *Toledo etc. R. R. Co. v. Patterson*, 63 Ill. 304; *Illinois etc. R. R. Co. v. Sutton*, 42 Ill. 438; 92 Am. Dec. 81; *Illinois etc. R. R. Co. v. Nelson*, 59 Ill. 110; *Law v. R. R. Co.*, 32 Iowa, 534; *Indianapolis etc. R. R. Co. v. Rinard*, 46 Ind. 293. It is also a reasonable regulation that only such passengers shall be permitted to ride upon freight trains as are provided with tickets of a particular description; for example, a round-trip ticket, a thousand-mile ticket, or a pass: *Faulkner v. R. R. Co.*, 55 Ind. 369.

⁶ *St. Louis etc. R. R. Co. v. Myrtle*, 51 Ind. 566; *Evans v. R. R. Co.*, 56 Ala. 246; 28 Am. Rep. 771; *Chicago etc. R. R. Co. v. Flagg*, 43 Ill. 364; 92 Am. Dec. 133; *Illinois etc. R. R. Co. v. Johnson*, 67 Ill. 312; *Illinois etc. R. R. Co. v. Sutton*, 42 Ill. 438; 92 Am. Dec. 81.

company forbid the carrying of passengers on freight trains, yet if a person goes on board and the conductor receives his fare, he will be entitled to the rights of a passenger.¹ If it has been customary to receive passengers upon freight trains without requiring them previously to procure tickets at the company's office, a person who has traveled upon those trains before the adoption of such a regulation, and indeed afterwards, without objection by the company's servants, for want of a ticket cannot be put off the train, without proof of express notice to him of the regulation requiring tickets to be purchased before entering the train. The posting of the new regulation in the station-houses of the company, in such a case, is not notice sufficiently express.² If the railroad company, after having carried passengers upon its freight-cars, sees fit to adopt a regulation excluding them altogether, it will be responsible in punitive damages to a passenger who, having purchased a ticket of one of its station agents, with the assurance that such ticket entitled him to passage upon the company's freight trains, is afterwards expelled from one of these trains by the conductor in consequence of such regulation.³ But the holder of a "mileage ticket," which is conditioned not to be good on freight trains, obtains no rights, though the carrier subsequently advertises that passengers with tickets may ride on freight trains.⁴ The carrier is obliged to use the same degree of diligence in the carriage of a passenger on a freight train as on a passenger train.⁵

¹ *Dunn v. R. R. Co.*, 58 Me. 192; 4 Am. Rep. 267; *Creed v. R. R. Co.*, 86 Pa. St. 139; 27 Am. Rep. 693; *Hanson v. R. R. Co.*, 38 La. Ann. 111; 58 Am. Rep. 162. *Contra*, *Eaton v. R. R. Co.*, 57 N. Y. 382; 15 Am. Rep. 513.

² *Lake Shore etc. R. R. Co. v. Greenwood*, 79 Pa. St. 373.

³ *Kansas etc. R. R. Co. v. Kessler*, 18 Kan. 523.

⁴ *Dunlap v. R. R. Co.*, 35 Minn. 203.

⁵ *Hazard v. R. R. Co.*, 1 Biss. 503; 26 Ill. 373; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291; *Ohio etc. R. R. Co. v. Dickerson*, 59 Ind. 317; *Edgerton v. R. R. Co.*, 35 Barb. 389; 39 N. Y. 227; *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336; *Ohio etc. R. R. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Flinn v. R. R. Co.*, 1 Houst. 469; *Dunn v. R. R. Co.*, 58 Me. 187; 4 Am. Rep. 267; *New York etc. R. R. Co. v.*

But it is not held to the same care in the providing of conveniences or appliances in the management of the trains or for the comforts of the passengers.¹

ILLUSTRATIONS. — A person got into a caboose attached to the rear of a mixed freight and passenger train, and while riding there was killed by the negligence of the railroad company. The caboose was forbidden to all but employees of the company. The deceased was not such employee, and it did not appear that he paid any fare. *Held*, that the legal presumption was that he was a passenger traveling for a consideration, and the company was liable in damages for his death: *Creed v. R. R. Co.*, 86 Pa. St. 139; 27 Am. Rep. 693. Plaintiff was injured while riding upon a car attached to defendant's freight train. It appeared that defendant permitted passengers to be carried upon some of its freight trains, but not upon this one; that plaintiff went aboard said train in good faith, supposing that it was authorized to carry passengers, and was not informed to the contrary until after said accident; that the train was not brought to the passenger-platform, and

Doane, 115 Ind. 435; 7 Am. St. Rep. 451. In *Murch v. R. R. Co.*, 29 N. H. 42, 61 Am. Dec. 631, the court say: "The party who makes an arrangement to be carried on a baggage-wagon or a freight-car impliedly agrees to accept and be satisfied with such accommodations as regards carriages and seats, and places of entering and leaving the carriages, as may be found in the usual course of the business. If the cars, at the time of his agreeing for his passage and taking his seat, are at a merchandise depot, he is to be satisfied with such means of entering the cars as are provided for rolling in the cask or box on which he is to be contented to take his seat, if nothing better offers. If the cars are at the time standing upon a part of the track where there is no provision for landing or receiving either goods or passengers, he is to be satisfied with such means and facilities as may casually be within his reach. The company, considered as owners of the road or as carriers, are not, in either case, bound to make landings or any provision whatever for the reception or discharge of passengers where none are expected to be. The duties and obligations of parties are construed reasonably, with

reference to the nature of their business. We understand that the freight trains upon these roads sometimes amount to fifty or more cars, and extend in length to two thousand feet or more, and that it depends upon what is, in this respect, mere matter of accident, the arrangement of the loading, where a place may be found for the casual passenger who may be forced to adopt this way of traveling. It may be at any part of the train, and provision must be made, if at all, for a safe entrance at every part of the train and at every part of the road where a passenger may desire to be put on board. A rule like that must be equivalent to a refusal to allow any passengers to be carried in this mode, unless they are at hand to take their places at the regular depots where the trains are loaded. It would be of mischievous consequence to adopt a rule which would deprive the railroad companies of the power to accommodate those whose occasions compel them to resort to these undesirable modes of conveyance."

¹ *Hazard v. R. R. Co.*, 1 Biss. 503; 26 Ill. 373; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291; *Indianapolis etc. R. R. Co. v. Beaver*, 41 Ind. 493.

that the ticket-office was not open. *Held*, that the jury might find that plaintiff was a passenger and entitled to recover: *Lucas v. R. R. Co.*, 33 Wis. 41; 14 Am. Rep. 735. The plaintiff, having purchased at Birmingham a ticket to Hanceville, a station ten miles beyond Blount Springs, entered a freight-car which was not authorized to carry passengers beyond Blount Springs. He testified that the ticket agent directed him to take it. Being informed by the conductor, after starting, that he could not be carried beyond Blount Springs, he declined to leave the train, as the conductor offered him an opportunity to do, and declared that he would go on; and having surrendered his ticket, which the conductor thereupon canceled, he traveled to Blount Springs, and was there required by the conductor to leave the train. *Held*, that the company was not liable unless the ticket agent gave that direction: *S. & N. Alabama R. R. Co. v. Huffman*, 76 Ala. 492; 52 Am. Rep. 349.

§ 1916. **Injuries to Passengers on Tracks.** — Where passengers are compelled to cross tracks to reach or leave trains, the railroad must see to it that they can do so in safety, and a neglect to do so will constitute negligence on its part.¹

§ 1917. **Liability of Carrier for Assault on Passenger by Fellow-passenger.** — The carrier is liable for an injury to a passenger by the unlawful act of a fellow-passenger, which act — clothed, as has been shown in section 1906, with the right to eject unruly persons — he might, by the exercise of care and diligence, have foreseen and prevented.² Although it is not the duty of a railroad company to furnish a standing police force adequate to

¹ *Penn. R. R. Co. v. Zebe*, 33 Pa. St. 318; *Klein v. Jewett*, 26 N. J. Eq. 474; *Chicago etc. R. R. Co. v. Wilson*, 63 Ill. 167; *Armstrong v. R. R. Co.*, 66 Barb. 437; *Keller v. R. R. Co.*, 24 How. Pr. 172; *Whalen v. R. R. Co.*, 60 Mo. 323; *State v. R. R. Co.*, 58 Me. 176; 4 Am. Rep. 258; *Dublin etc. R. R. Co. v. Slattery*, 3 Ir. App. Cas. 1155; *I. R. 10 C. L.* 256; *I. R. 8 C. L.* 531; 39 L. T., N. S., 265; 19 Alb. L. J. 70. But see *Falkiner v. R. R. Co.*, *I. R. 5 C. L.* 213.

² *Holly v. R. R. Co.*, 7 Rep. 460;

Sherley v. Billings, 8 Bush, 147; 8 Am. Rep. 451; *Goddard v. R. R. Co.*, 57 Me. 202; 2 Am. Rep. 39; *Hendricks v. R. R. Co.*, 12 Jones & S. 8; *Pittsburg etc. R. R. Co. v. Hinds*, 53 Pa. St. 512; 91 Am. Dec. 224; *Putnam v. R. R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190; *Flint v. Norwich etc. Trans. Co.*, 34 Conn. 554; 6 Blatchf. 158; *Pittsburg etc. R. R. Co. v. Pillow*, 76 Pa. St. 510; 18 Am. Rep. 424; *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200; 24 Am. Rep. 689.

the resistance of mobs of disorderly persons who may board its trains, yet it is the duty of the conductor of the train to make all possible resistance against such disorderly persons, by calling together for this purpose all the train-men and passengers willing to lend a helping hand to this end.¹ Whether the carrier has provided a sufficient number of officers for the protection of its passengers, is a question for the jury.² The conductor of a railroad train does not perform his duty on the occasion of a violent disturbance among a large body of drunken passengers by coming to the car-door and counseling the sober passengers to throw the rioters from the car,³ nor by simply hurrying an assaulted passenger from one car into another, making no effort to remove from the train the persons guilty of the assault, or prevent their further violence.⁴ It is negligence to stop a train and passengers in the midst of a howling, revengeful, lawless mob to take on persons whom the mob are seeking an opportunity to maltreat.⁵ But for a sudden assault which the carrier could not prevent he is not liable.⁶ A railroad company is not liable in damages, at the suit of a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by intruders at the station, while plaintiff was awaiting the arrival of a train, when it is not shown that the company had notice of any facts which justified the expectation of such an outrage.⁷ Nor is a carrier liable for the negligent act of a fellow-passenger, as for as an injury to a passenger caused by the falling upon him of an article negligently placed in a rack over his seat by another passenger.⁸

¹ Pittsburgh etc. R. R. Co. v. Hinds, 53 Pa. St. 512; 91 Am. Dec. 224.

² Holly v. R. R. Co., 7 Rep. 460.

³ Pittsburgh etc. R. R. Co. v. Hinds, 53 Pa. St. 512; 91 Am. Dec. 224.

⁴ New Orleans etc. R. R. Co. v. Burke, 53 Miss. 200; 24 Am. Rep. 689.

⁵ Chicago etc. R. R. Co. v. Pillsbury, 123 Ill. 9; 5 Am. St. Rep. 483.

⁶ Putnam v. R. R. Co., 55 N. Y. 108; 14 Am. Rep. 190.

⁷ Patton v. R. R. Co., 77 Ala. 591; 54 Am. Rep. 80.

⁸ Morris v. R. R. Co., 106 N. Y. 678.

ILLUSTRATIONS.—A passenger on a railroad train was injured through a quarrel between two drunken men, who were also passengers. The conductor of the train witnessed the quarrel, but refused to interfere. *Held*, that the railroad company was presumptively negligent, and liable for the injury: *Pittsburg etc. R. R. Co. v. Pillow*, 76 Pa. St. 510; 18 Am. Rep. 424. Plaintiff, while a passenger on defendant's cars, was assaulted and injured by fellow-passengers, who were defendant's servants, but were not then on duty. The conductor of the train, with knowledge of the assault, made no efficient effort to protect plaintiff, and the assailants were afterwards retained in defendant's service. *Held*, that defendant was liable to punitive damages: *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200; 24 Am. Rep. 689. A conductor permitted one calling himself an officer to carry on board the train a man, against his protest, so badly wounded that he died on the trip, and whom his custodian claimed to have under arrest. *Held*, in an action against the railroad company by the widow of the deceased, that the company was not liable: *Jackson v. R. R. Co.*, 87 Mo. 422; 56 Am. Rep. 460. The plaintiffs, colored persons, purchased tickets over the defendant's road, upon an excursion, and took seats in a car with white persons. There were separate cars provided for colored people, but they did not know it. The white persons annoyed and insulted them, and they complained to the conductor. He accepted their tickets, and said they might sit in that car, but that as it was an excursion train he could not control the conduct of the other passengers, and that they might expect rude treatment. The treatment continuing, similar appeals to the conductor met with a refusal of protection. Subsequently the white passengers violently ejected the plaintiffs from that car, and they entered one furnished for colored people, but were obliged to stand up for some time. The instructions of the company to conductors were to advise colored passengers found in cars set apart for white persons to go to the cars provided for colored persons, but if they declined to do so, to allow them to remain. *Held*, that the defendant was liable for the assault: *Britton v. R. R. Co.*, 88 N. C. 536; 43 Am. Rep. 749.

§ 1918. **Carrier cannot Release Himself from Liability for Negligence.**—Following the same principle as in the case of the carriage of goods, a carrier of a passenger who has paid a consideration for his passage cannot exempt himself from liability for damages caused by his own negligence, or that of his servants, by any contract which

he may have induced his customer to approve. Such a contract is void as against the policy of the law.¹

§ 1919. **Conflict as to Free Passengers.**—It is held in England that a carrier, in the case of a free passenger, may stipulate that he shall not be liable even for negligence, and such stipulation will be valid.² The same rule has been adopted in a few of the states of the Union.³ But according to the weight of authority in this country, the question of consideration is not material, and a free passenger, though expressly agreeing that the carrier shall not be liable for any injury he may sustain, may still recover for an injury caused by the negligence of the carrier or his servants.⁴

¹ Lawson on Contracts of Carriers, sec. 214; Ohio etc. R. R. Co. v. Selby, 47 Ind. 471; 17 Am. Rep. 719.

² Lawson on Contracts of Carriers, sec. 216.

³ Kinney v. R. R. Co., 32 N. J. L. 407; 34 N. J. L. 513; 3 Am. Rep. 265; Higgins v. R. R. Co., 28 La. Ann. 133; Welles v. R. R. Co., 26 Barb. 641; 24 N. Y. 181; Strong, Wright, and Sutherland, JJ., dissenting; Smith v. R. R. Co., 29 Barb. 132; 24 N. Y. 222; Perkins v. R. R. Co., 24 N. Y. 196; 82 Am. Dec. 282; Bissell v. R. R. Co., 29 Barb. 602; 25 N. Y. 442; 82 Am. Dec. 369; Armas v. R. R. Co., 67 Wis. 46; 57 Am. Rep. 388. In Connecticut, a railroad company gave to a boy of sixteen a free pass. His business was to sell sandwiches and fruit on the trains for a restaurant-keeper. The railroad company derived no direct benefit from his acts. At one time, when he was going on a train on his pass to visit his mother, he was killed by a collision caused by the negligence of the company's servants. His pass contained a condition that the company should not be liable for injuries caused by the negligence of its agents. It was held that no liability was incurred: Griswold v. R. R. Co., 53 Conn. 371; 55 Am. Rep. 115.

⁴ Mobile etc. R. R. Co. v. Hopkins, 41 Ala. 486; 94 Am. Dec. 607; Illinois Cent. R. R. Co. v. Read, 37 Ill. 484; 87 Am. Dec. 260; Ohio etc. R. R. Co.

v. Selby, 47 Ind. 471; 17 Am. Rep. 719; Rose v. R. R. Co., 39 Iowa, 246; Pennsylvania R. R. Co. v. Butler, 57 Pa. St. 335; Indiana Cent. R. R. Co. v. Mundy, 21 Ind. 48; 83 Am. Dec. 339; Gulf etc. R. R. Co. v. McGown, 65 Tex. 640. In Jacobus v. R. R. Co., 20 Minn. 123, 18 Am. Rep. 360, it is said: "There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government, as *parens patriæ*, has in protecting the lives and limbs of its subjects. . . . Any relaxation of the rule as to duty or liability naturally, and it may be said inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned. It is said, however, that it is unreasonable to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers because there may be a few on board for whom they are not responsible. In the first place, if this consideration were allowed to pre-

§ 1920. **Who not Gratuitous Passengers.**—But if the carrier has received even an incidental advantage from the carriage, the service will not be considered free. Thus a person who receives a free pass as part of a contract beneficial to the carrier—as, for example, a drover who receives a pass to travel with stock on which he pays freight—is not merely a gratuitous passenger,¹ and this, even though his ticket may have the words “free pass” printed upon it.² The price which he pays for the transportation of his cattle, and the care which he takes of them on the journey, are a sufficient consideration for his own passage. But a passenger on a train, traveling free

vail, it would prove too much; for it could be urged with equal force and propriety in the case of a merely gratuitous passenger, as in a case like this at bar. Yet, as we have seen, no such consideration is permitted to relieve the carrier from the same degree of liability for a gratuitous passenger as for a passenger for hire. Again, suppose (what is not at all impossible or improbable, as, for instance, in case of a free excursion) that most or all of the passengers upon a train were gratuitous, or riding upon conditioned free passes, the consideration urged would be no answer to a claim that the carrier should be responsible. A general rule can hardly be based upon such calculations of chances. Moreover, while it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and his vigilance, it still remains true that the greater the sense of responsibility the greater the care; and that any relaxation of responsibility is dangerous. Besides these considerations, it is to be remembered that the care and vigilance which a carrier exercises do not depend alone upon a mere sense of responsibility, or upon the existence of an abstract rule of imposing stringent obligations upon him. It is the enforcement of the rule, and of the liability imposed thereby,—the mulcting of the carrier for his negligence,—

which brings home to him in the most practical, forcible, and effectual way the necessity for strictly fulfilling his obligations. It may be that on a given occasion the gratuitous passenger, or the passenger upon a free pass, is the only person injured, as, for aught that appears, was the fact in this instance, or the only party who will proceed against the carrier,—the only person who will practically enforce upon the carrier the importance of a faithful discharge of his duty. These considerations, as it seems to us, ought to be decisive upon the point that sound public policy requires that the rule as to the liability of the carrier for the safety of the passenger should not be relaxed, though the passenger be gratuitous, or, as in this case, riding upon a conditioned free pass.”

¹ Ohio etc. R. R. Co. v. Selby, 47 Ind. 471; 17 Am. Rep. 719; Cleveland etc. R. R. Co. v. Curran, 19 Ohio St. 1; 2 Am. Rep. 362; Pennsylvania R. R. Co. v. Henderson, 51 Pa. St. 315; Smith v. R. R. Co., 29 Barb. 132; affirmed by a divided court, 24 N. Y. 222; Indianapolis etc. R. R. Co. v. Beaver, 41 Ind. 493. But see Bissell v. R. R. Co., 25 N. Y. 442; 82 Am. Dec. 369; R. R. Co. v. Lockwood, 17 Wall, 357; Little Rock R. R. Co. v. Miles, 40 Ark. 298; 48 Am. Rep. 10; Carroll v. R. R. Co., 88 Mo. 239.

² Cleveland etc. R. R. Co. v. Curran, 19 Ohio St. 1; 2 Am. Rep. 362.

upon a pass good for free passage in the ordinary cars of the railroad company, who pays compensation for transportation in a drawing-room car, does not become a passenger for hire.¹ A condition, therefore, in passes of the former kind, declaring a common carrier exempt from liability for negligence, is against the policy of the law, and is void.²

§ 1921. Conditions Limiting Liability in Tickets.—

We have seen, in an earlier section, that a railroad ticket is a voucher rather than a contract.³ Therefore, on paying his fare and receiving the voucher, the contract of carriage is complete, and any condition on the ticket which he may afterwards discover cannot affect him.⁴

¹ *Ulrich v. R. R. Co.*, 13 Daly, 129; 108 N. Y. 80; 2 Am. St. Rep. 369.

² *Cleveland etc. R. R. Co. v. Curran*, 19 Ohio St. 1; 2 Am. Rep. 362; *Cincinnati etc. R. R. Co. v. Pontius*, 19 Ohio St. 221; *Knowlton v. R. R. Co.*, 19 Ohio St. 260; 2 Am. Rep. 395; *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315; *Pennsylvania R. R. Co. v. McCloskey*, 23 Pa. St. 526; *Golday v. R. R. Co.*, 30 Pa. St. 242; 72 Am. Dec. 703; *Flinn v. R. R. Co.*, 1 Houst. 469; *R. R. Co. v. Lockwood*, 17 Wall. 357; *Ohio etc. R. R. Co. v. Selby*, 47 Ind. 471; 17 Am. Rep. 719; *Maslin v. R. R. Co.*, 14 W. Va. 180; 35 Am. Rep. 748. *Contra*, *Poucher v. R. R. Co.*, 49 N. Y. 263; 10 Am. Rep. 365. The plaintiff, who resided at Portland, Maine, being interested in a car-coupling which had been in use upon the cars of the defendant company, was requested by its officers to meet them at Montreal to arrange about its future use, they agreeing to pay his expenses. In pursuance of the arrangement he was furnished with a pass which purported to be a "free ticket," and which exempted the company from liability for the negligence of its servants. Held, that he was not a free passenger: *Grand Trunk R. R. Co. v. Stevens*, 95 U. S. 655.

³ *Ante*, § 1885.

⁴ *Malone v. R. R. Co.*, 12 Gray,

388; 74 Am. Dec. 598; *Brown v. R. R. Co.*, 11 Cush. 97; *Henderson v. Stevenson*, L. R. 2 Sc. & Div. Cas. 470; criticising *Zunz v. R. R. Co.*, L. R. 4 Q. B. 544; *Baltimore etc. R. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617. "It would be unreasonable to presume that a passenger, when he buys a railroad ticket at a ticket-office, stops to read the language printed on it, and it would be equally unreasonable to hold that a passenger must take notice that the language upon his ticket contains any contract or in any way limits the carrier's common-law liability. . . . The contract between these parties was made when the plaintiff bought her ticket, and the rights and duties of the parties were then determined. Hence, even if the plaintiff had read what appears upon her ticket after she had entered upon her journey, it would have made no difference with her rights. She was not then obliged to submit to a contract which she never made, or leave the train and demand her baggage": *Rawson v. R. R. Co.*, 48 N. Y. 212; 8 Am. Rep. 543. But see *Laing v. Colder*, 8 Pa. St. 479; 49 Am. Dec. 533; *Beckman v. Shouse*, 5 Rawle, 179; 28 Am. Dec. 653; *Camden etc. Trans. Co. v. Baldauf*, 16 Pa. St. 67; 55 Am. Dec. 481. In *Henderson v. Stevenson*, L. R. 2 Sc. & Div. Cas. 470, Lord Chelmsford said:

The liability of a railroad company for the loss of a passenger's baggage is not limited by a notice printed on the face of his ticket, unless his attention is called to the notice, or unless the circumstances are such as to make it negligence not to read it.¹ The law raises no presumption that a passenger on a railroad has read a notice limiting the company's liability for baggage from the fact that such notice is printed on the front or back of a check delivered to the passenger,² even when it has on its face the words "look on the back," nor from the fact that such notice is printed on a placard posted in the car, and containing other notices which the passenger has read.³ A distinction has been made both in the United States and England between ordinary steamboat tickets and ocean steamship tickets, for the reason that an engagement for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express

"Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid and accepted, their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage-money, the ticket being only a voucher that the money has been paid. Or if a ticket is necessary to bind the company, the moment it is delivered the contract is completed, before the passenger has had an opportunity of reading the ticket, much less the indorsement."

Lord Hatherly expressed the same opinion: "I agree with the observation that, the money having been paid, and the ticket having been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary. A ticket is in reality in itself nothing more than a receipt for the money which has been paid." In a recent English case, where a ticket, issued by a railroad company in England for a

journey from London to Paris, was in the form of a small book of coupons, inclosed in a paper cover, and the paper cover contained printed matter, it was held that the contract was contained in the whole book, including the cover, and that the English company were protected by a condition printed on the inside or page 2 of the cover, and exempting them from liability for damage incurred on the French railroad, although the passenger had not read or noticed the condition: *Burke v. R. R. Co.*, L. R. 5 C. P. D. 1; *Lawson on Contracts of Carriers*, sec. 455.

¹ *Mauritz v. R. R. Co.*, 23 Fed. Rep. 765.

² *Blossom v. Dodd*, 43 N. Y. 264; 3 Am. Rep. 701; *Madan v. Sherard*, 10 Jones & S. 353; 73 N. Y. 329; 29 Am. Rep. 153; *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Westcott*, 49 Barb. 283; *Sutherland v. Westcott*, 2 Sweeny, 260; *Woodruff v. Sherrard*, 9 Hun, 322; *Indianapolis R. R. Co. v. Cox*, 29 Ind. 360; 95 Am. Dec. 640.

³ *Malone v. R. R. Co.*, 12 Gray, 388; 74 Am. Dec. 598.

company's receipt for baggage or for freight, and that there is, therefore, no room in such a case for the suggestion that the party is surprised into a contract when he supposes himself to be simply receiving a voucher.¹

§ 1922. **Contributory Negligence of Passenger.**—A carrier of passengers is not liable for an injury to a passenger which the latter, by ordinary attention to his own safety, might have prevented.² But though in fault, yet if the injury could not have been avoided by the exercise of ordinary care, the carrier will be liable.³

§ 1923. **Contributory Negligence—Arm or Head out of Window.**—Though it has been more than once laid down that to allow one's arm or any portion of the body to be outside the window of the car while in motion is negligence *per se*,⁴ the best considered doctrine is, that whether such an act is or is not a negligent one is a question for the jury.⁵ In the case of a street-car, such

¹ *Steers v. Liverpool Steam. Co.*, 57 N. Y. 1; 15 Am. Rep. 453; *Wilton v. Atlantic Royal Mail Steam Nav. Co.*, 10 Com. B., N. S., 453.

² *Galena etc. R. R. Co. v. Fay*, 16 Ill. 558; 63 Am. Dec. 323; *Chicago etc. R. R. Co. v. George*, 19 Ill. 510; 71 Am. Dec. 239; *Warren v. R. R. Co.*, 8 Allen, 227; 85 Am. Dec. 700. "They [railroads] are not insurers against the perils to which a passenger may expose himself by his own rashness or folly. One who inflicts a wound upon his own body must abide the suffering and loss, whether he does it in or out of a railroad car": *Penn. R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Rep. 323.

³ *Zemp v. R. R. Co.*, 9 Rich. 84; 64 Am. Dec. 763; *Keith v. Pinkham*, 43 Me. 501; 69 Am. Dec. 80.

⁴ See *Pittsburg etc. R. R. Co. v. McClurg*, 56 Pa. St. 294; *Todd v. R. Co.*, 3 Allen, 18; 80 Am. Dec. 49; 7 Allen, 207; *Pittsburgh etc. R. R. Co. v. Andrews*, 39 Md. 329; 17 Am. Rep. 568; *Indianapolis etc. R. R. Co. v. Rutherford*, 29 Ind. 82; 92 Am.

Dec. 336; *Morel v. Mississippi Ins. Co.*, 4 Bush, 535; *Louisville etc. R. Co. v. Sickings*, 5 Bush, 1; 96 Am. Dec. 320; *Holbrook v. R. R. Co.*, 12 N. Y. 236; 64 Am. Dec. 502; *Laing v. Colder*, 8 Pa. St. 479; 49 Am. Dec. 533.

⁵ *Winters v. R. R. Co.*, 39 Mo. 468; *Barton v. R. R. Co.*, 52 Mo. 253; 14 Am. Rep. 418; *Miller v. R. R. Co.*, 5 Mo. App. 471; *Seigel v. Eisen*, 41 Cal. 109; *Chicago etc. R. R. Co. v. Pondrom*, 51 Ill. 333; 2 Am. Rep. 306; *New Jersey R. R. Co. v. Kennard*, 21 Pa. St. 203; *Farlow v. Kelly*, 108 U. S. 288. In *Spencer v. R. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758, it is said: "It is probably the habit of every person, while riding in the cars, to rest the arm upon the base of the window. If the window is open, it is likely to extend slightly outside. This, we suppose, is a common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so to accommodate the motion of the car."

an act would hardly be held to be negligence.¹ It has been held that it is negligent in a street-railroad company to have two tracks laid so near together that a passenger's arm projecting a few inches from a car-window may be hit by a passing car, and it is not necessarily negligent in the passenger to allow his arm so to project.²

§ 1924. Riding in Dangerous Place—On Platform.—

It is contributory-negligence to ride on the locomotive,³ or on the top of a cattle-car.⁴ Riding in the baggage-car with the consent of the conductor is not contributory negligence.⁵ But in a Pennsylvania case it was held that

Passengers know this, and must regulate their conduct accordingly. They do not suppose that the agents and managers of the road suffer obstacles to be so placed as barely to miss the car while passing. And it seems to us almost absurd to hold that in every case, and under all circumstances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in ordinary care and prudence. Of course a case might be supposed where carelessness would be clearly apparent from the circumstances. If a passenger should ride with his body half out of the car, or with his arms or his feet so protruded that they would inevitably expose him to danger and collision, we should have no hesitation in saying he was utterly reckless."

¹ *Miller v. R. R. Co.*, 5 Mo. App. 471; *Dahlberg v. R. R. Co.*, 32 Minn. 404; 50 Am. Rep. 585; *Germantown Pass. Co. v. Brophy*, 105 Pa. St. 38.

² *Summers v. R. R. Co.*, 34 La. Ann. 139; 44 Am. Rep. 419.

³ *Robertson v. R. R. Co.*, 22 Barb. 91; *Doggett v. R. R. Co.*, 34 Iowa, 284; *Railroad Co. v. Jones*, 95 U. S. 439; *Kresanowski v. R. R. Co.*, 5 McCrary, 528. See *Waterbury v. R. R. Co.*, 21 Blatchf. 314. *Contra*, *Lawrenceburg R. R. Co. v. Montgomery*, 7 Ind. 474; unless by direction of the conductor: *Hanson v. R. R. Co.*, 38 La. Ann. 111; 58 Am. Dec. 162.

⁴ *Little Rock R. R. Co. v. Miles*, 40 Ark. 298; 48 Am. Rep. 10.

⁵ *O'Donnell v. R. R. Co.*, 59 Pa. St. 239; 98 Am. Dec. 336; *Watson v. R. R. Co.*, 24 U. C. Q. B. 98; *Carroll v. R. R. Co.*, 1 Duer, 571; *Washburn v. R. R. Co.*, 3 Head, 638; 75 Am. Dec. 784. In *Kentucky R. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208, the court say: "It is the duty of passengers to occupy the cars provided for them, and the conductor has a right to presume that they are doing so until he knows the contrary; and if a passenger goes into the baggage, mail, or express car without the knowledge or consent of the conductor, he will not be permitted to urge, as an excuse for remaining there, that the conductor should have discovered him and ordered him back to his seat, but failed to do so. No one can be permitted to justify or excuse his own improper conduct by alleging that it was the duty of another to prevent such conduct on his part. It seems to us, therefore, that when contributory negligence is interposed as a defense to an action against a railroad company for negligently injuring a passenger, and the supposed negligence consists in the fact that the passenger voluntarily occupied a position in the train which was more dangerous than the position he should have occupied, the nature of the accident causing the injury is to be considered; and if upon such consideration it appears that the danger of injury from that particular accident was materially increased by the fact that the passenger was in that particular place instead of the place

a passenger who voluntarily rides in a baggage-car by permission of the conductor, but against the rules of the railroad conspicuously posted in that car, and is injured in consequence of riding there, cannot recover from the railroad company on the ground of its negligence.¹ And in Texas it has been laid down that one who is injured by accident while unnecessarily riding in a baggage-car, and who would have escaped had he been in a passenger-car, cannot recover.² Nor is riding on the platform of the car negligence *per se*,³ especially where there is no room inside,⁴ or one is there by the direction or with the consent of the carrier's servants.⁵ A passenger riding on the steps of a platform of a car is in a place of danger, and *prima facie* negligent, and in an action for injuries by a collision, the burden is on him to rebut the presumption of negligence arising from such fact, which may be done by showing that the car and platform were full of passengers, with no room for more, and that the conductor stopped the cars to allow him to get on, and called for and received his fare, as this implied on the part of the defendant an invitation to ride in the place in which he did, and also an implied assurance that such place was a suitable and safe place to ride.⁶ It is the duty

he should have occupied, he ought not to recover, unless he was there with the consent of the conductor. But if the nature of the accident be such that the danger of injury was not enhanced in consequence of the position occupied by the passenger, or if the accident was of such a nature as was as likely to occur in one portion of the train as another, or if he occupied the place with the knowledge or consent of the conductor, his right of recovery will not be affected by the fact that he was at an improper place."

¹ *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 21; 37 Am. Rep. 651.

² *Houston etc. R. R. Co. v. Clemmons*, 55 Tex. 88; 40 Am. Rep. 799.

³ *Zemp v. R. R. Co.*, 9 Rich. 84; 64 Am. Dec. 763; *Lafayette etc. R. R. Co. v. Sims*, 27 Ind. 59; *Macon etc.*

R. R. Co. v. Johnson, 38 Ga. 409; *Weile v. R. R. Co.*, 98 N. Y. 650; *Gerstle v. R. R. Co.*, 23 Mo. App. 361. But see *Hickey v. R. R. Co.*, 14 Allen, 249; *Quinn v. R. R. Co.*, 51 Ill. 495.

⁴ *Willis v. R. R. Co.*, 32 Barb. 399; 34 N. Y. 670.

⁵ In a New York case, the act of the conductor in compelling a lad who had paid his fare to give up his seat and stand upon the front platform was held sufficient to absolve this passenger from the imputation of negligence in this particular. The company was therefore responsible for his death, caused by being thrown from the car by the hasty and careless departure of another passenger: *Sheridan v. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490.

⁶ *Clark v. R. R. Co.*, 36 N. Y. 135; 93 Am. Dec. 495.

of a passenger standing on the platform of a steam-railroad car to go inside the car when requested so to do by a train-man, if there is standing-room inside, although there are no vacant seats.¹ Standing near the bow of a ferry-boat when it is landing is not negligence.² Even more liberal a rule exists in the case of horse-cars. Therefore it is held that riding upon the outside platform of a street-railroad car is not such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom, even though there is room inside.³

ILLUSTRATIONS.—A passenger on a steam-railroad train, unable to find a seat, although there was standing-room inside, stood on the platform of a car, near the edge, and was thrown off by an ordinary jolt, and injured. *Held*, that he had no cause of action against the railroad company: *Camden etc. R. R. Co. v. Hoosey*, 99 Pa. St. 492; 44 Am. Rep. 120. A passenger riding on the rear platform of a crowded street-car leaned his back against the dasher, and was struck and injured by the pole of a following car. *Held*, that he was not negligent: *Thirteenth etc. Street R. R. Co. v. Boudrou*, 92 Pa. St. 475; 37 Am. Rep. 707. One of a funeral party, that had unexpectedly crowded a car to go twelve miles, while voluntarily standing upon the platform of a car in which there was abundant standing-room, and attempting to regain money blown from his hand in paying his fare, lost his foothold, and was thrown off and killed. *Held*, that no recovery could be had for the injury: *Quinn v. R. R. Co.*, 51 Ill. 495. The plaintiff, a laborer in the employ of a railroad company, when about to leave the place where he was working on one of the defendant's trains, was told by the person superintending him, who was also conductor of the train, to get on anywhere, as the train was in a hurry to leave. The plaintiff got on the pilot of the locomotive, which was a dangerous place to ride. While on the trip, he was injured by a collision between the locomotive and some other cars of the company,

¹ *Graville v. R. R. Co.*, 105 N. Y. 525; 59 Am. Rep. 516.

² *Ganmon v. Union Ferry Co.*, 29 Hun, 631; *Peverly v. City of Boston*, 136 Mass. 366; 49 Am. Rep. 37.

³ *Meesel v. R. R. Co.*, 8 Allen, 234; *Augusta etc. R. R. Co. v. Renz*, 55 Ga. 126; *Spooner v. R. R. Co.*, 54 N. Y. 230; 13 Am. Rep. 570; *German-town R. R. Co. v. Walling*, 97 Pa. St.

55; 39 Am. Rep. 796; *Nolan v. R. R. Co.*, 87 N. Y. 63; 41 Am. Rep. 345; *Maguire v. R. R. Co.*, 115 Mass. 239; *Burns v. R. R. Co.*, 50 Mo. 139. But see *Baltimore etc. R. R. Co. v. Wilkinson*, 30 Md. 224; *Ward v. R. R. Co.*, 11 Abb. Pr., N. S., 411; *Andrews v. R. R. Co.*, 2 Mackey, 137; 27 Am. Rep. 266.

caused by the negligence of the company. The proper place for him to ride was in a box-car on the train, provided for the employees; and he had been told previously always to ride there, and had been forbidden riding on the pilot of the locomotive. No one of those in the box-car was injured, and he would not have been if he had ridden there. *Held*, that the plaintiff was guilty of contributory negligence, and could not recover of the defendant for the injury: *R. R. Co. v. Jones*, 95 U. S. 439. A New York statute provides that a person injured while standing on the platform of a car cannot sustain an action for the injury, provided a notice is posted inside the car forbidding passengers to take such a position, and there is room inside of the car. *Held*, not to prevent a recovery by a passenger injured while standing on the platform, where the car is full inside, and the only notice not to occupy the platform is posted outside of the car, and is not shown to have come to such passenger's knowledge: *Clark v. R. R. Co.*, 32 Barb. 657; 36 N. Y. 135; 93 Am. Dec. 495. A passenger in the caboose, who should have known that a part of the train was about to be backed onto the part wherein he was, stood, instead of keeping his seat. *Held*, that he cannot recover for injuries because of his contributory negligence: *Harris v. R. R. Co.*, 89 Mo. 233; 58 Am. Rep. 111. The managers of a steam-ferry, by neglecting to enforce the rule forbidding passengers from stepping over the guard-chain before the boat was made fast, had held out to passengers that there was no practical danger in violating it. *Held*, that the libellant's intestate, killed in such act, was not guilty of contributory negligence: *The Manhasset*, 19 Fed. Rep. 430. A passenger was permitted to get and remain on the front platform or steps of a street-car, and his fare was collected from him while there, the car being so crowded that he could not get any safer place. A notice was posted on the inside of the car to the effect that "all passengers must get on and off the rear platform, or must not get on or off when the car is in motion, or stand on the steps of the car." *Held*, that whether the passenger knew of this notice or not, he was not, as matter of law, guilty of negligence in being where he was, and might recover from the company for any injuries sustained by him through their fault or neglect while there: *Hadencamp v. R. R. Co.*, 1 Sweeny, 490. A drover whose cattle were on a train was himself injured by reason of a misplaced switch while riding on the engine. *Held*, that, although not a passenger, he was entitled to maintain an action if he was there with the permission, express or implied, of the company's servants, and whether such permission was given was a question of fact for the jury: *Waterbury v. R. R. Co.*, 17 Fed. Rep. 672.

§ 1925. Jumping from or upon Train while in Motion.

—A passenger is not in general justified in leaping from a train while in motion, or which starts before he has an opportunity to alight.¹ But if the train is going very slowly, and the passenger is acting under instructions from a servant of the carrier, it will not be contributory negligence.² In a Maryland case a large woman with a child in her arms, and a lot of bundles, was told by the conductor of a train to jump off at a station, the train having slowed up instead of stopping. The court held that she was not chargeable with contributory negligence in obeying the order to her injury.³ And circumstances of great necessity may justify it. In a Pennsylvania case the plaintiff, accompanied by three young children, on arriving at her destination, proceeded to alight; two of the children had done so, and while the plaintiff was still on the train, the cars started, when she sprang upon the platform of the station, on which one of the children had fallen prostrate, and was injured. It was held that this was not such

¹ *Jeffersonville etc. R. R. Co. v. Hendricks's Administrator*, 26 Ind. 228; *Morrison v. R. R. Co.*, 56 N. Y. 302; *Burrows v. R. R. Co.*, 63 N. Y. 556; reversing 3 *Thomp. & C.* 44; *Damont v. R. R. Co.*, 9 La. Ann. 441; 61 Am. Dec. 214; *Dougherty v. R. R. Co.*, 86 Ill. 467; *Gavett v. R. R. Co.*, 16 Gray, 501; 77 Am. Dec. 422; *Lucas v. R. R. Co.*, 6 Gray, 64; 66 Am. Dec. 406; *Ginnon v. R. R. Co.*, 3 Rob. (N. Y.) 25; *Illinois etc. R. R. Co. v. Slatton*, 54 Ill. 133; 5 Am. Rep. 109; *Pennsylvania Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323; *Evansville etc. R. R. Co. v. Duncan*, 28 Ind. 441; 92 Am. Dec. 322; *Detroit etc. R. R. v. Curtis*, 23 Wis. 152; 99 Am. Dec. 141. In an Alabama case it was held that one who entered a train as an escort for a woman to find her a seat, and who was injured in the endeavor to leave the train while it was under way, with some papers in his hand, is without remedy; *Central R. R. etc. Co. v. Letcher*, 69 Ala. 106; 44 Am. Rep. 505.

² *Georgia etc. R. R. Co. v. McCurdy*, 45 Ga. 288; 12 Am. Rep. 577; *Lambeth v. R. R. Co.*, 66 N. C. 494; 8 Am. Rep. 508; *Lovett v. R. R. Co.*, 9 Allen, 557; *Filer v. R. R. Co.*, 68 N. Y. 124; 59 N. Y. 351; 49 N. Y. 47; *Penn. R. R. Co. v. McCloskey*, 23 Pa. St. 526; *Wyatt v. R. R. Co.*, 55 Mo. 485; *Doss v. R. R. Co.*, 59 Mo. 27; 21 Am. Rep. 371; *Illinois etc. R. R. Co. v. Able*, 59 Ill. 131; *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 510; 5 Am. Rep. 60; *Galveston etc. R. R. Co. v. Smith*, 59 Tex. 406; *Bucher v. R. R. Co.*, 98 N. Y. 128; *International R. R. Co. v. Hassell*, 62 Tex. 256; 50 Am. Rep. 525. A passenger injured by deliberately, and for his own convenience, jumping off a moving train cannot recover because the conductor told him when to jump, and slackened the speed of the train a little, refusing to stop, and not being obliged to stop; *Bardwell v. R. R. Co.*, 63 Miss. 574; 56 Am. Rep. 842.

³ *Baltimore etc. R. R. Co. v. Leapley*, 65 Md. 571.

negligence as would prevent her recovery of damages.¹ If the train has stopped a sufficient length of time for passengers to get off, the attempt to do so after the train has started will be wholly inexcusable;² or if the passenger gets off after being warned that the train has not yet reached the station;³ or if the passenger, knowing that the train will stop at the station, leaps off before it has come to a stop.⁴ In the case of street-cars, it is held not contributory negligence to jump from them while in motion.⁵ In like manner, it is negligence on the part of the passenger to try to board a rapidly moving train;⁶ but this is usually a question of fact for the jury.⁷ It is negligence in the servants of a railroad company to tell passengers to go aboard when a train is not ready for their reception. After being told to go on board of any car, a passenger has a right to draw the conclusion that the train is ready for his reception, and he cannot be considered negligent in attempting to do so.⁸

ILLUSTRATIONS.—The train stopped at the station only a minute, and a passenger, when the signal was given, started for the door; but, being encumbered with some bundles and her little child, and meeting incoming passengers, was delayed till her child had alighted and the train had started. *Held*, that she was not barred from recovery for injuries sustained in jumping from the car to the platform by the fact that the train was in motion: *Loyd v. R. R. Co.*, 53 Mo. 509. Plaintiff paid his fare on defendant's road to N., where the conductor agreed to let him off. The train did not stop at N.,

¹ Penn. R. R. Co. v. Kilgore, 32 Pa. St. 292; 72 Am. Dec. 787.

² Illinois etc. R. R. Co. v. Slatton, 54 Ill. 139; 5 Am. Rep. 109.

³ Ohio etc. R. R. Co. v. Schiebe, 44 Ill. 460.

⁴ Ohio etc. R. R. Co. v. Stratton, 78 Ill. 88. Compare Kentucky etc. R. R. Co. v. Dills, 4 Bush, 593.

⁵ Wyatt v. R. R. Co., 55 Mo. 485; Crissey v. R. R. Co., 75 Pa. St. 83; Philadelphia etc. R. R. Co. v. Hassard, 75 Pa. St. 367. *Contra*, Nichols v. R. R. Co., 38 N. Y. 131; 97 Am. Dec. 780.

⁶ Phillips v. R. R. Co., 49 N. Y. 177; 57 Barb. 644; Chicago etc. R. R. Co. v. Scates, 90 Ill. 566; Knight v. R. R. Co., 23 La. Ann. 462; Hubener v. R. R. Co., 23 La. Ann. 492.

⁷ Johnson v. R. R. Co., 70 Pa. St. 359. One injured in attempting to board a moving train on an elevated railroad is guilty of negligence *per se*, and cannot recover: Solomon v. R. R. Co., 103 N. Y. 437; 56 Am. Rep. 843.

⁸ Detroit etc. R. R. Co. v. Curtis, 23 Wis. 152; 99 Am. Dec. 141.

but only slackened speed. The plaintiff was afraid to get off. After the station was passed, the conductor again slackened speed and directed the plaintiff to get off. He did so, and was injured. *Held*, that these facts did not constitute negligence on the part of the plaintiff, and that the verdict of the jury awarding damages to plaintiff must be sustained: *Georgia R. & B. Co. v. McCurdy*, 45 Ga. 288; 12 Am. Rep. 577. A railroad train not stopping at a station a reasonable length of time to allow passengers to alight, one undertook, in spite of warnings, to get off after the train had started, and was injured. *Held*, that she was guilty of contributory negligence fatal to recovery: *Jewell v. R. R. Co.*, 54 Wis. 610; 41 Am. Rep. 63. The plaintiff signaled a street-car to stop; the car was open, with a side-step or rail. The driver applied the brake, and while the car was moving slowly, the plaintiff put his foot on the step, took hold of the end of a seat, and raised himself to get on, when the driver, who was looking at him, started the car with a jerk; the plaintiff slipped under the car, and was injured. *Held*, that the case was proper for the jury: *Eppendorf v. R. R. Co.*, 69 N.Y. 195; 25 Am. Rep. 171. In an action for damages sustained by a person in trying to get on board a train in motion, the court charged that starting the train at the instant of giving the signal for departure was negligence on the part of the defendant; and that, while the attempt to board a train moving rapidly would be negligence on the part of the plaintiff, such an attempt, if the train were moving slowly, would not be negligence on his part. *Held*, error; the question was for the jury: *Texas etc. R. R. Co. v. Murphy*, 46 Tex. 356; 26 Am. Rep. 272.

§ 1926. Exception — Escaping Threatened Danger. —

The passenger may, in the presence of another danger, leap from a train or other vehicle to avoid it. If by his negligence the carrier places the passenger in a perilous position, he cannot complain if the passenger adopts, in the words of Chief Justice Ellenborough, “a perilous alternative.”¹

¹ *Jones v. Boyce*, 1 Stark. 493; *Ingalls v. Bills*, 9 Met. 1; 43 Am. Dec. 346; *Frink v. Potter*, 17 Ill. 406; *McKinney v. Neil*, 1 McLean, 540; *Buel v. R. R. Co.*, 31 N. Y. 314; 88 Am. Dec. 271; *Eldridge v. R. R. Co.*, 1 Sand. 69; *Wilson v. R. R. Co.* 23 Minn. 278; 37 Am. Rep. 410; South-

western R. R. Co. v. Paulk, 24 Ga. 356; *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418; 38 Am. Rep. 597; *Pitts. etc. R. R. Co. v. Martin*, 82 Ind. 476. *Huff v. R. R. Co.*, 14 Fed. Rep. 558; *Lawrence v. Green*, 70 Cal. 417; 59 Am. Rep. 428.

ILLUSTRATIONS.—Plaintiff was a passenger on one of defendant's horse-cars; at a crossing of a steam-railroad, the driver carelessly drove upon the latter track, directly in front of an approaching train; the plaintiff, and all the other passengers but one, seeing the danger, rushed and jumped, and the plaintiff in so doing fell and received injury; the driver got his car across the track in time to escape the train. *Held*, that the question of contributory negligence was for the jury; that the plaintiff was only bound to exercise ordinary prudence, and an error of judgment does not constitute negligence; and that evidence of the conduct of the other passengers was proper as part of the transaction, and as showing what ordinary prudence was under the circumstances: *Twomley v. R. R. Co.*, 69 N. Y. 158; 25 Am. Rep. 162. Plaintiff was injured in jumping off a stationary passenger train, in the mistaken belief that there was danger of a collision with a freight train approaching from the rear. *Held*, that she had no cause of action against the company: *Gulf, Colorado etc. R. R. Co. v. Wallen*, 65 Tex. 568. A passenger in the caboose of a moving freight train, frightened by the falling of a pile of lumber from a flat-car next before the caboose, jumped out. *Held*, that he was to blame for the injuries sustained, even though the company was negligent in piling the lumber so that it could fall: *Woolery v. R. R. Co.*, 107 Ind. 381; 57 Am. Rep. 114.

§ 1927. Other Instances of Contributory Negligence.

—When the railroad company has provided safe and convenient means for passengers to get on and off their trains, if the passenger uses a way of his own choice in preference to that provided by the company, he will be responsible for accidents which happen in consequence.¹ A passenger who finds a freight train with steam up, and blocking the way to his train, and crawls through or under it without permission of or notice to any one in charge of this train, is guilty of contributory negligence.² It is not necessarily negligent for a passenger to board a railroad train at a place other than the station platform.³ A pas-

¹ *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318; 37 Pa. St. 420; *Bancroft v. R. R. Co.*, 97 Mass. 275; *Gonzales v. R. R. Co.*, 50 How. Pr. 126; *Forsyth v. R. R. Co.*, 103 Mass. 510.

² *Chicago etc. R. R. Co. v. Cross*, 73

Ill. 394; *Chicago etc. R. R. Co. v. Dewey*, 26 Ill. 255; 79 Am. Dec. 374. But see *Allender v. R. R. Co.*, 37 Iowa, 264.

³ *Stoner v. R. R. Co.*, 98 Ind. 384; 49 Am. Rep. 764.

senger is not *per se* guilty of negligence in standing up in the car to view the scenery;¹ or in leaving his seat and standing in the passage-way of the car for the purpose of hastening his departure, after the approach of the train to the station at which he is to alight has been announced;² or in standing in the aisle, and making preparations to leave by brushing and plaiting a child's hair;³ or, having entered a car, and finding no seats vacant, in continuing to stand, looking about for a seat.⁴ Where the plaintiff, in the performance of his duty as a guard over prisoners, was required to stand at the door of a car, it was held that he was not in fault for so doing.⁵ Nor is it negligence *per se* to pass from car to car while the train is in motion, by the direction of a servant of the carrier, to find a seat;⁶ nor to step upon a connecting link between two cars in alighting after the train has stopped.⁷ A passenger, however, in search of a water-closet, without making proper inquiries, is not at liberty to go upon any part of the boat, into places not designed for the reception of passengers, and under circumstances of danger.⁸ One was not necessarily guilty of contributory negligence because he was upon the main deck of a steamboat looking for his baggage, when, by falling down a hatchway, he sustained the injury for which he sued.⁹ It was held to be a question for the jury whether a passenger on a steamboat, injured by the fall of a boat upon him, was in the exercise of due care in taking his position under the boat, suspended over a part of a deck where it was proper for passengers to be, and in continuing to stand there

¹ *Gee v. R. R. Co.*, L. R. 8 Q. B. 161.

² *Barden v. R. R. Co.*, 121 Mass. 426; *Wylde v. R. R. Co.*, 53 N. Y. 156; *Baltimore etc. R. R. Co. v. Leonhardt*, 66 Md. 70.

³ *R. R. Co. v. Pollard*, 22 Wall. 341.

⁴ *Pollard v. R. R. Co.*, 7 Bosw. 437. A passenger standing in a crowded street-car is not guilty of negligence: *Lapourte v. R. R. Co.*, 114 Mass. 18.

⁵ *Truex v. R. R. Co.*, 4 Lans. 198.

⁶ *McIntyre v. R. R. Co.*, 37 N. Y. 287; *Cleveland R. R. Co. v. Manson*, 30 Ohio St. 451; *Louisville etc. R. R. Co. v. Kelly*, 92 Ind. 371; 47 Am. Rep. 149.

⁷ *Johnson v. R. R. Co.*, 11 Minn. 296; 88 Am. Dec. 83.

⁸ *Dougan v. Champlain Trans. Co.*, 6 Lans. 430.

⁹ *Bowman v. Steam Co.*, 63 Cal. 181.

without attempting to move away, while he saw two or three persons enter it in addition to two others whom he had previously noticed there.¹ A passenger on an excursion-car is not guilty of contributory negligence in attempting to use the outside running-board on the side of a car without noticing that coal-bins belonging to the railroad company are so near the track that he cannot pass.² A passenger on a railroad train, having escaped uninjured from a car which caught fire, as there was evidence tending to show, by the negligence of the company, was held guilty of such negligence that he could not recover for burns and other injuries received in rushing back into the car again for the purpose of recovering his valise.³

ILLUSTRATIONS.—A passenger encumbered with hand-baggage alighted from a train moving six miles an hour on a dark night, before it had reached the platform of the station where he was to get off, and with which he was familiar, and with no reason to believe the train would not stop as usual. *Held*, contributory negligence: *South and North Ala. R. R. Co. v. Schaufler*, 75 Ala. 136. The plaintiff, in getting into a railroad carriage, having a parcel in his right hand, placed his left hand on the back of the open door, to aid him in mounting the step. There was conflicting evidence as to whether there was a proper handle affixed to the carriage to the right of the door. The night was dark, and the plaintiff did not see any handle. Before he had completely entered the carriage, the guard, without any previous warning, closed the door, and crushed his hand between the back of the door and the door-post. *Held*, no contributory negligence on part of plaintiff: *Fordham v. R. R. Co.*, L. R. 3 Com. P. 368. A passenger left his seat in a car before its arrival at a water-station, and was told by the conductor that it would stop. After it stopped he attempted to step off, when it started with a jerk, and he was injured. Had he kept his seat till the car stopped he could not have reached the step before the car started up. *Held*, nevertheless, that the company was liable: *Wood v. R. R. Co.*, 49 Mich. 370. The plaintiff, while sitting near the front door of a crowded and dark car on the defendant's railroad, in passing through a long tunnel, at-

¹ *Simmons v. R. R. Co.*, 97 Mass. 361; 100 Mass. 34.

² *Dickinson v. R. R. Co.*, 53 Mich. 43.

³ *Hay v. R. R. Co.*, 37 U. C. Q. B. 456,

temped to shut the door, there being no servant of the defendant at hand to do it, in order to keep out the smoke and cinders, and received an injury in doing so. *Held*, that defendant was liable: *Western Maryland R. R. Co. v. Stanley*, 61 Md. 266; 48 Am. Rep. 96. The plaintiff, a boy twelve years of age, in company with his father, had entered a third-class carriage at night, and, in feeling for a seat, placed his hand on the door-jamb, which was very near the seat. The porter at that moment violently closed the door, which crushed the plaintiff's fingers and struck his father, who entered after him, on the back. *Held*, that the evidence of negligence on the part of the porter was properly submitted to the jury, and that there was no contributory negligence on the part of the plaintiff: *Coleman v. R. R. Co.*, 4 Hurl. & C. 699. Plaintiff, having paid his fare, went on board defendant's passenger steamboat at New York, on Sunday, intending to take a pleasure ride. While the boat was lying at the dock, the boiler exploded, the steam having been permitted to reach a greater pressure than was allowable by the inspector's certificate under the act of Congress of 1871. *Held*, that the fact that plaintiff was traveling for pleasure on Sunday, in violation of a statute of the state, did not prevent his recovery for injuries received by him in consequence of the explosion: *Carroll v. R. R. Co.*, 58 N. Y. 126; 17 Am. Rep. 221. Plaintiff, a woman with a child in her arms, while alighting from one of defendant's cars, caught upon a nail projecting from the car-platform a steel hoop of a hoop-skirt which she wore as part of her clothing, and was thereby thrown upon the ground, and dragged some distance over the pavement before the car was stopped, and seriously frightened and injured. *Held*, that there was no contributory negligence; that if hoop-skirts are worn by such passengers as the railroad company were in the habit of conveying, the defendants were bound to provide for the safety of the passengers wearing that kind of a garment with as much caution as prudent and cautious persons would be bound to exercise: *Poulin v. R. R. Co.*, 61 N. Y. 621. On one side of a track was a station with platform, and on the other side a platform for the convenience of passengers going the other way. A woman forty-seven years old, having purchased a ticket, was told by the ticket agent to cross. When part way across she turned back to get a bundle, though warned of her danger, and in attempting to cross after getting the bundle, she was killed. The evidence was conflicting whether the train was one half or one quarter of a mile distant when the agent told her to cross. *Held*, that she was guilty of contributory negligence: *Baltimore and Ohio R. R. Co. v. State*, 63 Md. 135. A passenger on a ferry-boat, being crowded by others, stepped into the carriage-way, and

had his leg crushed by a horse that fell in attempting to rise from the boat to the ferry-bridge. In an action against the ferry company for damages, *held*, that the neglect of the company to provide a bridge that could be raised or lowered to a level with the boat, a way to prevent the meeting of passengers going in opposite directions, and a barrier between the carriage and passenger way, was sufficient evidence on the question of negligence to be left to the jury; and that the court rightly refused to charge that it was negligence on the part of the plaintiff to be in the carriage-way when injured: *Hazman v. Hoboken Land etc. Co.*, 2 Daly, 130. The plaintiff was a passenger on the defendant's steam-ferry and railroad from New York to Newark, New Jersey. The ferry-boat had come up to the bridge, and had been fastened by the chains to the bridge, the front chains on the boat had been let down, and the plaintiff was in the act of stepping from the boat to the shore, immediately behind the other passengers, when his foot was caught between the boat and the bridge and badly crushed. *Held*, that the plaintiff was not guilty of want of ordinary care, although at the very instant of stepping from the boat to the bridge he did not examine particularly to see if there was a vacant space between the boat and the bridge: *New Jersey R. R. Co. v. Palmer*, 33 N. J. L. 90. A train being suddenly started without signal, A., an emigrant passenger, jumped upon the platform of a car next his own, and the brakeman silently moving out of a passage-way, A. proceeded to cross, but fell between the cars, owing to their having been uncoupled to divide the train. *Held*, that the railroad company's negligence was the proximate cause of A.'s injury; and the question of contributory negligence was for the jury: *Andrist v. R. R. Co.*, 30 Fed. Rep. 345. A passenger in the caboose of a railroad freight train, on the stopping of the train a quarter of a mile short of his destination, got up to walk to the door, and was thrown down and injured by the sudden backing of the train. *Held*, that his negligence prevented his recovery of damages: *Harris v. R. R. Co.*, 89 Mo. 233; 58 Am. Rep. 111. A railroad passenger was ejected from a car at one end of a trestle, and his gun, which was in the baggage-car, at the other end. He crossed to get it, and in returning fell and was injured. *Held*, that the company was not liable therefor: *I. & G. N. R. R. Co. v. Folliard*, 66 Tex. 603; 59 Am. Rep. 632.

§ 1928. **Duty of Carrier as to Persons under Physical or Mental Disability.** — If a passenger is afflicted with a physical or mental disability, known to the carrier, the latter is bound to extend to him increased care and watch-

fulness.¹ But sick persons, and persons unable to take care of themselves, should provide themselves with proper assistance while traveling in railroad cars. And if, a person is sick, and, from inability to walk without assistance, requires longer delay at the station than is usual, he should give timely notice thereof to the conductor.² So it is the duty of the carrier, when aware of the intoxication of a passenger, to give him that degree of attention which considerations for his safety demand, beyond that ordinarily bestowed upon passengers.³ But the duty of a passenger carrier does not extend to the imprisonment of a passenger so as to prevent him from voluntarily exposing himself to needless peril.⁴ So the carrier is under a greater duty as to care in the case of an infant traveling alone than in the case of an adult.⁵

ILLUSTRATIONS.—The plaintiff, a boy ten years old, was riding on one of the defendant's street-cars, with the knowledge and consent of the conductor and driver, but without paying fare. They had no authority to carry passengers free. The driver requested him to take a package from the car and deliver it at the place where he was intending to get off. He took the papers, and without notice to the conductor or driver, while the car was in motion, and before it reached the crossing where it usually stopped, he jumped off the front platform, and was thrown under the wheel and injured. A printed notice was posted conspicuously in the car, forbidding passengers to stand upon or get on or off at the front platform, or to get on or off the car when in motion, and declaring that the company would not be

¹ *Sheridan v. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490; 34 How. Pr. 217; *Giles v. R. R. Co.*, 36 U. C. Q. B. 360, 369; *Pittsburgh etc. R. R. Co. v. McClurg*, 56 Pa. St. 294; *Columbus etc. R. R. Co. v. Powell*, 40 Ind. 37; *Willets v. R. R. Co.*, 14 Barb. 585; *Toledo etc. R. R. Co. v. Baddleley*, 54 Ill. 19; 5 Am. Rep. 71. But see *New Orleans R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478.

² *New Orleans R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478.

³ *Giles v. R. R. Co.*, 36 U. C. Q. B. 360; *Haley v. R. R. Co.*, 21 Iowa, 15; *Milliman v. R. R. Co.*, 6 Thomp. & C.

585; 66 N. Y. 642; *Maguire v. R. R. Co.*, 115 Mass. 239; *Whalen v. R. R. Co.*, 60 Mo. 323. The fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad train, nor does it free the company from its duty to render him, as a passenger, due care: *Milliman v. R. R. Co.*, 66 N. Y. 642; 6 Thomp. & C. 585.

⁴ *Indianapolis etc. R. R. Co. v. Rutherford*, 29 Ind. 82; 92 Am. Dec. 336.

⁵ *Hemmingway v. R. R. Co.*, 72 Wis. 42; 7 Am. St. Rep. 823. But see *Raben v. R. R. Co.*, 73 Iowa, 579.

responsible for any accident happening thereby. The trial court found that the injury was caused by the careless driving and management of the car; that the plaintiff, in getting off, under the circumstances used as much care as could be expected from a person of his age, and that no contributory negligence on his part was proved. *Held*, that on these findings the plaintiff was entitled to recover: *Brennan v. R. R. Co.*, 45 Conn. 284; 29 Am. Rep. 679. A boy seven years old, without the fault of his parents, wandered to a railroad station, entered a passenger train, and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track near a highway crossing where he could be seen for three quarters of a mile by persons in charge of a train coming from the south. A freight train moving northward in the daytime on an ascending grade, where it could easily have been stopped, ran upon and killed the child. *Held*, that the railroad company was liable: *Indianapolis etc. R. R. Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387.

§ 1929. Imputed Negligence—Negligence of Person in Charge of Infant.—The negligence of a grown person in charge of an infant is, in some cases, imputed to the infant, and a recovery denied for this reason.¹ In the leading case, an English one, the plaintiff, a child five years old, was in charge of its grandmother, who procured tickets for both at the defendant's station, with the intention of taking the train at that place. The pair, in crossing the track for the purpose of reaching a platform on the side of the station opposite the ticket-office, were run down by a train, under circumstances (as a jury found) of concurrent negligence on the part of the grandmother and the servants of the defendant. The grandmother was killed, and the plaintiff suffered personal injuries, for which the suit was brought. It was held that the infant could not recover, Crowder, J., saying: "The case is the same as if the child had been in the mother's arms. There is an identification, such that

¹ *Ohio etc. R. R. Co. v. Stratton*, 78 Barb. 585. See *ante*, Title Negligence, III. 88; *Fleming v. R. R. Co.*, 1 Abb. § 1210. N. C. 433; *Willetts v. R. R. Co.*, 14

the negligence of the grandmother deprives the child of the right of action. Now, the finding of the jury would clearly have prevented the grandmother from recovering; it therefore has the same effect in respect of an action by the child. It would be monstrous and absurd if there could be a distinction."¹

§ 1930. Imputed Negligence—Negligence of Carrier.—The passenger is not so far identified with the carrier that the contributory negligence of the latter will bar his recovery for an injury caused by the fault of a third person.²

§ 1931. Concurrent Negligence of Carrier and Third Person.—The carrier is responsible for an injury to a passenger caused by the concurrent negligence of the carrier and a third person.³

ILLUSTRATIONS.—A boy nine years old, a passenger on a street-car, was compelled by the conductor to stand on the platform, from which he was thrown and injured by the negligence of another passenger in leaving the car. *Held*, that the company was liable: *Sheridan v. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490. A stage-coach, by the negligence of the driver, is precipitated into a dry canal; the lock-keeper thereafter negligently opens the gates of the canal, and drowns the passenger. The stage-coach proprietor is responsible: *Byrne v. Wilson*, 15 I. R. C. L., N. S., 332. The driver of a load of hay recklessly en-

¹ *Waite v. R. R. Co.*, El. B. & E. 719, 735.

² *Bennett v. R. R. Co.*, 36 N. J. L. 225; 13 Am. Rep. 435; *Chapman v. R. R. Co.*, 19 N. Y. 341; 75 Am. Dec. 344; *Colgrove v. R. R. Co.*, 20 N. Y. 492; 6 Duer, 382; *Webster v. R. R. Co.*, 38 N. Y. 260; *Danville Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville etc. R. R. Co. v. Case*, 9 Bush, 728; *Johnson v. R. R. Co.*, 32 N. Y. 597; 88 Am. Dec. 353; *Holzab v. R. R. Co.*, 38 La. Ann. 185; 58 Am. Rep. 177. In *Thorogood v. Bryan*, 8 Com. B. 114, it was held that a passenger upon the vehicle of a common carrier, who sustains an injury which is the result of the concurrent negligence of those in charge of such vehicle and third persons, is so

identified with the former as to be chargeable with their negligence, in an action against the latter, and therefore entitled only to recover damages from his carrier. This doctrine has been adopted in this country in one or two cases: See *Lockhart v. Lichtenhaler*, 46 Pa. St. 164. But the American rule is as stated in the text. And *Thorogood v. Bryan* has been recently overruled in England: *The Bernier* L. R. 12 P. D. 58.

³ *Byrne v. Wilson*, 15 I. R. C. L., N. S., 332; *Sheridan v. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490; *Eaton v. R. R. Co.*, 11 Allen, 500; 87 Am. Dec. 730; *Spooner v. R. R. Co.*, 54 N. Y. 230; 13 Am. Rep. 570.

deavored to drive it from the highway crossing, upon and along the railway track, to certain private premises. This track was used by two other companies in the operation of their trains, besides the company owning it. The wagon-wheels became wedged in between the rails and the planking, and were held fast. The defendant's train, upon which the plaintiff was a passenger, having been detained by this circumstance, a flagman was not sent up the track until too late to stop other trains. The train of another company came rapidly around a curve at this point, and ran into the defendant's train, thereby causing the injury to the plaintiff. There was evidence also that the conductor and engineer of this colliding train were negligent in its operation. The defendants were held liable: *Eaton v. R. R. Co.*, 11 Allen, 500; 87 Am. Dec. 730. A child three years old was left to itself by its nurse when on board a steamship, and, wandering to a part where it had no right to be, was injured by the rudder-chain, which ran in an open box on the main deck. *Held*, that the ship was not liable: *The Burgundia*, 29 Fed. Rep. 464.

§ 1932. Liability of Carrier for Acts of Servants within Scope of Employment.—For an unlawful act of any of his servants while actually in the scope of his employment, and within his instructions, the carrier is responsible.¹

¹ *Rounds v. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Drew v. R. R. Co.*, 26 N. Y. 49; *Northwestern R. R. Co. v. Hack*, 66 Ill. 238; *Quigley v. R. R. Co.*, 11 Nev. 350, 363; 21 Am. Rep. 757; *Atlantic etc. R. R. Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382; *Passenger R. R. Co. v. Young*, 21 Ohio St. 518; 8 Am. Rep. 78; *Indianapolis etc. R. R. Co. v. Anthony*, 43 Ind. 183; *Jeffersonville etc. R. R. Co. v. Rogers*, 38 Ind. 116; 10 Am. Rep. 103; *Hewett v. Swift*, 3 Allen, 420; *Pittsburgh etc. R. R. Co. v. Slusser*, 19 Ohio St. 157; *New Orleans etc. R. R. Co. v. Hurst*, 36 Miss. 660; 74 Am. Dec. 785; *McKinley v. R. R. Co.*, 44 Iowa, 314; 24 Am. Rep. 748; *Pittsburgh etc. R. R. Co. v. Theobald*, 51 Ind. 246; *Bayley v. R. R. Co.*, 'L. R. 7 Com. P. 415; *Travers v. R. R. Co.*, 63 Mo. 421; *Baltimore etc. R. R. Co. v. Blocher*, 27 Md. 277; *Brown v. R. R. Co.*, 66 Mo. 588; *Thorpe v. R. R. Co.*, 13 Hun, 70; *Jackson v. R. R. Co.*, 47 N. Y. 274; 7 Am. Rep. 448; *Moore v. R. R. Co.*, 4 Gray, 465; 64 Am. Dec. 83. In *Rounds v. R. R. Co.*, 64 N. Y. 129, the court say: "It is, in general,

sufficient to make the master responsible that he gave to the servant an authority or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master, in that case, will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another."

Where a railroad conductor attempts to seize articles of property in the hands of a passenger for the purpose of enforcing payment of fare, the corporation is liable to an action of assault and battery.¹ So a railroad company is liable for the act of one of its conductors in improperly putting a person off a freight-car while the car is in motion, if it has instructed its conductors not to allow any person to ride in any freight-car attached to its trains.²

ILLUSTRATIONS.—A railroad ticket agent left another employee in charge of the ticket-office. He returned to a purchaser too little change, and on being asked for it, assaulted him. *Held*, that the company was liable: *Fick v. R. R. Co.*, 68 Wis. 469; 60 Am. Rep. 878. The driver of a street-car invites a person to ride with him gratuitously on the front platform. The person is negligently injured. The carrier is responsible: *Wilton v. R. R. Co.*, 107 Mass. 108; 9 Am. Rep. 11.

§ 1933. And for Willful and Malicious Acts of Servants.

—The carrier is liable for the wanton, willful, and malicious acts of his servants towards his passengers. The ordinary rule as to the liability of a master for the willful and unauthorized acts of his servants which injure third persons do not apply in this case. The carrier agrees to carry for hire the passenger from one place to another, and is responsible for any breach of the obligation thus assumed in ill usage of the passenger by himself or employees. Passengers not only contract for room and transportation, but for good treatment; and it is the duty of the owners to use due care and exertion to protect them from any degree of violence, abuse, or ill treatment from other passengers, or the carrier's servants, or other persons coming on board during the trip. The principal in this class of cases is liable for the misconduct of the employee when it occasions injury to the passenger, whether arising from malice or neglect.³ A common carrier of

¹ *Ramsden v. R. R. Co.*, 104 Mass. 117; 6 Am. Rep. 200.

² *Holmes v. Wakefield*, 12 Allen, 580; 90 Am. Dec. 171.

³ *Pendleton v. Kinsley*, 3 Cliff. 416; *Milwaukee R. R. Co. v. Finney*, 10 Wis. 388; *Keene v. Lizardi*, 5 La. 431; 25 Am. Dec. 197; 6 La. 315; 26 Am.

passengers is liable for a malicious assault by his servant on a passenger in his charge, the moving cause of the assault being the passenger's expostulation with the servant for an assault on a third person outside the vehicle.¹ So the carrier is bound to protect its female passengers from obscenity or immodest conduct on the part of its employees.²

ILLUSTRATIONS.—A conductor of a train forcibly seized and kissed a female passenger. *Held*, that the company was liable in damages: *Craker v. R. R. Co.*, 36 Wis. 657; 17 Am. Rep. 505. While collecting fares during a trip of a steamboat owned by the defendant, the clerk of the steamer engaged in a dispute with the plaintiff, a passenger, as to his fare, and inflicted personal injuries upon him. *Held*, irrespective of the dispute, and as if none had arisen, that the plaintiff could recover for the injuries received, although the defendant did not authorize the acts of his employee: *Pendleton v. Kinsley*, 3 Cliff. 416. Plaintiff was a passenger on the steamboat of defendants, common carriers, when the steward and some of the table-waiters wrongfully assaulted and injured him. *Held*, that defendants were liable: *Bryant v. Rich*, 106 Mass. 180; 8 Am. Rep. 311. The plaintiff, a passenger in defendant's railroad-car, gave up his ticket to a brakeman, who was authorized to demand and receive it. Shortly after, the latter approached plaintiff, denied

Dec. 478; *Chamberlain v. Chandler*, 3 Mason, 242; *Bryant v. Rich*, 106 Mass. 180; 8 Am. Rep. 311; *Ramsden v. R. R. Co.*, 104 Mass. 117; 6 Am. Rep. 200; *Malecek v. R. R. Co.*, 57 Mo. 18; *Sherley v. Billings*, 8 Bush, 117; 8 Am. Rep. 451; *Shea v. R. R. Co.*, 62 N. Y. 180; 20 Am. Rep. 480; *Rounds v. R. R. Co.*, 64 N. Y. 129; *Higgins v. R. R. Co.*, 46 N. Y. 23; 7 Am. Rep. 293; *Passenger Co. v. Young*, 21 Ohio St. 518; 8 Am. Rep. 78; *Weed v. R. R. Co.*, 17 N. Y. 362; 72 Am. Dec. 474. In *Goddard v. R. R. Co.*, 57 Me. 202, 2 Am. Rep. 39, in reply to the argument that the master is not responsible for the willful acts of his servants, the court said: "The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he (the carrier) is under to his passenger, and the duty which he owes a stranger. It may be true that if the

carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. . . . The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable." *Contra*, *Isaacs v. R. R. Co.*, 47 N. Y. 122; 7 Am. Rep. 418; *Parker v. R. R. Co.*, 5 Hun, 57; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 119; 2 Am. Rep. 373.

¹ *Stewart v. R. R. Co.*, 90 N. Y. 588; 43 Am. Rep. 185.

² *Louisville etc. R. R. Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600.

that he had received his ticket, and assaulted and grossly insulted him. In an action against the railroad company to recover damages, *held*, that the defendants were liable, and that plaintiff could recover exemplary damages: *Goddard v. R. R. Co.*, 57 Me. 202; 2 Am. Rep. 39. Plaintiff entered defendant's car as a passenger, his dog accompanying him. While the train was in motion a brakeman attempted to eject the dog, but was forcibly prevented by the plaintiff. Afterwards the brakeman suddenly attacked plaintiff, inflicting upon him serious injuries. On the trial of an action of trespass therefor against the company, the court charged that if the brakeman "was acting in the performance of his duty as brakeman, he would be justified in using a reasonable degree of force necessary and proper to accomplish the removal of the dog from the car; but if he used more violence than was necessary, and inflicted on plaintiff blows that were unnecessary to perform his duty, the company would be liable, and the jury may, in that case, award punitive or exemplary damages." *Held*, correct: *Hanson v. R. R. Co.*, 62 Me. 84; 16 Am. Rep. 404. The plaintiff, a passenger on defendant's road, applied to the baggage-master to have his trunk checked, which not being promptly done, the plaintiff became angry and used threatening and abusive language, whereupon the baggage-master seized a hatchet and struck him. *Held*, that the company was not liable: *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110; 2 Am. Rep. 373.

§ 1934. Liability of Carrier while Using Another's Line or Means of Transportation.—Where the carrier runs his vehicles a part of the way over the road of another carrier, the courts hold the carrier who first received the passenger, and with whom the contract of transportation was made, to the same degree of liability as if it owned and controlled the entire length of line traversed, the reason being that the carrier having contracted to furnish his passengers with a safe, expeditious, and comfortable passage must do so to the end.¹ Thus where it was

¹ *Birkett v. R. R. Co.*, 4 Hurl. & N. 730; *Great Western R. R. Co. v. Blake*, 7 Hurl. & N. 987; *Buxton v. R. R. Co.*, L. R. 3 Q. B. 549; *Thomas v. R. R. Co.*, L. R. 5 Q. B. 226; affirmed in exchequer chamber, L. R. 6 Q. B. 266; *John v. Bacon*, L. R. 5 Com. P. 437; *Murch v. R. R. Co.*, 29 N. H. 9; 61 Am. Dec. 631; *Seymour v. R. R. Co.*, 3 Biss. 43;

Peters v. Rylands, 20 Pa. St. 497; 59 Am. Dec. 746; 1 Phila. 264; *McLean v. Burbank*, 11 Minn. 277; *Champion v. Bostwick*, 11 Wend. 571, 581; 18 Wend. 175, 181; 31 Am. Dec. 376; *McElroy v. R. R. Co.*, 4 Cush. 400; 50 Am. Dec. 794. *Contra*, *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424.

necessary for a stage-coach to cross a ferry, and by the negligence of the proprietors of the ferry the life of a passenger on the stage-coach was lost, the owners of the stage-coach were held responsible.¹ Where the defendant used the station of another company by arrangement with them, and the plaintiff, a passenger of the defendant, slipped upon some pieces of ice scattered upon the platform of the station, injuring herself, it was held the duty of the defendant to see that the platform used by it was safe and convenient for passengers to get in and out of the cars, regardless of any arrangement with the company owning the building.² The owners of passenger-cars run upon a railroad belonging to the state are liable for an injury sustained by a passenger from the collision of two of their trains passing in the same direction, though the motive power of the road was furnished by the state, and was under the control of the state's agents, and though the accident happened through the negligence of the agents of the state.³ A railroad company is liable as a common carrier for injuries to cars of a connecting company while they are in transit over its road, and which it receives, with their passengers and freight, into its exclusive custody and control.⁴

ILLUSTRATIONS.—A railroad company ran its trains over a bridge belonging to a bridge company. The fare-taker of the bridge company ordered a man to be put off a train on a trestle in the dark, from which he fell. *Held*, that an action could be maintained against the railroad company: *Union R. R. and Transit Co. v. Kallagher*, 114 Ill. 325. A railroad company and an omnibus-driver entered into an agreement whereby the latter transported passengers from the station, the company selling a ticket for the purpose. *Held*, that the company was not liable to a passenger on the omnibus for an injury caused by the driver's negligence: *Poole v. R. R. Co.*, 35 Hun, 29. Plaintiff took passage at Cleveland, Ohio, for San Francisco.

¹ *McLean v. Burbank*, 11 Minn. 277.

⁴ *Vermont etc. R. R. Co. v. R. R.*

² *Seymour v. R. R. Co.* 3 Biss. 43.

Co., 14 Allen, 462; 92 Am. Dec.

³ *Peter v. Rylands*, 1 Phila. 264; 20 786.

Pa. St. 497; 59 Am. Dec. 746.

He purchased a ticket entitling him to ride in a certain sleeping-car, forming a part of the train. On leaving that car at Toledo, where a stay for dinner was announced to the passengers, he inquired of an employee in that car whether his baggage would be safe if left in the car, and was told to leave it there; that it would be safe. He so left the baggage, and on his return found that car detached, and his baggage removed to another, but a hand-bag was missing. He had no notice of the change. In an action to recover for the loss, an offer by the defendant to prove that the sleeping-car did not belong to the railroad company, but to a third person, who, under a contract with defendant, furnished conductors and servants for it, was rejected. *Held*, 1. That a finding that the bag was lost through the defendant's negligence was warranted; 2. That the ownership and conduct of the car formed no defense, it not appearing that the plaintiff knew the facts: *Kinsley v. R. R. Co.*, 125 Mass. 54; 28 Am. Rep. 200.

§ 1935. Liability for Acts of Another Carrier Using its Line or Means of Transportation. — For the same reason, a railroad company is responsible for an injury sustained by a passenger in its cars, in consequence of the careless management of a switch by which another railroad connects with and enters upon its road, although the switch is provided by the proprietors of the other road, and attended by one of its servants at its expense.¹ A railroad company is liable for the acts of its lessees or others operating its road.² If a railroad company receive upon its track the cars of another company, placing them under the control of its agents and servants, and drawing them by its locomotives over its own road to their place of destination, it assumes towards the passengers coming upon its road in such cars the relation of a common carrier of passengers, and all the liabilities incident to that relation.³ So where the owners of a line of canal-boats, engaged in the business of common carriers of passengers

¹ *McElroy v. R. R. Co.*, 4 Cush. 400; 50 Am. Dec. 795; *Barron v. R. R. Co.*, 1 Biss. 453; 5 Wall. 90. See *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424.

² *Nelson v. R. R. Co.*, 26 Vt. 717; 62 Am. Dec. 614.

³ *Schopman v. R. R. Co.*, 9 Cush. 24; 55 Am. Dec. 42; *Clymer v. R. R. Co.*, 5 Blatchf. 317; *Nashville etc. R. R. Co. v. Carroll*, 6 Heisk. 347.

and goods, chartered one of their boats to another transportation company for a single trip, but retained charge of it, and navigated it with their own master and crew, they were held liable to a passenger upon this trip for the loss of his goods.¹ Where a railroad company leaves cars on a switch, securely fastened, for the use of a mill company, the latter thereafter control them on their own account; and if they so move the cars upon the switch that a passenger on a passing train, whose arm protrudes from the window, is injured by striking the car, the company could not be held liable, unless some kind of an agency is established for the company on the part of the mill proprietors.²

ILLUSTRATIONS. — A passenger, in a car of the F. R. R. Co., standing on a side-track, is injured by the negligence of a brakeman of the W. R. R. Co., in coupling the two cars, in carrying out a contract between the two roads for their mutual benefit. *Held*, that he may recover therefor from the F. company: *White v. R. R. Co.*, 136 Mass. 321. The plaintiff purchased a ticket of the defendants, paying his fare to a station beyond the defendants' line, and upon a connecting line. By arrangement between the two companies, the defendants were permitted to use the line of the other company for the transportation of their carriages, and the fares were apportioned between them. The plaintiff continued in the same carriage throughout the entire journey, and after the train had passed upon the line of the other company, it came into collision with a locomotive left on that line by the servants thereof, injuring the plaintiff. There was no negligence on the part of the driver of the defendants' train. The defendants were held responsible for this injury under their implied contract to maintain the line, over which the plaintiff must travel in their carriages, in a condition fit for traffic: *Great Western R. R. Co. v. Blake*, 7 Hurl. & N. 987. Defendant so stopped a train at its station, as was its custom, that a car projected over the intersecting track of another road, down which came cars belonging to the company owning the other road, which had become uncoupled, and overturned the projecting car, to plaintiff's intestate's injury. *Held*, that a right of action existed: *Kellow v. R. R. Co.*, 68 Iowa, 470.

¹ *Campbell v. Perkins*, 8 N. Y. 430.

² *Louisville etc. R. R. Co. v. Sickings*, 5 Bush, 1; 96 Am. Dec. 320.

§ 1936. **Connecting Lines—Liability of First Carrier.**

—The rule generally adopted in the courts, both of the United States and England, is, that if a carrier undertakes to carry a passenger and his baggage to a certain destination he is responsible for his safety, and that of his baggage, as carrier, throughout the whole distance, whether the franchise and means of conveyance where the injury or loss occurs be owned or controlled by him or by some other carrier. The terms of his contract are to carry the passenger through, and the law holds him to a performance of it, notwithstanding the intervention of another carrier as a means of effecting such a performance.¹ The duty of a railroad company to safely transmit a passenger over the whole course of his journey for which it has sold a ticket is not changed by agreements and leases with connecting roads apportioning charges and expenses of which the passenger had no notice.² The issuing of a ticket over other roads is sufficient evidence that the carrier so doing undertakes to carry the passenger and his baggage through to the terminus indicated upon the ticket.³ The fact that the plaintiff has knowledge of the distinct ownership of the connecting

¹ *Illinois etc. R. R. Co. v. Copeland*, 24 Ill. 337; 76 Am. Dec. 749; *Kent v. R. R. Co.*, L. R. 10 Q. B. 1; 44 L. J. Q. B. 18; 31 L. T., N. S., 430; 23 Week. Rep. 25; *Najac v. R. R. Co.*, 7 Allen, 329; 83 Am. Dec. 686; *Wilson v. R. R. Co.*, 21 Gratt. 654; *Ward v. Vanderbilt*, 4 Abb. App. 521; *Williams v. Vanderbilt*, 28 N. Y. 217; 84 Am. Dec. 333; 29 Barb. 491; *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469; *Great Western R. R. Co. v. Blake*, 7 Hurl. & N. 986; 8 Jur., N. S., 1013; 31 L. J. Ex. 346; *Hart v. R. R. Co.*, 8 N. Y. 37; 59 Am. Dec. 447; *Weed v. R. R. Co.*, 19 Wend. 534; *Candee v. R. R. Co.*, 21 Wis. 582; 94 Am. Dec. 566; *Carter v. Peck*, 4 Sneed, 203; 67 Am. Dec. 604; *Croft v. R. R. Co.*, 1 McAr. 492; *Mytton v. R. R. Co.*, 4 Hurl. & N. 614; 28 L. J. Ex. 385;

Burnell v. R. R. Co., 45 N. Y. 184; 6 Am. Rep. 61; *Buxton v. R. R. Co.*, L. R. 3 Q. B. 549; *Baltimore etc. R. R. Co. v. Campbell*, 36 Ohio St. 647; 38 Am. Rep. 617.

² *Little v. Dusenberry*, 46 N. J. L. 614; 50 Am. Rep. 445.

³ *Ill. Cent. R. R. Co. v. Copeland*, 24 Ill. 337; 76 Am. Dec. 749; *Kent v. R. R. Co.*, L. R. 10 Q. B. 1; *Najac v. R. R. Co.*, 7 Allen, 329; 83 Am. Dec. 686; *Wilson v. R. R. Co.*, 21 Gratt. 654; *Great Western R. R. Co. v. Blake*, 7 Hurl. & N. 986; 8 Jur., N. S., 1013; 31 L. J. Ex. 346; *Cary v. R. R. Co.*, 29 Barb. 35; *Hart v. R. R. Co.*, 8 N. Y. 37; 59 Am. Dec. 447; *Weed v. R. R. Co.*, 19 Wend. 534; *Carter v. Peck*, 4 Sneed, 203; 67 Am. Dec. 604; *Louisville etc. R. R. Co. v. Weaver*, 9 Lea, 38; 42 Am. Rep. 654.

lines does not alter the case,¹ nor the fact of a notice on the ticket that it will not be liable except on its own road.² The fact that at some point on the passenger's journey his baggage is rechecked will not operate as a new contract for its carriage from that point.³ Nor can a carrier making such a contract for carriage beyond his own line free himself from liability by showing an agreement between the various carriers whose lines constitute the route that each shall be responsible for losses and injuries occurring on his part of the line.⁴ A different rule is laid down in a few states, viz., that a through-ticket in the form of several tickets by different connecting carriers is to be regarded as a distinct contract by each carrier to carry over his own line, and no farther.⁵

ILLUSTRATIONS.—Plaintiff bought a passage-ticket over defendants' road from New York to Niagara Falls. He then had a ticket from the latter place to New Orleans by the "Mobile route." He presented the tickets to defendants' baggage-master at New York, and asked him to check his baggage to New Orleans by the route indicated by the tickets. The baggage-master examined the tickets and gave him checks, which he put in his pocket without examination. The checks were stamped "New Orleans and New York," and also with certain abbreviations indicating roads forming the "Great Jackson route." At Niagara Falls the defendant delivered the baggage to the agent of the latter route, and while in transit it was destroyed by accident. *Held*, that defendant was liable: *Isaacson v. R. R. Co.*, 94 N. Y. 278; 46 Am. Rep. 142.

§ 1937. **Liability of Carrier on whose Line Loss Occurred.**—The carrier on whose line the injury or loss occurred is always responsible.⁶ Where a passenger with

¹ *Carter v. Peck*, 4 Sneed, 203; 67 Am. Dec. 604.

² *Central R. R. Co. v. Combs*, 70 Ga. 533; 48 Am. Rep. 582.

³ *Candee v. R. R. Co.*, 21 Wis. 582; 94 Am. Dec. 566.

⁴ *Wilson v. R. R. Co.*, 21 Gratt. 654.

⁵ *Nashville etc. R. R. Co. v. Sprayberry*, 9 Heisk. 852; 35 Am. Rep. 705; *Hood v. R. R. Co.*, 22 Conn. 1; *Knight*

v. R. R. Co., 56 Me. 235; 96 Am. Dec. 449; *Furstenheim v. R. R. Co.*, 9 Heisk. 238; *Brooke v. R. R. Co.*, 15 Mich. 332.

⁶ *Johnson v. R. R. Co.*, 70 Pa. St. 357; *Schopman v. R. R. Co.*, 9 Cush. 24; *Glasco v. R. R. Co.*, 36 Barb. 557; *Chicago etc. R. R. Co. v. Fahey*, 52 Ill. 81; 4 Am. Rep. 587; *Pennsylvania etc. R. R. Co. v. Schwarzenberger*, 45 Pa. St. 208; 84 Am. Dec. 490.

a through-ticket over a connecting line of railroads checks his baggage at the starting-point through to his destination, and upon arriving it is damaged, or has been broken open and robbed, he may sue the company which issued the check, or the company delivering the baggage in bad order.¹ In the case of lost baggage, the plaintiff will have to show that it came into the hands of the carrier whom he wishes to charge.² But this may be shown by other than direct proof.³ Where baggage, for the transportation of which over three connecting railroads, operated by separate and independent companies, through-checks have been issued by one of the terminal roads, is shown to have been in good condition when delivered to the intermediate road, but damaged when delivered at the destination, it does not devolve on the intermediate road, in the absence of any special contract or arrangement between the companies, to show that it was in good condition when delivered to the last terminal road.⁴

§ 1938. Right to Restrict Liability to his Own Line by Contract.—The carrier may by contract with the passenger limit his liability to his own line.⁵ But such a notice or stipulation in a ticket must be shown to have been known to the passenger before the journey commenced.⁶

§ 1939. Duties and Liabilities of Carriers by Stage.—A carrier of passengers by stage is bound to provide safe vehicles and harness and careful drivers. He must not overload the coach; must drive carefully, regarding the rule of the road; not racing with other vehicles. He

¹ *Wolff v. R. R. Co.*, 68 Ga. 653; 45 Am. Rep. 501.

² *Kessler v. R. R. Co.*, 61 N. Y. 538; 7 Lans. 62; *McCormick v. R. R. Co.*, 4 E. D. Smith, 181; *Chicago etc. R. R. Co. v. Fahey*, 52 Ill. 81; 4 Am. Rep. 587; *Fairfax v. R. R. Co.*, 5 Jones & S. 516.

³ *Kan. Pac. R. R. Co. v. Montelle*,

10 Kan. 119; *McCormick v. R. R. Co.*, 4 E. D. Smith, 181.

⁴ *Montgomery etc. R. R. Co. v. Culver*, 75 Ala. 578; 51 Am. Rep. 483.

⁵ *Quimby v. Vanderbilt*, 17 N. Y. 306; 72 Am. Dec. 469. See *ante*, § 1865.

⁶ *Wilson v. R. R. Co.*, 21 Gratt. 657.

must carry to the destination. "But passenger-carriers, not being insurers, are not responsible for accidents, where all reasonable skill and diligence have been employed. When everything has been done which human prudence, care, and foresight can suggest, accidents may happen. The lights may in a dark night be obscured by fog; the horses may be frightened; the coachman may be deceived by the sudden alteration of objects on the road; the coach may be upset accidentally by striking another vehicle or by meeting with an unexpected obstruction; or from the intense severity of the cold, the coachman, although possessed of all proper skill, and taking all due and reasonable care, may at the time become physically incapable of managing his horses, or of otherwise doing his duty. In all these and the like cases, if there is no negligence whatsoever, the coach proprietors are exonerated."¹

§ 1940. **Street-car Companies.**—Most of the general principles applicable to carriers of passengers are applicable also to street-car companies; and these will be found in the former sections of this chapter. A few rulings specially applicable to street-cars are grouped in this section.

Street-car companies are "carriers of passengers" within a statute.² It is the duty of a street-railroad company to carry passengers with safety; and if injury to a passenger results from the carelessness of its servants in the management of its car, or from a defective brake, or from an overloaded car, or from all combined, the company will be liable.³ It is negligence for a street-car to start when a passenger is alighting, though the passenger did

¹ See Story on Bailments, secs. 592-602; *Stockton v. Frey*, 4 Gill, 406; 45 Am. Dec. 138; *Frink v. Coe*, 4 G. Greene, 555; 61 Am. Dec. 141; *Farish v. Reigle*, 11 Gratt. 697; 62 Am. Dec. 666; *Tuller v. Talbot*, 23 Ill. 357; 76

Am. Dec. 695; *Gallagher v. Bowie*, 66 Tex. 265.

² *Thompson on Carriers of Passengers*, 442.

³ *Chicago etc. R. R. Co. v. Young*, 62 Ill. 328.

not request the stopping, and the driver had reason to believe she was not going to alight at that place.¹ It is negligence to undertake to carry large numbers of people vastly in excess of the seating capacity of its cars, and to permit passengers to ride on the platform and foot-boards without objection.² It may be negligence on the part of a street-car company not to provide on each car a conductor to take fare, as well as a driver.³ A street-railroad must, where it crosses the track of a steam-railroad, employ a sufficient guard to avoid danger to its passengers; and the failure of the steam-railroad company to properly provide for public safety at the crossing does not relieve from negligence of its employees a street-railroad company whose track intersects the other.⁴

It seems to be considered negligent to get upon a street-car on the side upon which there is another parallel track.⁵ The passenger should notify the conductor or driver of his wish to alight.⁶ He need not keep his seat until the car comes to a stop.⁷ It is a question of fact for the jury, and not of law for the court, whether it is due care and a proper exercise of the right, to eject a drunken passenger while the car is in motion.⁸ It is not negligence *per se* to get off or on the front platform of a street-car.⁹ It may be a question for the jury whether the conductor or driver

¹ Chicago etc. R. R. Co. v. Mills, 105 Ill. 63. Where the driver of a horse-car stops for purposes other than the letting passengers get off, and starts forward without being aware that passengers are getting off, the company is not chargeable with negligence, if any one is injured thereby: Chicago West. Div. R. R. Co. v. Mills, 91 Ill. 39.

² Topeka City R. R. Co. v. Higgs, 38 Kan. 375; 5 Am. St. Rep. 754.

³ Holly v. R. R. Co., 61 Ga. 215; 34 Am. Rep. 97.

⁴ Central R. R. Co. v. Kuhn, 86 Ky. 578; 9 Am. St. Rep. 309.

⁵ Halpin v. R. R. Co., 8 Jones & S. 175; Dale v. R. R. Co., 1 Hun, 146.

⁶ Nichols v. R. R. Co., 106 Mass. 463; Cram v. R. R. Co., 112 Mass. 38; Mulhaddo v. R. R. Co., 30 N. Y. 370.

⁷ Nichols v. R. R. Co., 38 N. Y. 131; 97 Am. Dec. 780.

⁸ Lovett v. R. R. Co., 9 Allen, 557; Murphy v. R. R. Co., 118 Mass. 228; Healey v. R. R. Co., 28 Ohio St. 23; Sanford v. R. R. Co., 23 N. Y. 343; 80 Am. Dec. 286; Higgins v. Watervliet Turnpike Co., 46 N. Y. 23; 7 Am. Rep. 293.

⁹ Mulhaddo v. R. R. Co., 30 N. Y. 370; McDonough v. R. R. Co., 137 Mass. 210. See Baltimore etc. R. R. Co. v. Wilkinson, 30 Md. 224; McKeon v. R. R. Co., 42 Mo. 79.

is negligent in allowing a passenger to stand on or get on and off the front platform.¹ It has been held negligence in law upon the part of the company's employees to allow very young children to get on or stand upon the front platform while the car is in motion.² It has been held that after a passenger has got off from a street-car, and is walking upon the highway, the relation of carrier and passenger has ceased, and towards such person the railroad company is under the obligation of using only such care as is to be exercised between two persons lawfully using the highway.³ So a passenger who leaves a street-car on which he was riding without advising the person in charge that he left it temporarily, and intending to return and claim his place, ceases to be a passenger, and loses his right to be protected as such.⁴ Where a street-car is stopped so as to obstruct the passage of a pedestrian desiring to cross the street, it is not a trespass or wrongful act on his part to step upon and pass over the platform of the car in order to avoid the obstruction.⁵

ILLUSTRATIONS.—Plaintiff, while riding in one of defendant's horse-cars, was injured in consequence of a runaway team of horses, belonging to the defendants, running into the rear of the car in which she was sitting. It was proved that the runaway horses had been worked together every day for more than six weeks previous to the accident, had given entire satisfaction, and were considered perfectly safe. It appeared that the driver of them was not in good health, but there was nothing to show that his disease was such a one as prevented him from performing his duties as driver. *Held*, that there was no evidence of negligence on the part of the defendants: *Quinlan v. R. R. Co.*, 4 Daly, 487. In an action for causing the death of a passenger, it appeared that upon first entering the car the deceased obtained

¹ *Crissey v. R. R. Co.*, 75 Pa. St. 83; *Maher v. R. R. Co.*, 67 N. Y. 52.

² *Pitts. etc. R. R. Co. v. Caldwell*, 74 Pa. St. 422; *Brennan v. R. R. Co.*, 45 Conn. 284; 29 Am. Rep. 679; *Phila. etc. R. R. Co. v. Hassard*, 75 Pa. St. 367; *East Saginaw City R. R. Co. v. Bohn*, 27 Mich. 503; *Wilton v. R. R. Co.*, 107 Mass. 108; 9 Am. Rep. 11;

125 Mass. 130; *Day v. R. R. Co.*, 12 Hun, 435. See *Smith v. R. R. Co.*, 10 Cent. L. J. 272, and note.

³ *Platt v. R. R. Co.*, 2 Hun, 124; 4 *Thomp. & Co.* 406.

⁴ *Central R. R. Co. v. Peacock*, 69 Md. 257; 9 Am. St. Rep. 425.

⁵ *Shea v. R. R. Co.*, 62 N. Y. 180; 20 Am. Rep. 480.

a seat; but the car, from some cause, ran off the track, and the conductor requested the assistance of the passengers to put it on. The deceased did not regain his seat, and from the crowded condition of the car was compelled to stand on the front platform. Thus he was brought into close proximity to the brake, which was used by the driver, at or about the time of the accident. There was evidence from which the jury might fairly have inferred that he was thrown from the platform by the sudden turning of the brake. *Held*, that a verdict against the company should be sustained: *Chicago City R. R. Co. v. Young*, 62 Ill. 238. A street-car stopped at the signal of a passenger. Another passenger, in attempting to alight at the same time, without giving notice of his wish, was injured by the starting of the car. *Held*, that the question of negligence was for the jury: *Rathbone v. R. R. Co.*, 13 R. I. 709. A passenger in a street-car, after signaling to the conductor to stop the car, left his seat and stood for a moment, while the car was in motion, on the rear platform, upon which there was an accumulation of snow and ice, rendering the platform slippery, expecting that the car would stop, so that he could alight, and omitted to take hold of the rail. The car jolted, and he was thrown off. *Held*, that whether he was guilty of such negligence as to preclude his maintaining an action for the injuries thereby received was a question of fact for the jury: *Fleck v. R. R. Co.*, 134 Mass. 480.

§ 1941. **Carriers by Water.**—Most of the rules as to the rights and liabilities of carriers given in this chapter apply to carriers by water as well as to other kinds of carriers. A few special rulings regarding carriers by water will be found in the succeeding sections.¹

§ 1942. **Receiving and Landing Passengers.**—The carrier is bound to the utmost diligence in providing proper means for the taking aboard or the landing of passengers.² This extends, however, only to such times as he is ready to receive and land them.³ The captain of a passenger

¹ Passengers on a steam-yacht chartered for their use, but not under their control in matters of navigation, have a right of action against its owners for injuries caused them by the negligent management of those in charge: *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178.

² *John v. Bacon*, L. R. 5 Com. P.

437; *Julien v. The Wade Hampton*, 27 La. Ann. 377; *Keokuk etc. Packet Co. v. True*, 88 Ill. 608; *Brockway v. Lascala*, 1 Edm. Select Cases, 135; *Smith v. London Docks Co.*, L. R. 3 Com. P. 326.

³ *The Anglo-Norman*, 4 Saw. 185. See *Keokuk etc. P. Co. v. True*, 88 Ill. 608.

steamboat has implied authority on its late arrival at night to permit passengers and baggage to remain on board till morning, and the carrier is liable for a loss of baggage during the night.¹

ILLUSTRATIONS. — A passenger for hire on a steamboat, attempting to go ashore before reaching his destination, sustained personal injury from the carrier's negligent omission to provide lights. *Held*, that the carrier was liable: *Dice v. Trans. Co.*, 8 Or. 60; 34 Am. Rep. 575.

§ 1943. **Authority of Master over Passengers.** — The master of a vessel has absolute control over his passengers in all that is necessary for good order or the safety of the passengers, crew, or vessel.² The passenger is bound to obey all reasonable orders of the captain. If a passenger misconducts himself, he may be deprived of the accommodations which he has before enjoyed, or he may be imprisoned or put in irons. But the power of the captain is limited to the necessities of the case.³

ILLUSTRATIONS. — A filed a libel against a steamship, alleging that he took passage on her for Hamburg with his wife and son, and that when two days out from New York, the master compelled them to leave the state-room in the first cabin, and confined them during the voyage in another room which was unfit for them. It appeared that the child was attacked by small-pox, or varioloid, and that the master directed it to be removed to the steward's room, telling the father and mother that if they went with it they must stay, and would not be allowed to come into the first cabin again, and accordingly they were all removed, and were not allowed thereafter to come to the first cabin. *Held*, that the court clearly had jurisdiction of the cause of action; that the master's act was but the performance of his duty; that the accommodations provided were reasonable, there was no unreasonable confinement, and libellant had no cause of action: *The Hammonia*, 10 Ben. 512.

§ 1944. **Duty of as to Treatment of Passengers.** — The passenger is entitled to respectful treatment from master

¹ *Prickett v. New Orleans Anchor Line*, 13 Mo. App. 436.

² *Chamberlain v. Chandler*, 3 Mason, 242.

³ *King v. Franklin*, 1 Fost. & F. 360; *Boyce v. Bayliffe*, 1 Camp. 58.

and crew.¹ A ship is under no obligation to furnish surgical aid to passengers, and an action will not lie against the owner by a passenger for unskillful treatment by the ship's surgeon.² And even where by law or by its own choice it becomes bound to provide a surgeon, its liability ceases when it has selected a competent one, and it cannot be charged for his negligent act.³

ILLUSTRATIONS.—Plaintiff's intestate, though in the exercise of due care, fell from defendant's boat, and was drowned by reason of the failure of defendant to stop its boat, and come to his assistance. *Held*, that defendant was liable: *Melhado v. Trans. Co.*, 27 Hun, 99.

§ 1945. **Duty of as to Accommodation of Passengers.**—The carrier is bound to provide his passengers with comfortable accommodations by day and night, with proper food,⁴ and with seats at the table.⁵ A steerage passenger is entitled to a berth, and the use of the steerage-room in which to walk about.⁶ If a deck-passenger on a steamboat insists on remaining in a part of the boat where he has no right to be, he may be removed by force, if necessary. If excessive force is used to his injury, the

¹ *Keene v. Lizardi*, 5 La. 431; 25 Am. Dec. 197; 6 La. 315; 26 Am. Dec. 478; *Pendleton v. Kinsley*, 3 Cliff. 416; *Smith v. Wilson*, 31 How. Pr. 272; *Nieto v. Clark*, 1 Cliff. 145; *McGuire v. Golden Gate*, 1 McAll. 104. In a leading case (*Chamberlain v. Chandler*, 3 Mason, 242), Mr. Justice Story said: "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship-room and personal existence on board, but for reasonable food, comforts, necessities, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment; for that decency of demeanor which constitutes the charm of social life; for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further,—it includes an implied stipu-

lation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors by the excitement of terror and cold malignancy of conduct to inflict torture upon susceptible minds."

² *Laubheim v. Steamship Co.*, 51 N. Y. Sup. Ct. 467; 107 N. Y. 228; 1 Am. St. Rep. 815.

³ *Laubheim v. Steamship Co.*, 51 N. Y. Sup. Ct. 467; 107 N. Y. 228; 1 Am. St. Rep. 815.

⁴ *St. Amand v. Lizardi*, 4 La. 243; *Young v. Fewson*, 8 Car. & P. 55.

⁵ The officers may reserve a table for themselves: *Ellis v. Steam. Co.*, 111 Mass. 146.

⁶ The carrier has no right to compel passengers to remain in their berths or a restricted portion of the steerage-room during the voyage: *The Ori-flamme*, 3 Saw. 397.

steamboat company may be liable; otherwise, if his injuries are caused by a scuffle for which he is in fault.¹ A ship is liable for injuries inflicted by the bite of a dog, on board by consent of the master and owners, upon a person lawfully on board, and entitled to be carried safely.² It is negligence to fail to provide small boats and appliances to rescue a passenger who may fall overboard.³ Where a door-way leading to the hold of an excursion boat is so placed as naturally to be mistaken for a door-way leading to the deck, and for want of a light or warning a passenger falls down the hole, he is entitled to damages.⁴

ILLUSTRATIONS.—A steerage passenger occupied a berth in defendant's steamship in the lower tier of a section built in two tiers or platforms. Through the negligence of defendant's servants, the upper tier of berths fell in the night-time, and plaintiff became, from fright, paralyzed and helpless, and in this condition was removed from her berth, in order that repairs might be made; being helpless, she was, after being removed, thrown and hurt by the rolling of the ship, and then was picked up and placed in a wet place. From the fall and wetting she sustained injuries. *Held*, that defendants were liable: *Smith v. Steam. Co.*, 86 N. Y. 408.

§ 1946. **United States Statutes Relating to Carriers by Water.**—Congress has by legislation done much to regulate the carriage of passengers by water. Statutes of the federal government are in force providing for the inspection of steamships, the appliances for life-saving and extinguishing fires, the stowage of dangerous goods, the number of passengers to be carried, and the accommodations to be given them.⁵ By another statute, the provisions of which are given below,⁶ the liability of the

¹ *N. J. Steamboat Co. v. Brockett*, 121 U. S. 637.

² *The Lord Derby*, 17 Fed. Rep. 265.

³ *Lobdell v. Bullet*, 13 La. 348; 33 Am. Dec. 567.

⁴ *The Pilot Boy*, 23 Fed. Rep. 103.

⁵ See these statutes given in full or digested: *Thompson on Carriers of Passengers*, 475 et seq.

⁶ Act of March 3, 1851; 9 U. S. Stats. at Large, 635, cap. 43.

"Sec. 4281. If any shipper of platinum, gold, gold-dust, silver bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks,

carrier by water is limited. In *Railroad Co. v. Lockwood*,¹ Mr. Justice Bradley said of this statute: "This seems to

or time-pieces of any description, trinkets, orders, notes, or securities for the payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

"Sec. 4282. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

"Sec. 4283. The liability of the owner of any vessel for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending.

"Sec. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any

property whatever on the same voyage, and the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and [owner] [owners] of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

"Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight for the benefit of such claimants to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner shall cease.

"Sec. 4286. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

"Sec. 4287. Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers, or seamen for or on account of any embezzlement, injury, loss, or destruction of merchandise or property put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen respectively, nor to lessen or take away any

¹ 17 Wall. 357.

be the only important modification of previously existing law on the subject which in this country has been effected by legislative interference. And by this it is seen that, though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employees, and liable without limit for his own negligence."

The baggage of passengers has been held to be,¹ and not to be, included² in the provisions of this statute. Carriers by land cannot take advantage of it.³ The statute does not apply to express-men or other carriers who use ships in which to transport their goods.⁴ The navigation of the great lakes is not "inland navigation."⁵ It embraces injuries to the person as well as injuries to property.⁶ The inspection of the boilers, etc., of a vessel employed in the carriage of passengers, and the certificate of the inspector showing that they answer the requirements, do not *per se* constitute a defense to an action for an injury to a passenger. The acts of Congress do not impair the common-law right of action by persons thus injured through the unskillfulness or negligence of the owner or master of a vessel.⁷

responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

"Sec. 4288. Any person shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder in a vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise to the master, mate, officer, or person in charge of the lading of the vessel, shall be liable to the United States in a penalty of one thousand dollars. But this section shall not apply to any vessel of any description whatsoever used in rivers or inland navigation.

"Sec. 4289. The provisions of (this title) the seven preceding sections re-

lating to the limitation of liability of the owners of vessels shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."

¹ Chamberlain v. Western Trans. Co., 44 N. Y. 305; 4 Am. Rep. 681.

² Dunlap v. Steamboat Co., 98 Mass. 371; Brock v. Gale, 14 Fla. 523; 14 Am. Rep. 356.

³ Railroad Co. v. Fraloff, 100 U. S. 24.

⁴ Hill Manufacturing Co. v. R. R. Co., 104 Mass. 122; 6 Am. Rep. 202.

⁵ Walker v. Trans. Co., 3 Wall. 150.

⁶ Rounds v. Providence and Stonington S. S. Co., 14 R. I. 344; The City of Columbus, 22 Fed. Rep. 460.

⁷ Swarthout v. Steam. Co., 48 N. Y. 209; 8 Am. Rep. 541.

CHAPTER XCV.

BAGGAGE.

- § 1947. Liability of carrier for baggage.
- § 1948. What is and is not baggage.
- § 1949. Extra baggage.
- § 1950. Delivery of baggage to carrier.
- § 1951. Effect of "checking."
- § 1952. Baggage taken by passenger into vehicle.
- § 1953. Delivery by carrier.
- § 1954. Passenger must remove baggage.

§ 1947. **Liability of Carrier for Baggage.**—The contract to carry the passenger includes also a contract to carry, without extra charge, his baggage.¹ The responsibility of the carrier for baggage is the same as that of a common carrier of goods,—he is an insurer, with the exception of the act of God, and the like.² But for the

¹ *Orange County Bank v. Brown*, 9 Wend. 85; 24 Am. Dec. 129; *Peixotti v. McLaughlin*, 1 Strob. 468; 47 Am. Dec. 563; *Woods v. Devin*, 13 Ill. 746; 56 Am. Dec. 483; *Merrill v. Grinnell*, 30 N. Y. 594; *Chicago etc. R. R. Co. v. Fahey*, 52 Ill. 81; 4 Am. Rep. 587; *Cincinnati etc. R. R. Co. v. Marcus*, 38 Ill. 219; *Hannibal etc. R. R. Co. v. Swift*, 12 Wall. 262; *Fairfax v. R. R. Co.*, 5 Jones & S. 516; *The Elvira Harbeck*, 2 Blatchf. 336; *Glasco v. R. R. Co.*, 36 Barb. 557; *Perkins v. Wright*, 37 Ind. 27; *Hutchings v. R. R. Co.*, 25 Ga. 61; 71 Am. Dec. 156; *Hirschsohn v. Packet Co.*, 2 Jones & S. 521; *Mississippi etc. R. R. Co. v. Kennedy*, 41 Miss. 671; *Wilson v. R. R. Co.*, 56 Me. 60; 96 Am. Dec. 435; *Smith v. R. R. Co.*, 44 N. H. 325; *Powell v. Myers*, 26 Wend. 591; *Camden etc. R. R. Co. v. Burke*, 13 Wend. 611; 28 Am. Dec. 488; *Pardee v. Drew*, 25 Wend. 459; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *McGill v. Rowand*, 3 Pa. St. 451; 45 Am. Dec. 654.

² *Dibble v. Brown*, 12 Ga. 217; 56 Am. Dec. 460; *Hannibal etc. R. R. Co. v. Swift*, 12 Wall. 262; *Fairfax v. R. R. Co.*, 5 Jones & S. 516; *The Elvira Harbeck*, 2 Blatchf. 336; *Glasco v. R. R. Co.*, 36 Barb. 557; *Perkins v. Wright*, 37 Ind. 27; *Moore v. Steamer Evening Star*, 20 La. Ann. 402; *Wilson v. Chesapeake*, 21 Gratt. 654; *Orange County Bank v. Brown*, 9 Wend. 85; 24 Am. Dec. 129; *Peixotti v. McLaughlin*, 1 Strob. 468; 47 Am. Dec. 563; *Woods v. Devin*, 13 Ill. 746; 56 Am. Dec. 483; *Hawkins v. Hoffman*, 6 Hill, 586; 41 Am. Dec. 767; *Merrill v. Grinnell*, 30 N. Y. 594; *Bomar v. Maxwell*, 9 Humph. 621; 51 Am. Dec. 682; *Chamberlain v. Western Trans. Co.*, 45 Barb. 218; *Camden etc. R. R. Co. v. Burke*, 13 Wend. 611; 28 Am. Dec. 488; *Bayliss v. Lintott*, L. R. 8 Com. P. 345; 42 L. J. Com. P. 119; 28 L. T., N. S., 666; *Blossman v. Hooper*, 16 La. Ann. 160; *Chicago etc. R. R. Co. v. Fahey*, 52 Ill. 81; 4 Am. Rep. 587; *Dill v. R. R. Co.*, 7 Rich. 158; 62 Am. Dec. 407; *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. 251; 32 Am. Dec. 470; *Nashville etc. R. R. Co. v. Elliott*, 1 Cold. 611; 78 Am. Dec. 506; *Baltimore Packet Co. v. Smith*, 23 Md. 402; 87 Am. Dec. 575; *Roth v. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736.

baggage of a free passenger it is held that the responsibility of the carrier is that only of a gratuitous bailee.¹ Still the passenger's fare need not have been paid in advance to hold the carrier liable.² And it may be paid by the passenger or a third person.³ One engaged in the business of carrying baggage for hire between railroad depots, hotels, and other places in a town or city, is a common carrier, and, as such, is liable for the contents of a trunk, although it is not such as is usually carried as baggage, unless the owner thereof has been guilty of fraud or deception.⁴ The same rules of care and diligence on the part of a railroad company apply whether baggage is forwarded on same, preceding, or subsequent train, where the passenger has paid his fare, and his baggage is sent forward, pursuant to an agreement, and as a part of the consideration moving from the company for the fare prepaid by the passenger.⁵ In the carriage of baggage a railroad company may make reasonable rules. A rule is reasonable that it will carry as baggage only the passenger's wearing apparel on passenger trains; and plaintiff, who, being in the habit of carrying his peddler's wares as baggage, declined to certify that "his trunk contained nothing except wearing apparel," is not entitled to damages for the company's refusal to carry such trunk.⁶ The wearing apparel of an infant child being presumptively furnished by the husband and father, in the absence

¹ Flint etc. R. R. Co. v. Weir, 37 Mich. 111; 26 Am. Rep. 499. See Bean v. Green, 12 Me. 422; Mobile etc. R. R. Co. v. Hopkins, 40 Ala. 493.

² Van Horn v. Kermit, 4 E. D. Smith, 454; Block v. The Trent, 18 La. Ann. 664; Flaherty v. Greennam, 7 Daly, 481; McGill v. Rowand, 3 Pa. St. 451; 45 Am. Dec. 654; Woods v. Devin, 13 Ill. 747; 56 Am. Dec. 483.

³ Malone v. R. R. Co., 12 Gray, 388; Van Horn v. Kermit, 4 E. D. Smith, 454; Marshall v. R. R. Co., 11 Com. B. 655; Curtis v. R. R. Co., 74 N. Y. 116; 30 Am. Dec. 271. A father who transports baggage of daughter, and

receives checks therefor, may maintain an action against the common carrier for its loss, upon the contract, independent of his right as father. The contract for the transportation was made with him; and as holder of the checks, which take the place of a bill of lading, he may sue as consignee: Baltimore Steam Packet Co. v. Smith, 23 Md. 402; 87 Am. Dec. 575.

⁴ Parmelee v. Lowitz, 74 Ill. 116; 24 Am. Rep. 276.

⁵ Warner v. R. R. Co., 22 Iowa, 166; 92 Am. Dec. 390.

⁶ Norfolk etc. R. R. Co. v. Irvine, 84 Va. 553.

of proof to the contrary, he may maintain an action against a common carrier for its loss.¹

ILLUSTRATIONS. — An action was brought against a street-car company for the loss of a satchel which was inadvertently left in one of the defendant's cars, and in pursuance of a regulation of the company was carried to the depot of the company and placed in the hands of the receiver of the road, whose duty it was to keep it for the owner. He delivered it to a person who was not the owner of it, who demanded it, saying it was the property of her mistress. *Held*, that the company was responsible: *Morris v. R. R. Co.*, 1 Daly, 202. A passenger bought a through-ticket from Galveston to Savannah. There was an attached coupon for each road, and his baggage was checked through. On arriving at Savannah the baggage was missing. *Held*, that the last carrier in the line was liable therefor: *Savannah etc. R. R. Co. v. McIntosh*, 73 Ga. 532.

§ 1948. What is and is not "Baggage." — By "baggage," in the law of passenger-carriers, is meant such articles of personal convenience and necessity as are usually carried by passengers for their personal use, and not as merchandise.² "To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station, and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer."³

¹ *Richardson v. R. R. Co.*, 85 Ala. 559.

² *Hutchinson on Carriers*, sec. 679.

³ *Railroad Co. v. Fraloff*, 100 U. S. 24; *Parmelee v. Fischer*, 22 Ill. 212; 74 Am. Dec. 139; *Dibble v. Brown*, 12 Ga. 217; 56 Am. Dec. 460; *American Contract Corp. v. Cross*, 8 Bush, 472; 8 Am. Rep. 471; *Cincinnati etc. R. R. Co. v. Marcus*, 38 Ill. 219; *Dexter v. R. R. Co.*, 42 N. Y. 326; 1 Am. Rep. 527; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85; 14 Am. Rep. 716; *Del Valle v. Steamer Richmond*, 27 La. Ann. 90; *Hutchings v. R. R. Co.*, 25 Ga. 61; 71 Am. Dec. 156; *Macrow v. R. R. Co.*, L. R. 6 Q. B. 612; 40 L. J. C. P. 300; 24 L. T., N. S., 618; 19

Week. Rep. 873; *Mississippi etc. R. R. Co. v. Kennedy*, 41 Miss. 671; *Toledo etc. R. R. Co. v. Hammond*, 33 Ind. 379; 5 Am. Rep. 221; *Jordan v. R. R. Co.*, 5 Cush. 69; 51 Am. Dec. 44; *Bomar v. Maxwell*, 9 Humph. 620; 51 Am. Dec. 682. Valuable laces carried by a lady in her baggage while traveling were held, under the circumstances, to be reasonable apparel and baggage, for the loss of which a common carrier would be liable: *Fraloff v. R. R. Co.*, 10 Blatchf. 16; 100 U. S. 24. A railroad company is not bound to carry a large amount of gold coin as luggage of a passenger, although he is a county treasurer on his way to pay such coin to the state treasurer.

The following have been held to be "baggage": Articles usually worn on the person;¹ books and manuscripts;² fire-arms;³ money in small amounts for traveling expenses;⁴ an opera-glass;⁵ tools of a mechanic, and instruments of a professional man;⁶ wearing apparel;⁷ a watch, and jewelry intended to be worn on the person, but carried in one's trunk for safety.⁸

The following have been held not "baggage": Gold and silver bullion or ware, precious stones and jewelry not intended to be worn on the person of the traveler;⁹ masquerade costumes furnished for use at a ball, and con-

and although it has carried such coin as luggage of such officers for some years, and although it allows an express company on the same train to carry such coin for hire: *Pfister v. R. R. Co.*, 70 Cal. 169; 59 Am. Rep. 404.

¹ *McCormack v. R. R. Co.*, 4 E. D. Smith, 181; *McGill v. Rowand*, 3 Pa. St. 451; 45 Am. Rep. 654.

² *Doyle v. Kiser*, 6 Ind. 242; *Hopkins v. Westcott*, 6 Blatchf. 64. But see *Hannibal etc. R. R. Co. v. Swift*, 12 Wall. 262. A price-book used by a commercial traveler in his daily business is baggage within the rule of a carrier's liability: *Gleason v. Trans. Co.*, 32 Wis. 85; 14 Am. Rep. 716.

³ *Woods v. Devin*, 13 Ill. 786; 56 Am. Dec. 483; *Chicago etc. R. R. Co. v. Collins*, 56 Ill. 212; *Van Horn v. Kermit*, 4 E. D. Smith, 454; *Davis v. R. R. Co.*, 22 Ill. 278; 74 Am. Dec. 151.

⁴ *Merrill v. Grinnell*, 30 N. Y. 594; *Bomar v. Maxwell*, 9 Humph. 621; 51 Am. Dec. 683; *Johnson v. Stone*, 11 Humph. 419; *Doyle v. Kiser*, 6 Ind. 242; *Jordan v. R. R. Co.*, 5 Cush. 69; 51 Am. Dec. 44; *Duffy v. Thompson*, 4 E. D. Smith, 178; *Weed v. R. R. Co.*, 19 Wend. 534; *Cincinnati etc. R. R. Co. v. Marcus*, 38 Ill. 219; *Torpey v. Williams*, 3 Daly, 162; *Hickox v. R. R. Co.*, 31 Conn. 281; 83 Am. Dec. 143; *Illinois etc. R. R. Co. v. Copeland*, 24 Ill. 332; 76 Am. Dec. 749; *Cadwallader v. R. R. Co.*, 9 L. C. Rep. 169; *Orange County Bank v. Brown*, 9 Wend. 85; 24 Am. Dec. 129.

⁵ *Toledo etc. R. R. Co. v. Hammond*, 33 Ind. 379; 5 Am. Rep. 221.

⁶ *Porter v. Hildebrand*, 14 Pa. St. 129; *Davis v. R. R. Co.*, 10 How. Pr. 330; *Hannibal etc. R. R. Co. v. Swift*, 12 Wall. 262. A reasonable quantity of his tools is proper baggage for a mechanic working as a watchmaker and jeweler. What constitutes a reasonable quantity is for the jury: *Kansas City etc. R. R. Co. v. Morrison*, 34 Kan. 502; 55 Am. Rep. 252.

⁷ *Duffy v. Thompson*, 4 E. D. Smith, 178; *Doyle v. Kiser*, 6 Ind. 242; *Baltimore etc. R. R. Co. v. Smith*, 23 Md. 402; *Dibble v. Brown*, 12 Ga. 217; 56 Am. Dec. 460. Linen cut into shirt-bosoms is wearing apparel, for the loss of which, when carried as baggage by a passenger, a common carrier is liable: *Duffy v. Thompson*, 4 E. D. Smith, 178.

⁸ *American Contract Co. v. Cross*, 8 Bush, 472; 8 Am. Rep. 471; *Coward v. R. R. Co.*, 16 Lea, 225; 57 Am. Rep. 226.

⁹ *Bell v. Drew*, 4 E. D. Smith, 59; *Michigan etc. R. R. Co. v. Carrow*, 73 Ill. 348; 24 Am. Rep. 248; *Cincinnati etc. R. R. Co. v. Marcus*, 38 Ill. 219; *Torpey v. Williams*, 3 Daly, 162; *Hellman v. Holladay*, 1 Woolw. 365; *Nevins v. Steamboat Co.*, 4 Bosw. 225; *Steers v. Steamboat Co.*, 57 N. Y. 1; 15 Am. Rep. 453; *Walsh v. The Wright*, 1 Newb. Adm. 494; *The Ionic*, 5 Blatchf. 538; *Bomar v. Maxwell*, 9 Humph. 620; 51 Am. Dec. 682; *Del Valle v. The Richmond*, 27 La. Ann. 90.

veyed in a trunk;¹ merchandise;² money beyond what is required for traveling expenses;³ presents for friends;⁴ goods of another person, even though he is also a passenger.⁵

For articles which are carried as baggage, but which are not entitled to pass free as such, the carrier is not responsible as an insurer.⁶ A carrier has a right to as-

¹ Michigan etc. R. R. Co. v. Oehm, 56 Ill. 293.

² Cahill v. R. R. Co., 10 Com. B., N. S., 154; 7 Jur., N. S., 1164; 30 L. J. Com. P. 289; 9 Week. Rep. 653; 4 L. T., N. S., 246; affirmed on appeal, 13 Com. B., N. S., 818; 8 Jur., N. S., 1063; 31 L. J. Com. P. 271; 10 Week. Rep. 391; Belfast etc. R. R. Co., v. Keys, 9 H. L. Cas. 556; 8 Jur., N. S., 367; 9 Week. Rep. 793; 4 L. T., N. S., 841; Great Northern R. R. Co. v. Shepherd, 8 Ex. 30; 7 Eng. R. R. Cas. 310; 21 L. J. Ex. 286; Mississippi etc. R. R. Co. v. Kennedy, 41 Miss. 671; Collins v. R. R. Co., 10 Cush. 506; Dibble v. Brown, 12 Ga. 217; 56 Am. Dec. 460; Smith v. R. R. Co., 44 N. H. 325; Bell v. Newton, 4 E. D. Smith, 59; Pardee v. Drew, 25 Wend. 459; Hutchings v. R. R. Co., 25 Ga. 61; 71 Am. Dec. 156; Michigan etc. R. R. Co. v. Oehm, 56 Ill. 293; Michigan etc. R. R. Co. v. Carrow, 73 Ill. 348; 24 Am. Rep. 248; Richards v. Westcott, 2 Bosw. 589; Ross v. R. R. Co., 4 Mo. App. 583; Lee v. R. R. Co., 36 U. C. Q. B. 350; Beckman v. Shouse, 5 Rawle, 179; Blumantle v. R. R. Co., 20 Alb. L. J. 304; Stimson v. R. R. Co., 98 Mass. 83; 93 Am. Dec. 140; Hawkins v. Hoffman, 6 Hill, 586; 41 Am. Dec. 767; Alling v. R. R. Co., 126 Mass. 121; 30 Am. Rep. 667; Penn. Co. v. Miller, 35 Ohio St. 541; 35 Am. Rep. 620; Spooner v. R. R. Co., 23 Mo. App. 403. A feather-bed not intended for use on the voyage: Connolly v. Warren, 106 Mass. 146; 8 Am. Rep. 300. But a bed, pillows, bolster, and quilts belonging to a poor man moving with his family have been held baggage: Ouimit v. Henshaw, 35 Vt. 605; 84 Am. Dec. 646.

³ Phelps v. R. R. Co., 19 Com. B., N. S., 321; 11 Jur., N. S., 652; 34 L. J. Com. P. 259; 13 Week. Rep. 782; 12 L. T., N. S., 496; Butcher v. R.

R. Co., 16 Com. B. 13; 1 Jur., N. S., 427; 24 L. J. Com. P. 137; Grant v. Newton, 1 E. D. Smith, 95; Whitmore v. Str. Caroline, 20 Mo. 513; Merrill v. Grinnell, 30 N. Y. 594; Bomar v. Maxwell, 9 Humph. 621; 51 Am. Dec. 682; Doyle v. Kiser, 6 Ind. 242; Jordan v. R. R. Co., 5 Cush. 69; 51 Am. Dec. 44; Dunlap v. International Steamboat Co., 98 Mass. 371; Dibble v. Brown, 12 Ga. 217; 56 Am. Dec. 460; Hellman v. Holladay, 1 Woolw. 365; Hutchings v. R. R. Co., 25 Ga. 61; 71 Am. Dec. 156; Hickox v. R. R. Co., 31 Conn. 281; 83 Am. Dec. 143; The Ionic, 5 Blatchf. 538; Senecal v. Richelieu Co., 15 L. C. Jur. 1; Orange County Bank v. Brown, 9 Wend. 85; 24 Am. Dec. 129; Davis v. R. R. Co., 22 Ill. 278; 74 Am. Dec. 151; Pfister v. R. R. Co., 70 Cal. 169; 59 Am. Rep. 404. What is a reasonable amount of money for traveling expenses depends upon the length of the journey, the mode of travel, and the position in life of the passenger, and should not exceed what a prudent person would take with him under the circumstances. What such an amount is is a question for the jury: Merrill v. Grinnell, 30 N. Y. 594.

⁴ Nevins v. Steamboat Co., 4 Bosw. 225; The Ionic, 5 Blatchf. 538.

⁵ Dunlap v. Steam. Co., 98 Mass. 371; Weed v. R. R. Co., 19 Wend. 534; Chicago etc. R. R. Co. v. Boyce, 73 Ill. 510; 24 Am. Rep. 268; Dexter v. R. R. Co., 42 N. Y. 326; 1 Am. Rep. 527; Mississippi etc. R. R. Co. v. Kennedy, 41 Miss. 671. One member of a family traveling together is an exception to this rule: Dexter v. R. R. Co., 42 N. Y. 326; 1 Am. Rep. 527; Curtis v. R. R. Co., 74 N. Y. 116; 30 Am. Rep. 271.

⁶ Hellman v. Holladay, 1 Woolw. 367; Nevins v. Steam. Co., 4 Bosw. 225; Doyle v. Kiser, 6 Ind. 242; Bel-

sume that a valise offered him by a passenger as baggage contains only personal effects, and is not responsible for general merchandise contained in it.¹ Where a common carrier has a fixed tariff of charges for transporting gold, if a passenger surreptitiously introduce gold into the carrier's vehicle, intending to avoid payment for its transportation, he is guilty of gross fraud, and cannot recover in case of loss.² But these rules apply only to those cases where the carrier is not aware of the presence of articles not "baggage" in the baggage. If he is notified of the fact, or if they are carried openly, or so packed that their nature is obvious, and the carrier accepts them for carriage without objection, the law presumes an undertaking on his part to carry them as baggage, and he will be liable for their loss as if they were properly baggage.³

ILLUSTRATIONS.—A carpenter took passage in a stage-coach to go a certain distance, and his trunk, containing some clothing and tools to the value of fifty-five dollars, was lost. *Held*, that the stage proprietors were liable for all the contents of the trunk: *Porter v. Hildebrand*, 14 Pa. St. 129. A traveling salesman offered his three sample-trunks to a common carrier to be carried as baggage. The trunks were so received, and were carried on the same train with the salesman. *Held*, that both parties were estopped to claim that the trunks were not baggage:

fast R. R. Co. v. Keys, 9 H. L. Cas. 556; Michigan etc. R. R. Co. v. Oehm, 56 Ill. 294.

¹ Haines v. R. R. Co., 29 Minn. 160; 43 Am. Rep. 199.

² Hellman v. Holladay, 1 Woolw. 365.

³ Great Northern R. R. Co. v. Shepherd, 7 Eng. R. R. Cas. 310; 8 Ex. 30; 21 L. J. Ex. 286; Stoneman v. R. R. Co., 52 N. Y. 429; Hellman v. Holladay, 1 Woolw. 365; Minter v. R. R. Co., 41 Mo. 503; 97 Am. Dec. 288. *Contra*, Blumantle v. R. R. Co., 34 Am. Rep. 376. The package must be such as to obviously indicate that its contents are not baggage. Where a traveler carried with him a box covered with a black leather case, on the top of which was painted in the center, lengthwise, his name, in white letters about two inches long, and on each

end of which was painted the word "glass," also in white letters about two inches long, and which had around it two black leather straps between the words "glass," it was held that the appearance of the box did not so plainly indicate that its contents were merchandise as to render the plaintiff liable for its loss. Erle, C. J., said: "It seems to me that it would be introducing a most pernicious rule to hold that if a package which from its appearance is likely to contain merchandise is brought to a railroad by a passenger, the company's servants are bound to inquire whether it consists of what is ordinarily understood to be personal luggage, or merchandise, at the peril of being held liable for a loss, if loss occurs": *Cahill v. R. R. Co.*, 10 Com. B., N. S., 154; 13 Com. B., N. S., 818.

Hoeger v. R. R. Co., 63 Wis. 100; 53 Am. Rep. 271. A tent was received by the agent of a railroad company, to be transported as baggage, and was lost while in the possession of the company. *Held*, that though it was not strictly baggage, the company was liable for its loss: *Chicago, Rock Island etc. R. R. Co. v. Conklin*, 32 Kan. 55. The plaintiff purchased in New York, and checked over defendant's road as baggage, a trunk and contents, consisting of wearing apparel for himself and wife, articles for members of his family, and cloth for some dresses, including one for his landlady. The trunk was lost, and in an action to recover the value of it and contents, *held*, that defendants were liable, except for the cloth purchased for the landlady: *Dexter v. R. R. Co.*, 42 N. Y. 326; 1 Am. Rep. 527.

§ 1949. **Extra Baggage.**—Where there is an excess of baggage beyond what is allowed to be carried free of charge, and the passenger pays extra on it, the carrier is liable as a common carrier of goods for the extra baggage.¹

§ 1950. **Delivery of Baggage to Carrier.**—The delivery of baggage by leaving it at the station without notice to the carrier may be sufficient to charge him, if this has been the course of dealing established in the past.² A railroad company is presumed to receive baggage for transportation, and not for storage, and its liability commences as soon as the baggage is delivered to and received by its agent, notwithstanding the fact that it was not checked at the time it was received, and would not be for several hours, nor until fifteen minutes before the train started, and that the passenger was so informed.³ Where for any reason the baggage of the passenger does not arrive in time to go with him on the same train, and the

¹ *Sloman v. R. R. Co.*, 6 Hun, 546; 67 N. Y. 208; *Hellman v. Holladay*, 1 Woolw. 365; *Stoneman v. R. R. Co.*, 52 N. Y. 429; *Camden etc. R. R. Co. v. Baldauf*, 16 Pa. St. 67; 55 Am. Dec. 481; *Glasco v. R. R. Co.*, 36 Barb. 557; *Dibble v. Brown*, 12 Ga. 218; 56 Am. Dec. 460; *Hamburg etc. Packet Co. v. Guttman*, 127 Ill. 598.

² *Freeman v. Newton*, 3 E. D. Smith,

246; *Green v. R. R. Co.*, 38 Iowa, 100; 41 Iowa, 410. The assent of a common carrier that the baggage of a traveler may be left at a railroad station without notice to the carrier or agent may be implied from the course of business or custom of the carrier: *Green v. R. R. Co.*, 38 Iowa, 100.

³ *Hickox v. R. R. Co.*, 31 Conn. 281; 83 Am. Dec. 143.

carrier undertakes to forward it on the next, he is liable for its loss as a carrier.¹ Where a carrier has an agent on his boat to receive and take charge of baggage and to check it, it is not a good delivery of baggage to him to leave it upon the boat without obtaining a check, or calling the agent's attention to it. To charge a carrier, there must be an acceptance of the goods, either in a special manner or according to the usage of his business.²

ILLUSTRATIONS.—G. advised defendant's agent that she intended to take the train the following morning. She sent her baggage, properly marked, to the station the evening before her departure, as was the custom with passengers intending to take the morning train, and it was locked up in defendant's baggage-room. *Held*, that the facts constituted an acceptance of the baggage by the carrier: *Green v. R. R. Co.*, 41 Iowa, 410. A person, intending to take passage on a steamboat, brought his trunk on board and put it in the usual place for baggage, but did not deliver it to any one. It appeared that receipts were not usually given for baggage, and that there was no one whose particular business it was to receive baggage from passengers. Through mistake, he did not take passage, and the trunk was lost. *Held*, that the steamboat was not liable as a carrier: *Wright v. Caldwell*, 3 Mich. 51. A portmanteau was left outside of the cabin on a steamboat, one of the employees of the boat saying that it would be safe there. *Held*, to be sufficient to charge the owner of the boat with its loss: *Bankier v. Wilson*, 5 L. C. Rep. 203. A railroad company received a passenger's check for baggage which had not then arrived by another road, and gave its own check for the same, and surrendered the passenger's first check to the other railroad company. *Held*, sufficient, in the absence of proof to the contrary, to show that the baggage was received by the company so surrendering the first check: *Chicago etc. R. R. Co. v. Clayton*, 78 Ill. 616.

§ 1951. **Effect of "Checking."**—The delivery to the passenger of a "check" for his baggage is *prima facie* evidence that it was received by the carrier,³ which,

¹ *Warner v. R. R. Co.*, 22 Iowa, 166; 92 Am. Dec. 389; *Flaherty v. Greenman*, 7 Daly, 481. But see *Beecher v. R. R. Co.*, L. R. 5 Q. B. 241; *The Elvira Harbeck*, 2 Blatchf. 336.

² *Ball v. Steam. Co.*, 1 Daly, 491.

³ *Davis v. R. R. Co.*, 22 Ill. 278; 74 Am. Dec. 151; *Chicago etc. R. R. Co. v. Clayton*, 78 Ill. 616; *Check v. R. R. Co.*, 2 Disney, 238; *Davis v. R. R. Co.*, 10 How. Pr. 330; *Atchison etc. R. R. Co. v. Brewer*, 20 Kan. 669; *Illinois Cent. R. R. Co. v. Copeland*, 24 Ill.

however, may be rebutted.¹ It has been held that, as a trunk is the usual accompaniment of a traveler, possession of a check is evidence of a delivery of a trunk.² Though a regulation of the carrier may require that the baggage of passengers must be checked, yet the carrier cannot avail himself of a failure to comply with this regulation, if it appears that, at the time of the delivery of the baggage to the carrier's agent, the passenger demanded a check, and failed to receive it because the person whose duty it was to check baggage was not present.³ If a baggage-master at a railroad station receives a trunk to be checked, without insisting that the owner shall first purchase a ticket, and the trunk is lost before a ticket is purchased, the railroad company is liable, even though the baggage-master disregarded the company's rule in the matter.⁴

ILLUSTRATIONS. — A passenger purchased of the A. & G. Railroad Company, at Savannah, a through-ticket for Jacksonville, and had his trunk checked by a check marked "A. & G. Railroad." That railroad was only the first of three connecting railroads between those points. The trunk was delivered by that railroad to the second, the passenger retaining the check, and was afterward lost. *Held*, that the passenger could recover therefor of the A. & G. Railroad Company: *Hawley v. Screven*, 62 Ga. 347; 35 Am. Rep. 126.

§ 1952. **Baggage Taken by Passenger into Vehicle.** — Though, as a general rule, the carrier is not liable for goods not placed in his custody, but retained by the owner in his own charge, yet as to small articles of baggage taken by the passenger into the car, it seems the carrier

332; 76 Am. Dec. 749. The delivery of a check is not essential to the carrier's liability; it is a mere receipt: *Hickox v. R. R. Co.*, 31 Conn. 281; 83 Am. Dec. 143. In Massachusetts, by statute, railroads are required to deliver checks for baggage received: *Najac v. R. R. Co.*, 7 Allen, 329; 83 Am. Dec. 686.

¹ *Chicago etc. R. R. Co. v. Clayton*, 78 Ill. 616.

² *Dill v. R. R. Co.*, 7 Rich. 158; 62 Am. Dec. 407.

³ *Freeman v. Newton*, 3 E. D. Smith, 246; *Great West. R. R. Co. v. Goodman*, 12 Com. B. 313.

⁴ *Lake Shore etc. R. R. Co. v. Foster*, 104 Ind. 293; 54 Am. Rep. 319.

is still liable.¹ But this rule does not extend to valuables, securities, etc., which he carries on his person.² A common carrier of passengers is not liable for the negligent destruction of money kept in the custody of the passenger, and carried by him, without notice to the carrier, for a purpose unconnected with the expenses of the journey.³ Property carried upon a ferry-boat, in the custody and control of the owner, a passenger, is not at the sole risk either of the ferry-man or the owner. If it is lost or damaged solely by the act or neglect of the ferry-man, he must respond to the owner. The owner cannot recover if he is guilty of negligence contributing to the loss.⁴ A railroad company is not rendered liable for the loss of a bag filled with costly jewelry, dropped from a car-window by a passenger, merely by reason of the refusal of her demand to

¹ In *Le Conteur v. R. R. Co.*, L. R. 1 Q. B. 54, Cockburn, C. J., said: "I am very far from saying that there may not in these cases sometimes be a state of circumstances in which a passenger who has luggage which, by the terms of the contract, the company are bound to convey to the place of destination along with him may not release the company from their obligation as carriers for the safe custody of the article by taking it into his own personal custody and charge. But I think the circumstances must be strong to relieve the company from their liability. It is not because the article that is part of the passenger's luggage to be conveyed with him is, by the joint consent of the passenger and the company, placed in a carriage with him that the company are necessarily released from their obligation to carry safely. Nothing could be more inconvenient than that the practice of placing small articles which it is convenient to the passenger to have with him in the carriage in which he is about to ride should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safely carrying such articles, it would

follow that no one who has occasion to leave the carriage temporarily would be able to have them with him with any degree of safety. I cannot think, therefore, we ought to come to any conclusion which would relieve the company, under such circumstances, from the obligation as carriers to carry the luggage safely, which for general convenience ought certainly to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances indeed, and circumstances leading irresistibly to the conclusion that the passenger takes such personal control and charge of his luggage as to altogether give up all hold upon the company, before we can say that the company, as common carriers, would not be liable in the event of the loss." The carrier is not liable for a passenger's overcoat, which, on quitting the cars, he leaves on the seat: *Tower v. R. R. Co.*, 7 Hill, 47; 42 Am. Dec. 30.

² *Weeks v. R. R. Co.*, 72 N. Y. 50; 28 Am. Dec. 104; *Clark v. Burns*, 118 Mass. 275; 19 Am. Rep. 456.

³ *First National Bank of Greenfield v. R. R. Co.*, 20 Ohio St. 259; 5 Am. Rep. 655.

⁴ *Wyckoff v. Ferry Co.*, 52 N. Y. 32; 11 Am. Rep. 650.

stop the train for its recovery before arrival at a regular station.¹ It has been held that a passenger by boat by taking his baggage into his state-room does not absolve the carrier from liability.²

ILLUSTRATIONS.—A passenger by railroad entered a car just before the train started, left his valise on a vacant seat, and went out, and upon his return found the valise was gone. It did not appear that any one was in charge of the train at the time. *Held*, that there was no sufficient delivery of the valise to the defendant: *Kerr v. R. R. Co.*, 34 U. C. C. P. 209. A passenger by steamboat secured a state-room, in which he left his overcoat, and locked the door. The door was opened, and the coat stolen, without any negligence on his part. *Held*, that the proprietors of the steamboat were liable for the loss, and that the owner could not be considered as having the *animus custodiendi*, to the exclusion of the carriers, as the whole vessel was in their possession, and subject to their control: *Gore v. Trans. Co.*, 2 Daly, 254. Plaintiff took passage on defendants' steamboat, and was assigned a state-room. He asked for a key to the room, that he might place his baggage therein, and was informed that they gave no keys. He thereupon went to the room, and deposited his hand-baggage, informing the saloon-boys of the fact, and asking if it would be safe. The baggage was stolen. There was a baggage-man on the boat, whose duty it was to receive and check baggage, which plaintiff knew. *Held*, that the defendant was not liable for the baggage, but *semble*, that he would have been had the state-room been locked: *Gleason v. Trans. Co.*, 32 Wis. 85; 14 Am. Rep. 716.

§ 1953. **Delivery by Carrier.**—The liability of the carrier continues until the baggage is delivered to the passenger,³ or to his agent.⁴ A delivery to the baggage-

¹ *Henderson v. R. R. Co.*, 20 Fed. 430; 123 U. S. 61.

² *Macklin v. Steamboat Co.*, 7 Abb. Pr., N. S., 229; *Gore v. Trans. Co.*, 2 Daly, 254; *Walsh v. The H. M. Wright*, 1 Newb. Adm. 494; *Mudgett v. Steam. Co.*, 1 Daly, 151. But see *Gleason v. Transportation Co.*, 32 Wis. 85; 14 Am. Rep. 716; *Am. Steam. Co. v. Bryan*, 83 Pa. St. 446; *The R. E. Lee*, 2 Abb. 49; *Wilcox v. The Philadelphia*, 9 La. 80; 29 Am. Dec. 436; *Clark v. Burns*, 118 Mass. 275; 19 Am. Rep. 456.

³ *Ouimit v. Henshaw*, 35 Vt. 604; 84 Am. Dec. 647; *Minor v. R. R. Co.*, 19 Wis. 40; 88 Am. Dec. 670; *Toledo R. R. Co. v. Hammond*, 33 Ind. 379; 5 Am. Rep. 221; *Cole v. Goodwin*, 19 Wend. 251; 32 Am. Dec. 470. A delivery to an unauthorized person on a forged order will not excuse the carrier: *Powell v. Myers*, 26 Wend. 591; *Mattison v. R. R. Co.*, 57 N. Y. 552; *Morris v. R. R. Co.*, 1 Daly, 202; *Blossman v. Hooper*, 16 La. Ann. 160.

⁴ *Mobile etc. R. R. Co. v. Hopkins*, 41 Ala. 486; 94 Am. Dec. 607.

master of an independent steamboat company, who is not the passenger's authorized agent, but who has, under agreement between the carriers, always entered the cars prior to their arrival at the depot and taken the baggage of through-passengers, giving his checks in exchange for those of the railroad company, will not discharge the railroad company from loss resulting after such delivery.¹ A carrier retaining a trunk of a passenger under its lien for her fare is liable for any articles lost therefrom while in its possession.² The station platform is a proper place for a carrier by rail to deliver the baggage,³ and it should have its servants there to attend to receiving the checks.⁴ Where a passenger's trunk is carried to its destination, and, not being called for, is placed overnight by the carrier in the waiting-room, the passenger can recover for baggage stolen from it.⁵

ILLUSTRATIONS.—The plaintiff was a passenger on defendants' road, but had lost her trunk while traveling over a connecting road. A few days after, a conductor on the connecting road found the trunk, and left it in charge of the defendants' baggage-master, stating the facts and requesting him to forward it to plaintiff, which he agreed to do. Nothing was said about freight, nor whether the trunk should go by the freight or passenger train. The trunk being lost, *held*, that the defendants were liable for its value: *Wilson v. R. R. Co.*, 57 Me. 138; 2 Am. Rep. 26. At Montreal, the plaintiff purchased of the G. T. R. R. Co. a ticket for the city of New York via rail to Troy or Albany, thence by steamboat. His portmanteau was checked for the same route. At Troy, a railroad agent delivered it to defendant, and the latter carried it to New York on its railroad and put it in its baggage-room. Three days afterwards, as soon as the plaintiff had reason to believe that defendant had it, he demanded it, but it could not be found. It contained thirty-nine sovereigns and some partly worn clothing. *Held*, 1. That the defendant, having taken the portmanteau without the plaintiff's knowledge or assent, was responsible for its contents, without regard to their character:

¹ *Mobile etc. R. R. Co. v. Hopkins*, Ex. Div. 153; *Cary v. R. R. Co.*, 29 41 Ala. 486; 94 Am. Dec. 607. Barb. 35.

² *Southwestern R. R. Co. v. Bently*, 51 Ga. 311.

⁴ *Dinenny v. R. R. Co.*, 49 N. Y. 546.

⁵ *St. Louis etc. R. R. Co. v. Hardway*, 17 Ill. App. 321.

³ *Patscheider v. R. R. Co.*, L. R. 3

Fairfax v. R. R. Co., 73 N. Y. 167; 29 Am. Rep. 119. The plaintiff went to defendant's station at Philadelphia to take passage for Chicago. The baggage-master refused checks for his baggage unless he paid for extra baggage. The plaintiff refused this and demanded his baggage. The baggage-master declined to deliver it on the ground that it was not accessible before train-time. The plaintiff refused to take passage. The next day the defendants' president promised to stop the baggage at Pittsburgh, and gave him an order for it. He thereupon took passage on defendants' road for Chicago. On arriving at Pittsburgh he applied for the baggage, but was told that it had gone on to Chicago, and received an order on the Chicago agent for it. It arrived at Chicago that day, was stored at the station, and the next night was destroyed by fire. The plaintiff stopped over at Pittsburgh one day and arrived at Chicago the next. *Held*, that there was a conversion of the baggage at Philadelphia, and no waiver of any claim therefor: *McCormick v. R. R. Co.*, 99 N. Y. 65; 52 Am. Rep. 6. Baggage had arrived at its destination and been placed in the depot by the company, where it was stolen by burglars during the night. *Held*, that the baggage "should have been stored in a safe and secure warehouse to exonerate the company" from liability as a common carrier: *Bartholomew v. R. R. Co.*, 53 Ill. 227; 5 Am. Rep. 45. The plaintiff traveled a part of the way to her destination by the defendants' railroad, and on the next morning resumed her route by another connecting road which used the same baggage-room and platform as the first, her trunk remaining in the baggage-room all night and she retaining the check. Before the train on the second road left, an employee of the first took the check, agreeing to place the trunk in proper position for transportation; but on reaching her destination, it was discovered that it had not been put on board the train, and it was never found. *Held*, that the defendant was liable: *Rome R. R. Co. v. Wimberly*, 75 Ga. 316; 58 Am. Rep. 468.

§ 1954. **Passenger must Remove Baggage.**—The passenger has a reasonable time within which to remove his baggage.¹ A passenger has a right to regard as the agent of a railroad company a person who handles and takes charge of the baggage upon the arrival of the train at a station, and notice to such person by the passenger as to

¹ *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Gilhooly v. New York etc. Steam Nav. Co.*, 1 Daly, 197; *Patscheider v. R. R. Co.*, L. R. 3 Ex. Div. 153; *Cary v. R. R. Co.*, 29 Barb. 35; *Curtis v. R. R. Co.*, 74 N. Y. 116; 30 Am. Rep. 271; *Warner v. R. R. Co.*, 22 Iowa, 166; 92 Am. Dec. 389.

the destination of his baggage is notice to the company; and the act of such person in relation to the baggage is the act of the company.¹ Where, after the carriage is completed, the passenger suffers it to remain in the carrier's storehouse or depot, the latter holds it as a warehouseman.² But the carrier must properly and safely store it.³ What is a reasonable time within which to claim baggage depends a good deal on the facts of each particular case; but the facts being undisputed, is a question of law for the court.⁴ To go to a hotel near by, and send the porter for the baggage, is not an unnecessary delay.⁵

ILLUSTRATIONS. — A salesman arrived at his destination with his trunks Saturday afternoon. They were burned in the depot at three, A. M., on Monday. *Held*, that the liability of the railroad company was that of a warehouseman, and not that of a common carrier: *Hoeger v. R. R. Co.*, 63 Wis. 100; 53 Am. Rep. 271. A vessel arrived in port on Monday; on Tuesday the master and mate requested the passenger to remove his baggage, which he failed to do. Upon the passenger demanding his baggage the following Wednesday, it was found to be miss-

¹ *Ouimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646.

² *Pike v. R. R. Co.*, 40 Wis. 583; *Dininy v. R. R. Co.*, 49 N. Y. 546; *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 268; *Roth v. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736; *Van Horn v. Kermit*, 4 E. D. Smith, 454; *Louisville etc. R. R. Co. v. Mahan*, 8 Bush, 184; *Holdridge v. R. R. Co.*, 56 Barb. 191; *Bartholomew v. R. R. Co.*, 53 Ill. 227; 5 Am. Rep. 45; *Burnell v. R. R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61; *Chicago etc. R. R. Co. v. Fairclough*, 52 Ill. 106; *Mattison v. R. R. Co.*, 57 N. Y. 552; *Mote v. R. R. Co.*, 27 Iowa, 22; 1 Am. Rep. 212; *Ross v. R. R. Co.*, 4 Mo. App. 583; *Penton v. R. R. Co.*, 28 U. C. Q. B. 367; *Patscheider v. R. R. Co.*, L. R. 3 Ex. Div. 153; *Chicago etc. R. R. Co. v. Addizoat*, 17 Ill. App. 632; *Ouimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 646; *Warner v. R. R. Co.*, 22 Iowa, 166; 92 Am. Dec. 389. A statute forbidding the doing of any secular work or traveling on the Lord's day will not excuse a passenger who arrives at his destina-

tion on Sunday morning from demanding and receiving his baggage: *Jones v. Trans. Co.*, 50 Barb. 193; nor the passenger's illness: *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 268; nor the lateness of the hour of arrival: *Ouimit v. Henshaw*, 35 Vt. 605; 84 Am. Dec. 606.

³ *Bartholomew v. R. R. Co.*, 53 Ill. 227; 5 Am. Rep. 45; *Chicago etc. R. R. Co. v. Fairclough*, 52 Ill. 106; *Mattison v. R. R. Co.*, 57 N. Y. 552; *Mote v. R. R. Co.*, 27 Iowa, 22; 1 Am. Rep. 212.

⁴ *Chicago etc. R. R. Co. v. Boyce*, 73 Ill. 510; 24 Am. Rep. 268; *Roth v. R. R. Co.*, 34 N. Y. 548; 90 Am. Dec. 736. See *Gilhooly v. Steam Nav. Co.*, 1 Daly, 197; *Curtis v. R. R. Co.*, 49 Barb. 148. A passenger arriving at his destination at 8:30, P. M., has "no right to prolong the strict and rigid liability of the company as a common carrier by leaving his baggage in the possession of its agent during the night": *Louisville etc. R. R. Co. v. Mahan*, 8 Bush, 184.

⁵ *Nevins v. Steamboat Co.*, 4 Bosw. 225.

ing. *Held*, that the owners were relieved from their liability as carriers: *Van Horn v. Kermit*, 4 E. D. Smith, 453. The plaintiff arrived at his destination at three o'clock in the afternoon, and having had his trunks put into the baggage-room, left the station in an omnibus. In the evening about eight o'clock he sent his checks for the trunks, but one of them had been stolen. *Held*, that the defendants were not responsible; their duty as common carriers ended when the trunk was placed on the platform and the plaintiff had had a reasonable time to remove it: *Penton v. R. R. Co.*, 28 U. C. Q. B. 367. A traveler, upon reaching the end of one of the stages of her journey, not wishing to be troubled with her trunk, left it to the care of the carrier, without inquiry about it, presentation of her check, or explanation, for about seventeen hours, while she went about three miles to visit a friend, and during that period the trunk with its contents was, without negligence on the part of the carrier, destroyed by fire in a baggage-room on the dock, into which it had been removed by the carrier's employees. *Held*, that the carrier was not liable for the loss: *Jones v. Trans. Co.*, 50 Barb. 193. Plaintiff purchased a ticket at a point on the New York Central railroad for New York, and received a check for his trunk accordingly. On the second day after his arrival in New York, plaintiff presented his check at the Hudson River railroad depot and demanded his trunk, which could not be found. *Held*, that the New York Central railroad was liable on its contract of carriage for the proper storage of the trunk, although its liability as insurer had been changed by the delay in calling for the trunk to that of bailee: *Burnell v. R. R. Co.*, 45 N. Y. 184; 6 Am. Rep. 61. A passenger by railroad, upon the arrival of the train at the place of destination, allowed his valise, for which he held the company's check, to remain in the open depot, though in the place where baggage was usually kept, in charge of an agent of the company, and did not present his check or call for his valise, or make any arrangement for it, until nearly twenty-four hours had passed, during which time it was stolen. *Held*, that he was chargeable with negligence, and the company was not liable for the loss. Its liability as carrier terminated with the arrival of the baggage, and thereafter it was liable only as bailee: *Holdridge v. R. R. Co.*, 56 Barb. 191.

PART V.—TELEGRAPH COMPANIES.

CHAPTER XCVI.

TELEGRAPH COMPANIES.

- § 1955. Telegraph companies are public agencies — But not common carriers.
- § 1956. Must transmit for all that apply.
- § 1957. Exceptions.
- § 1958. Telephone companies.
- § 1959. Degree of care and diligence required in transmission of telegrams.
- § 1960. Presumption of negligence — Burden of proof.
- § 1961. Power to limit liability by contract or notice.
- § 1962. Power to contract against negligence.
- § 1963. Conditions as to repeating messages.
- § 1964. Other conditions in telegraph blanks.
- § 1965. Knowledge of sender of conditions essential.
- § 1966. Contributory negligence of sender — Illegality.
- § 1967. Measure of damages.
- § 1968. What damages not recoverable.
- § 1969. Knowledge by company of importance of message essential.
- § 1970. Injuries to feelings.
- § 1971. Connecting lines.
- § 1972. Who may bring action.

§ 1955. Telegraph Companies are Public Agencies — But not Common Carriers.—A telegraph company is a public agency, and is subject to public regulation and control.¹ But a telegraph company is not a common carrier, nor subject to the extraordinary responsibilities of a common carrier. In an early case in California² it was said: "The rules of law which govern the liability of telegraph companies are not new. Such companies hold themselves out to the public as engaged in a particular

¹ *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 302; 78 Am. Dec. 338; *Western U. Tel. Co. v. Bartlett*, 62 Me. 217; 16 Am. Rep. 437; *De Rutte v. New York etc. Tel. Co.*, 30 How. Pr. 413; 1 Daly, 517; *Wann v. Western U. Tel. Co.*, 37 Mo. 481; 90 Am. Dec. 395;

Tyler v. Western U. Tel. Co., 74 Ill. 168; *Passmore v. Western U. Tel. Co.*, 78 Pa. St. 242; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Fowler v. Western U. Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211.

² *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589.

branch of business in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other is or may be attended with the same consequences; and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both respects is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules." A similar opinion was expressed in the English court of common pleas in 1855,¹ Jervis, C. J., saying that the defendant company was "in the nature of a carrier who would have a certain liability imposed upon him at common law, but they might limit this liability by special notice, as a carrier could, subject to the condition or qualification that they could not limit it to the extent of protecting themselves against the consequences of their gross negligence." Later English cases² appear to qualify this expression; but the absorption of the telegraph companies in Great Britain by the government changes their relation to the people of that country to a considerable extent. In the United States, excepting a *nisi prius* decision of little authority,³ the rule of the California court has not been followed, and telegraph companies are not held to the extraordinary responsibilities of common carriers; that is to say, they are not insurers of the correct transmission of the messages received by them, excepting the act of God and the public enemy.⁴

¹ *McAndrew v. Electric Tel. Co.*, 17 Com. B. 3.

² *Dickson v. Renters' Tel. Co.*, 3 Com. P. Div. 7; 2 Com. P. Div. 62.

³ *Bowen v. Lake Erie Tel. Co.*, 1 Am. Law Reg. 685; *Allen Tel. Cas.* 7.

⁴ *Binney v. R. R. Co.*, 18 Md. 341; 81 Am. Dec. 607; *New York etc. Tel.*

§ 1956. **Must Transmit for All Who Apply.**—A telegraph company cannot refuse to send a message for any one tendering it, accompanied by the legal charges; nor can it give a preference to one customer over another.¹ A corporation chartered for the purpose of transmitting

Co. v. Dryburg, 35 Pa. St. 298; 78 Am. Dec. 338; *Shields v. Washington etc. Tel. Co.*, 11 Am. L. T. 311; *Allen's Tel. Cas.* 7; *West. U. Tel. Co. v. Ward*, 23 Ind. 377; 85 Am. Dec. 462; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *Ellis v. American Tel. Co.*, 13 Allen, 226; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519; *Baldwin v. United States Tel. Co.*, 45 N.Y. 744; 6 Am. Rep. 165; 54 Barb. 506; 6 Abb. Pr., N. S., 405; 1 Lans. 125; *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Dec. 446; *Passmore v. Western U. Tel. Co.*, 78 Pa. St. 238; *Bryant v. American Tel. Co.*, 1 Daly, 575; *De Rutte v. New York etc. Tel. Co.*, 30 How. Pr. 403; 1 Daly, 547; *Wann v. Western U. Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 395; *Washington etc. Tel. Co. v. Hobson*, 15 Gratt. 122; *Bartlett v. Western U. Tel. Co.*, 62 Me. 209; *Western U. Tel. Co. v. Fontaine*, 58 Ga. 433; *Camp v. Western U. Tel. Co.*, 1 Met. (Ky.) 164; 71 Am. Dec. 461; *Aiken v. Tel. Co.*, 5 S. C. 353; *Fowler v. Western U. Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211; *Western U. Tel. Co. v. Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630. In *Breese v. U. S. Tel. Co.*, 45 Barb. 274, 31 How. Pr. 86, the court say: "The business in which the [company] is engaged, of transmitting ideas only from one point to another by means of electricity, operating upon an insulated and extended wire, and giving them expression at the remotest point of delivery by certain mechanical sounds, or by marks or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place by common carriers, that the peculiar and stringent rules by which the latter are controlled and regulated

can have very little just and proper application to the former. And all attempts heretofore made by courts to subject the two kinds of business to the same legal rules and liabilities will, in my judgment, sooner or later have to be abandoned as clumsy and indiscriminating efforts and contrivances which have no natural relation or affinity whatever, and at best but a loose and mere fanciful resemblance. The bearer of written or printed documents and messages from one to another, if such was his business or employment, might very properly be called and held a common carrier; while it would obviously be little short of an absurdity to give that designation or character to the bearer of mere verbal messages, delivered to him by mere signs of speech, to be communicated in like manner. The former would have something which is or might be the subject of property, capable of being lost, stolen, or wrongfully appropriated, while the latter would have nothing in the nature of property which could be converted or destroyed, or form the subject of larceny, or of tortious caption and appropriation even by the king's enemies."

¹ *Ante*, § 1955. See also *Western Union Tel. Co. v. Ward*, 23 Ind. 377; *United States Tel. Co. v. Western Union Tel. Co.*, 56 Barb. 46; *Davis v. Western Union Tel. Co.*, 1 Cin. 100; and *Smith v. Gold etc. Tel. Co.*, 42 Hun, 454, where a company was enjoined from removing a ticker from a broker's office. The complaint must allege that the plaintiff paid or tendered the usual charges: *Western Union Tel. Co. v. Mossler*, 95 Ind. 29. But where the agent declines to receive the money, and requests the sender to allow it to be paid by the sender, the company cannot set up the defense, in an action for damages, that no compensation was paid: *Western Union Tel. Co. v. Yopst*, 118 Ind. 248.

stock quotations by telegraph is a public corporation, and cannot make any distinction in respect to persons who wish to partake of the privileges which it was created to furnish, nor refuse its privileges to one willing to pay for them.¹ The company must forward messages received by it in the order in which they are received, with this exception, that private dispatches must give way for the transmission of matters of public interest and to communications between officers of the law.² A gold and stock telegraph company may put its gold and stock reporting instruments in a subscriber's office on condition that he shall not furnish copies, and may remove them if he violates the condition.³

§ 1957. **Exceptions.**—It may, however, refuse to send a dispatch which is expressed in indecent, obscene, or filthy language; but if such does not appear on the face of the dispatch, it cannot justify a refusal to transmit it on the ground that the message was sent for an illegal or immoral purpose.⁴ A telegraph company will not be compelled to furnish the keeper of a "bucket-shop" with stock quotations.⁵ A condition that a transient person sending a dispatch requiring an answer must deposit enough money to pay for ten words is reasonable, and unless complied with, the company may refuse to send the message.⁶ A telegraph company may not transact ordinary business on Sunday, but it may keep open its offices for the receipt and transmission of messages, where a reasonable necessity exists, such as those designed to relieve suffering, avert harm, or prevent serious loss.⁷ The Indiana statute imposing a penalty for failure to transmit

¹ *Friedman v. Gold etc. Tel. Co.*, 32 Hun, 4.

² *Western Union Tel. Co. v. Ward*, 23 Ind. 377; 85 Am. Dec. 463.

³ *Shepard v. Gold etc. Tel. Co.*, 38 Hun, 338.

⁴ *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

⁵ *Smith v. Western Union Tel. Co.*, 84 Ky. 664.

⁶ *Western Union Tel. Co. v. McGuire*, 104 Ind. 130; 54 Am. Rep. 296.

⁷ *Western Union Tel. Co. v. Yopst*, 118 Ind. 248.

a telegram does not apply to messages sent from another state.¹

ILLUSTRATIONS. — A telegraph company had a rule that messages requiring answers should not be sent unless a deposit was made to secure payment for the answer. Plaintiff sent from his hotel, which he was just about leaving, a message by a messenger to the telegraph-office with money for its prepayment, but not for the answer. The company refused to send the message, and sent it back to the hotel, plaintiff then having left town. *Held*, in his suit against the company, that judgment should be rendered for defendant: *Hewlett v. Western Union Tel. Co.*, 28 Fed. Rep. 181.

§ 1958. Telephone Companies. — In like manner a telephone company is a public agent, and cannot arbitrarily refuse to furnish its instruments to any person desiring them and offering to comply with its regulations.² Any person or corporation engaged in the telephone business operating telephone lines, furnishing telephonic connections, facilities, and service to business houses, persons, and companies, and discriminating against any person or company, can be compelled by mandate to furnish such service in the manner and on the terms it furnishes it to others.³ And being a public agency, the state may regu-

¹ *Western Union Tel. Co. v. Reed*, 96 Ind. 195.

² *State v. Bell Telephone Co.*, 36 Ohio St. 296; 38 Am. Rep. 583; *State v. Nebraska Telephone Co.*, 17 Neb. 126; 52 Am. Rep. 404; *Bell Telephone Co. v. Balt. etc. Telephone Co.*, 59 Am. Rep. 172, note. *State v. Bell Telephone Co.*, 10 Cent. L. J. 438; 11 Cent. L. J. 357; *Louisville Trans. Co. v. Am. Dist. Telephone Co.*, 14 Chic. L. N. 15. A telephone company is a telegraph company within statutes: *Chesapeake etc. Telephone Co. v. Balt. etc. Telephone Co.*, 66 Md. 397; 59 Am. Rep. 167; *Franklin v. Northwestern Telephone Co.*, 69 Iowa, 97; *Iowa Union Telephone Co. v. Board of Equalization*, 67 Iowa, 250; *Attorney-General v. Edison Telephone Co.*, L. R. 6 Q. B. Div. 244; *Wis. Telephone Co. v. Oshkosh*, 62 Wis. 36; *Bell Telephone Co. v. Com.*, 59 Am. Rep. 172.

The word "telephone" in the Indiana statute means "an organized apparatus or combination of instruments usually in use in transmitting as well as in receiving telephonic messages"; *Cent. Union Telephone Co. v. Bradbury*, 106 Ind. 1. A conversation by telephone is admissible in evidence: *People v. Ward*, 3 N. Y. Crim. Rep. 511; even where the voice of the other party is not identified: *Wolfe v. R. R. Co.*, 97 Mo. 473; 10 Am. St. Rep. 331; *Reed v. R. R. Co.*, 72 Iowa, 166. As to an acknowledgment of a deed by telephone, see *Banning v. Banning*, 80 Cal. 271.

³ *State v. Neb. Telephone Co.*, 17 Neb. 126; 52 Am. Rep. 504; *Cent. Union Telephone Co. v. Falley*, 118 Ind. 194; 10 Am. St. Rep. 114; holding that such right is not taken away by a statute imposing a penalty for such refusal; *State v. Bell Telephone*

late telephone charges.¹ And the fact that telephones are patented is immaterial;² and so is the fact that its lines extend beyond the state.³ But the right to regulate the charge for the use of telephones has been denied to a municipal corporation.⁴ Under a statute which enacts that telegraph companies shall receive dispatches from and for other telegraph lines, and from and for individuals, and transmit them with impartiality and good faith, a contract between a telephone company and the owner of telephone instruments, providing that the company in the use of the instruments shall discriminate as between telegraph companies, is void as against public policy.⁵ The company may establish reasonable regulations, and deny to persons not complying with its rules the right to use its instruments. Thus a rule that persons using the instruments shall conduct their conversations in a becoming manner, free from obscenity or profanity, is valid;⁶ and so is a regulation that a subscriber shall not use his instrument in transmitting messages for a rival company.⁷ But a regulation is unreasonable and invalid which prohibits subscribers from calling a messenger otherwise than through the central office.⁸ And it has been held in Indiana that the company cannot relieve itself from its duty and liability to serve all the public, at the charges prescribed by the statute, by ceasing to operate its business under a rental system, and charging so much for

Co., 10 Cent. L. J. 438; 11 Cent. L. J. 359; *State v. Bell Telephone Co.*, 23 Fed. Rep. 539; *Bell Telephone Co. v. Com.*, 35 Alb. L. J. 4; 59 Am. Rep. 172; *Louisville Trans. Co. v. Am. Dist. Tel. Co.*, 24 Alb. L. J. 283.

¹ *Cent. Union Telephone Co. v. Falley*, 118 Ind. 194; 10 Am. St. Rep. 114; *Cent. Union Tel. Co. v. Bradbury*, 106 Ind. 1.

² *Hockett v. State*, 105 Ind. 250; 55 Am. Rep. 201. But a telephone company may withdraw its instruments from a state and enjoin others using them where it owns the patents:

American Tel. Co. v. Cushman, 36 Fed. Rep. 488.

³ *Cent. Union Tel. Co. v. Falley*, 118 Ind. 194; 10 Am. St. Rep. 114.

⁴ *City of St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 629; 9 Am. St. Rep. 370.

⁵ *State v. Telephone Co.*, 36 Ohio St. 296; 38 Am. Rep. 583; *Com. Union Tel. Co. v. New England Tel. Co.*, Vt. 1889.

⁶ *Pugh v. Tel. Co.*, 27 Alb. L. J. 162.

⁷ *People v. Hudson River Telephone Co.*, 19 Abb. N. C. 466.

⁸ *People v. Hudson River Tel. Co.*, 19 Abb. N. C. 466.

each conversation, or by removing the instruments from houses and offices of subscribers, and establishing public telephone stations, and then charging for each separate use of the telephone.¹

ILLUSTRATIONS. — The owner of a telephone patent licensed A to do the telephone business of a certain city on condition that A should not establish telephonic connection with any telegraph company unless especially authorized by the owner, who afterwards permitted the establishment of a connection with a certain telegraph company. *Held*, that the court could by *mandamus* compel a connection with another telegraph company, although the owner was not a party to the proceeding: *State v. Bell Telephone Co.*, 23 Fed. Rep. 539. The defendant, a Connecticut telephone company, had purchased from a Massachusetts telephone company owning the patent the right to use its magnetic telephone system for a certain period, on the condition that it should not permit telegraph companies to use the system unless they had purchased the right from the Massachusetts company. A statute of Connecticut provides that every telephone company shall impartially permit persons and corporations to transmit speech through its wires by its instruments. The plaintiff, a telegraph company in Connecticut, not having purchased the right, sued to compel the defendant to permit it to use the system. *Held*, not maintainable: *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, 49 Conn. 352; 44 Am. Rep. 237.

§ 1959. Degree of Care and Diligence Required in Transmission of Telegrams. — On this question there has been some difference of opinion. "Due and reasonable care,"² the "exact diligence, which is the condition precedent of all faithful service,"³ "ordinary care and diligence,"⁴ are phrases which have been used to describe this latter requisite. They, however, all tend to require on the part of the companies "the use of good apparatus and instruments, and reasonable skill, and a high degree of care and diligence in their operation."⁵ A dispatch

¹ *Cent. Union Tel. Co. v. Falley*, 118 Ind. 194; 10 Am. St. Rep. 114.

² *Ellis v. American Tel. Co.*, 13 Allen, 226.

³ *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238.

⁴ *Baldwin v. United States etc. Tel.*

Co., 45 Barb. 505; 45 N. Y. 744; 6 Am. Rep. 165.

⁵ *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Abraham v. Western Union Tel. Co.*, 23 Fed. Rep. 315; *Fowler v. Western Union Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211.

delivered in its regular order, and within thirty minutes from the time when received at the office of the city of delivery, is seasonably delivered.¹ The fact that the sender of a message told the operator that it was of special importance has no bearing on the conduct of the agents of the telegraph company in the city to which the message was sent in negligently delaying its delivery.² But when sued for negligent delay in delivering a message, it cannot contend that the sender should have sent it sooner, instead of waiting till the last minute.³ At a small station it is not the duty of the company to keep more than one operator, and if a message was left with a messenger during the operator's absence, and the message was forwarded on the operator's return, after a reasonable absence, the company is not guilty of negligence.⁴ If the usual line of business between the two points is through a repeating office, the company is entitled to a reasonable time for delay caused by other business at such repeating office.⁵ A telegraph company must make a reasonable effort to deliver a message received for transmission. It is not enough to attempt a delivery only at the business office of the person addressed.⁶ There is an implied authority on the part of a hotel clerk to receive a dispatch for a guest. If the clerk is negligent in delivering it, the telegraph company is not at fault.⁷ If a telegraph company, failing to learn the whereabouts of one to whom a message is sent, delivers it to his wife, and informs the sender, it performs its duty.⁸

But it is gross negligence to employ an operator who is ignorant of the existence of a county town which is one

¹ *Julian v. Tel. Co.*, 98 Ind. 327.

² *Pope v. Western Union Tel. Co.*, 14 Ill. App. 531.

³ *Pope v. Western Union Tel. Co.*, 14 Ill. App. 531.

⁴ *Behm v. Western Union Tel. Co.*, 8 Biss. 131.

⁵ *Behm v. Western Union Tel. Co.*, 8 Biss. 131.

⁶ *Pope v. Western Union Tel. Co.*, 9 Ill. App. 283; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772.

⁷ *Western Union Tel. Co. v. Trissal*, 98 Ind. 566.

⁸ *Given v. Tel. Co.*, 24 Fed. Rep. 119.

of the stations on its line.¹ But the employees are not required to know the hour at which an office of the company in another city closes.² If, by reason of atmospheric disturbances, the message cannot be correctly transmitted, the attempt to transmit it should not be made.³ For negligently delivering forged dispatches it is liable for the damage thereby sustained,⁴ and also for the frauds of its agents in sending false and fraudulent dispatches.⁵ That the act of negligence which prevented the message from reaching its destination occurred out of the state will not defeat a recovery.⁶ Evidence is inadmissible against the company that because of the alleged negligence one of its officers made a deduction from the pay of one of its operators.⁷ Under the Indiana statute requiring telegraph companies to deliver dispatches, etc., "provided such persons or agents reside within one mile," etc., "or within the city," etc., it is a valid defense to an action to recover the penalty that the person addressed did not live within the distance prescribed.⁸ But paying back the amount paid for sending a dispatch and acceptance of the same (unless it is agreed to be accepted in full of all that the party has a right to recover by virtue of the statute) will not bar an action for the full penalty.⁹

ILLUSTRATIONS. — A cipher cable message for a ship-broker in Savannah was delayed one hour and a half after reaching that city, when it should have been delivered in five minutes. Because of the delay the broker lost a commission of five hundred dollars. *Held*, that the company was liable therefor: *Western Union Tel. Co. v. Fatman*, 73 Ga. 285; 54 Am. Rep. 877. An impostor, at Cincinnati, sent a dispatch in the name of B over defendant's telegraph line, to C, at Selma, Alabama, requesting

¹ *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

² *Given v. Tel. Co.*, 24 Fed. Rep. 119.

³ *Western Union Tel. Co. v. Cohen*, 73 Ga. 522.

⁴ *Strause v. Western Union Tel. Co.*, 8 Biss. 104.

⁵ *McCord v. Western Union Tel. Co.*, 39 Minn. 181.

⁶ *Western Union Tel. Co. v. Hamilton*, 50 Ind. 181.

⁷ *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485.

⁸ *Western Union Tel. Co. v. Lindley*, 62 Ind. 371.

⁹ *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

C to send a telegraphic money-order to B at Cincinnati; C complied, and defendant paid the money to the impostor at Cincinnati. *Held*, that defendant was not liable for the mistake, in the absence of any suspicious circumstances: *Western Union Tel. Co. v. Meyer*, 61 Ala. 158; 32 Am. Rep. 1. A telegraph-operator at Y. received a message dated at E., and addressed to bankers at P., which read as follows: "Keystone Bank will pay the check of T. F. McCarthy to the amount of twenty thousand dollars (\$20,000). J. J. Town, cashier of Keystone Bank." The person presenting the message was known to the operator by the name of McCarthy, but no authority from the cashier was shown. The message was transmitted, and proved to be fraudulent. *Held*, that the operator was guilty of gross negligence, for which the company was liable: *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; 6 Am. Rep. 140. A message was received and payment for its transmission to O., at 6:50, P. M., on Sunday. The telegram was a request to send a physician by the first train. It was received at O. at 8:09, P. M. The next train left at 11:30, P. M. The telegram was delivered at 7:35, A. M., the next day. The office hours at O. closed on Sunday at 6, P. M., and by the rules of the office telegrams received after that time were not delivered until the next morning. *Held*, for the jury to determine the reasonableness of such regulations: *Brown v. Western Union Tel. Co.*, Utah, 1889.

§ 1960. Presumption of Negligence—Burden of Proof.

—From the fact that the company has failed to deliver the message as sent, or within a reasonable time, the presumption of negligence arises, and the burden of proof is therefore on the company to show that the failure arose from a cause for which it is not legally responsible.¹ Thus the presumption of negligence arises where an important word is omitted,² or where the terms of the mes-

¹ *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *De Rutte v. N. Y. Tel. Co.*, 1 Daly, 547; 30 How. Pr. 403; *Rittenhouse v. Independent Line*, 44 N. Y. 263; 4 Am. Rep. 673; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Dorgan v. Telegraph Co.*, 1 Am. L. T. 406; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Tyler v. Western Union Tel. Co.*, 74 Ill. 168; 24 Am. Rep. 279; 60 Ill. 421; 14 Am. Rep. 38; *Tel. Co. v. Griswold*, 37 Ohio

St. 301; 41 Am. Rep. 500; *Harkness v. Western U. Tel. Co.*, 73 Iowa, 190; 5 Am. St. Rep. 672; *Western U. Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795; *Fowler v. Western U. Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211; *Little Rock etc. R. R. Co. v. Davis*, 41 Ark. 79. See *Sweetland v. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519.

² *Ayer v. Western U. Tel. Co.*, 79 Me. 493; 1 Am. St. Rep. 353.

sage are seriously changed, and the name of the sender entirely disfigured,¹ or where the company delays for several hours to transmit a message requiring only from five to fifteen minutes.²

§ 1961. Power to Limit Liability by Contract or Notice.—A telegraph company may limit its ordinary liability by a contract or notice assented to by the sender of the message.³ But it cannot by contract evade a statutory liability, penal in its nature, for failure to transmit a message correctly.⁴ A condition exempting the company from liability for errors, delays, or omissions "arising from whatever cause" is unreasonable.⁵

§ 1962. Power to Contract against Negligence.—But for similar reasons of public policy to those which we have seen prevent a common carrier from escaping liability for negligent acts, a telegraph company is not permitted to avoid its liability for the consequences of the negligence of itself or its duly authorized agents.⁶ A

¹ *Western Union Tel. Co. v. Meek*, 49 Ind. 53.

² *Western Union Tel. Co. v. Scircle*, 103 Ind. 227.

³ *McAndrew v. Electric Tel. Co.*, 17 Com. B. 3; *Young v. Western U. Tel. Co.*, 65 N. Y. 163; *Breese v. United States Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526; *De Rutte v. New York etc. Tel. Co.*, 1 Daly, 547; *Sweetland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Manville v. Western U. Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Western U. Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744; *Western U. Tel. Co. v. Tyler*, 74 Ill. 68; 24 Am. Rep. 279; 60 Ill. 421; *Passmore v. Western U. Tel. Co.*, 78 Pa. St. 238; 9 Phila. 90; *Harris v. Western U. Tel. Co.*, 9 Phila. 88; *Wolf v. Western U. Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387; *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *Wann v. Western U. Tel. Co.*, 37 Mo. 473; 90 Am. Dec. 395; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519; *Camp v.*

Western U. Tel. Co., 1 Met. (Ky.) 164; 71 Am. Dec. 461; *Western U. Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Ellis v. American Tel. Co.*, 13 Allen, 226; *Redpath v. Western U. Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Grinnell v. Western U. Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Pepper v. Tel. Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699.

⁴ *Western Union Tel. Co. v. Adams*, 87 Ind. 598; 44 Am. Rep. 776; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

⁵ *Fowler v. Western U. Tel. Co.*, 80 Me. 381; 6 Am. St. Rep. 211.

⁶ *McAndrew v. Electric Tel. Co.*, 17 Com. B. 1; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744; *True v. International Tel. Co.*, 60 Me. 19; 11 Am. Rep. 156; *Breese v. United States Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Ellis v. American Tel.*

condition relieving the company from liability for errors or delays in transmission or delivery, or for non-delivery of messages, will not relieve it from liability for a negligent omission to deliver a message.¹ Some courts, however, have restricted this lack of power to contract to what is called "gross" negligence.² A better rule, however, has been laid down in the majority of the decisions, viz., that notwithstanding a condition in the contract between the sender and the company, the latter will still be liable for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary skill on the part of its operatives, or the use of defective instruments, but will not be liable for mistakes occasioned by causes beyond its control, such as atmospheric changes, or the vagaries of electricity, provided these mistakes could not have been avoided by the exercise of ordinary care and skill on the part of the operating agents of the company.³ But even a condition against liability for negligence will not cover a failure to send the message at all.⁴

§ 1963. **Conditions as to Repeating Messages.**—The blanks of a telegraph company usually contain a condi-

Co., 13 Allen, 226; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 453; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Wann v. Western Union Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 395; *Dorgan v. Telegraph Co.*, 1 Am. L. T. 406; *Sweetland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Bartlett v. Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Mandee v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; 41 Am. Rep. 500; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710; *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 1 Am. St. Rep. 353; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 126; *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; 5 Am. St. Rep. 672; *Western Union Tel. Co. v. Crall*, 38 Kan. 679; 5 Am. St. Rep. 795.

¹ *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775.

² As in *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485.

³ *Sweetland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238; 9 Phila. 88; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 453; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; 24 Am. Rep. 279; 60 Ill. 421; *Aiken v. Telegraph Co.*, 5 S. C. 358; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136.

⁴ *Western Union Tel. Co. v. Way*, 83 Ala. 542.

tion that if the message is not repeated,—for which service an extra charge is asked,—the company shall not be liable beyond a certain small amount; generally the sum paid for the telegram, or fifty times its amount. Such conditions are sustained as reasonable; but at the same time they are not allowed to exclude the company's liability for negligence.¹ They are, however, a sufficient protection, where the mistake or delay is not due to the negligence of the company or its servants.² Under such a condition the party cannot recover more than the sum named if he does not require it to be repeated, and if no negligence is shown beyond the fact that the message did not reach its destination;³ or if nothing is shown beyond an error in the dispatch as delivered.⁴ But such a condition will not relieve from liability for a negligent failure to deliver a message, not repeated, after it was received at the office to which it was addressed,⁵ nor for a negligent failure to send it at all.⁶

¹ *Sprague v. Western Union Tel. Co.*, 6 Daly, 200; 67 N. Y. 590; *Baldwin v. Tel. Co.*, 45 Barb. 505; 1 Lans. 126; 6 Abb. Pr., N. S., 195; 45 N. Y. 744; 6 Am. Rep. 165; *Bryant v. Tel. Co.*, 1 Daly, 575; *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; 3 Phila. 408; *Dorgan v. Tel. Co.*, 1 Am. L. T. 406; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Binney v. New York etc. Tel. Co.*, 18 Md. 341; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558; *Seiler v. Western Union Tel. Co.*, 3 Am. Law Rev. 777; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; 74 Ill. 168; 24 Am. Rep. 279; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; 54 Am. Rep. 644; *Camp v. Western Union Tel. Co.*, 1 Met. (Ky.) 164; 71 Am. Dec. 461; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; 44 Am. Rep. 589; *Wann v. Tel. Co.*, 37 Mo. 472; 90 Am. Dec. 395; *Pegram v. Tel. Co.*, 97 N. C. 57; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9

Am. Rep. 744; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; 54 Am. Rep. 644; *Western Union Tel. Co. v. Harris*, 19 Ill. App. 347.

² *Id.*; *Schwartz v. Atlantic etc. Tel. Co.*, 18 Hun, 157; *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356; *Sweetland v. Ill. & Miss. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526; *Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717; *Aiken v. Tel. Co.*, 69 Iowa, 31; 58 Am. Rep. 210; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Grinnell v. Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485.

³ *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231.

⁴ *Becker v. Western Union Tel. Co.*, 11 Neb. 87; 38 Am. Rep. 356; *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 56 Am. Rep. 119. *Contra*, *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480.

⁵ *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Gulf etc. R. R. Co. v. Wilson*,

⁶ *Birney v. Tel. Co.*, 18 Md. 341; 81 Am. Dec. 607.

§ 1964. **Other Conditions in Telegraph Blanks.**—Other conditions have been sustained as reasonable, viz., that the company shall not be liable unless the claim is presented within a certain number of days after sending the message.¹ But such a condition does not relieve from a statutory penalty for a negligent delay in sending or delivering the message.² And the federal courts will not sustain as reasonable a rule of a telegraph company that it will not be liable for error or delay in transmitting messages, where the claim is not presented within thirty days from the time of sending the message.³ And a contract limiting its liability to twenty-five cents has been held invalid.⁴

§ 1965. **Knowledge by Sender of Conditions Essential.**—There can be no contract between the sender and the company which the latter can set up to restrict its liability, unless it has been assented to by the former. But notice of the company's regulations, and the conditions which it seeks to put upon the sender, are given to him by printing them on the blanks upon which the message is written; and by the sender using the blanks without dissent, he is taken to assent to the conditions which they contain,⁵ and he will not be permitted to show that he did not read or understand the conditions.⁶ For the same

¹ *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387; *Western Union Tel. Co. v. Jones*, 95 Ind. 228; 48 Am. Rep. 713; *West. Union Tel. Co. v. Meredith*, 95 Ind. 93; *Aiken v. Tel. Co.*, 5 S. C. 358; *Heiman v. Tel. Co.*, 57 Wis. 562; *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257; *Cole v. Tel. Co.*, 33 Minn. 227; *Western Union Tel. Co. v. Dunfield*, 11 Col. 335.

² *Western Union Tel. Co. v. Cobb*, 47 Ark. 344; 58 Am. Rep. 756.

³ *Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362.

⁴ *Western Union Tel. Co. v. Young*, 93 Ind. 108.

⁵ *Western Union Tel. Co. v. Carlew*, 15 Mich. 525; *De Rutte v. New York etc. Tel. Co.*, 1 Daly, 547; 30 How. Pr. 403; *Womack v. Western Union Tel. Co.*, 58 Tex. 176; 44 Am. Rep. 614; *Western Union Tel. Co. v. Dunfield*, 11 Col. 335.

⁶ *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Breese v. United States Tel. Co.*, 48 N. Y. 132; 45 Barb. 174; 8 Am. Rep. 526; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

reason, if a person is familiar with the regulations of the company, as by having sent previous messages, he will be taken to have assented to those conditions if he sends a dispatch written on a business card of his own.¹ But although the company's rules prohibit its agents from receiving messages written otherwise than on its printed blanks, a sender ignorant of the prohibition is not bound thereby, and where the agent, without the sender's request, copies a message written on ordinary paper upon a blank, the sender will not be bound by the stipulations in the blank.²

ILLUSTRATIONS.—A telegraph dispatch was written on the blank of another company than that transmitting it, with certain terms and conditions on the back of it. *Held*, that on its acceptance the terms and conditions became incorporated in the contract of sending, and must be taken as forming a part of it: *United States etc. Co. v. Gildersleve*, 29 Md. 232; 96 Am. Dec. 519. The sender told the operator that he knew nothing about the business, and wished he would write the message, which the operator did, and the sender signed, on the operator pointing out the place. *Held*, that the operator was for that purpose the sender's agent, and the company was not liable for the sender's failure to notice the printed stipulation as to non-liability save for repeated messages: *Western Union Tel. Co. v. Edsall*, 63 Tex. 668.

§ 1966. **Contributory Negligence of Sender—Illegality.**—Damages are not recoverable where the sender has been guilty of negligence contributing to the loss.³ Where the sender of a telegram, intending to write a certain word, negligently writes what more nearly resembles another word, the company is not liable for damages caused by transmitting the word as it appeared to be written.⁴ A person addressing a telegram to a person in a city of twelve thousand inhabitants, and failing to make

¹ *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

Contra, *Pearsall v. Tel. Co.*, 44 Hun. 532.

² *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

³ *Deslottes v. B. & O. Tel. Co.*, 40 La. Ann. 183.

⁴ *Koons v. Western Union Tel. Co.*, 102 Pa. St. 164.

the address more definite on the agent calling his attention thereto, is guilty of contributory negligence, barring recovery of a statutory penalty for failure of the company to properly transmit;¹ and the company is not liable for a mistake of its clerk in endeavoring, at the request of the sender, to correct a mistake in the written message.²

So where contracts for fictitious or option "futures" are illegal, the loss or gain resulting from them cannot be recovered as damages sustained by the sender of a telegram in consequence of a mistake made by the company in transmitting it.³ It is held in Indiana that the statutory penalty for failing to transmit a message cannot be recovered in the case of a message sent on Sunday, where the words do not show that sending the message was a work of necessity. The telegram in this case read: "Come up in morning; bring all."⁴

§ 1967. Measure of Damages.—Damages sustained by the failure of a telegraph company to correctly transmit or seasonably deliver messages intrusted to it are recoverable when such damages are the natural and proximate result of the company's neglect, and may be presumed to have been in the contemplation of both parties when the

¹ *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294.

² *Western Union Tel. Co. v. Foster*, 64 Tex. 220; 53 Am. Rep. 754.

³ *Cothran v. Western Union Tel. Co.*, Ga. 1889.

⁴ *Rogers v. Western Union Tel. Co.*, 78 Ind. 169; 41 Am. Rep. 558, the court saying: "Courts cannot declare as matter of law that the business of telegraphy is a work of necessity. There are doubtless many cases in which the sending and delivery of a message would be a work of necessity within the meaning of our statute. But we cannot judicially declare that all contracts for the transmission of telegraphic messages are to be deemed within the statutory exception. Whether the contract is within the exception must be determined, as

a question of fact, from the evidence in each particular case. We cannot adjudge that the message which the appellee agreed to transmit is one which comes within the statute permitting the performance of works of necessity. . . . The words are to be taken in their ordinary meaning; for there is nothing ascribing to them any other or different signification. Upon their face they imply a friendly invitation to visit the sender. Such a message cannot be regarded as a work of necessity within the meaning of our statute." In *Texas* a message was sent on Sunday announcing a death in the family. An action for damages for failing to deliver was held maintainable: *G. C. & S. F. Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 269.

contract was made.¹ The rule is well stated by Earl, C. J., in a New York case:² "The damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. . . . A party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts." Thus the actual damages sustained were held recoverable in the following cases, viz.: Where a dispatch ordering "one shawl," when delivered, read "one hundred shawls";³ where the message, as delivered to the operator, read "two hand bouquets," but, as delivered to the receiver, read "two hundred bouquets";⁴ where the com-

¹ *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263; 4 Am. Rep. 673; *Sprague v. Western Union Tel. Co.*, 6 Daly, 200; 67 N. Y. 590; *Baldwin v. American Tel. Co.*, 1 Daly, 575; *De Rutte v. New York, A., & B. Tel. Co.*, 1 Daly, 547; *Mowry v. Western Union Tel. Co.*, 51 Hun, 126; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751; *Marr v. Western Union Tel. Co.*, 85 Tenn. 529; *Pepper v. Telegraph Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699; *Washington & N. O. Tel. Co. v. Hobson*, 15 Gratt. 122; *Lane v. Montreal Tel. Co.*, 7 U. C. C. P. 23; *Parks v. Alta California Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480; *Western Union Tel. Co. v. Shotton*, 71 Ga. 760; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; 74 Ill. 168; 24 Am. Rep. 279; *Western Union Tel.*

Co. v. Du Bois, Ill. 1889; *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57; *Western Union Tel. Co. v. Harris*, 19 Ill. App. 347; *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605.

² *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 447; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Squire v. Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 127; *Cannon v. Western Union Tel. Co.*, 100 N. C. 300; 6 Am. St. Rep. 590.

³ *Bowen v. Lake Erie Tel. Co.*, 1 Am. Law Reg. 685.

⁴ *New York etc. Tel. Co. v. Dryburg*, 3 Phila. 408; 35 Pa. St. 298; 78 Am. Dec. 338.

pany delivered an incorrect market report;¹ where the message was never sent as ordered;² where the message was delayed by the company in its delivery;³ where an order for five thousand "sacks" of salt was delivered as calling for five thousand "casks";⁴ where there was a mistake in a message ordering stock sold and other stock purchased;⁵ where wheat was ordered to be purchased at "22," and the message, as delivered, said "25";⁶ where the name of the receiver was misspelled;⁷ where one hundred shares of stock were ordered to be sold, and the message when delivered ordered one thousand to be sold;⁸ where ten thousand bushels of corn were ordered to be shipped, and the message when delivered said "one" thousand bushels;⁹ where the sender made a certain offer for merchandise, and the message as delivered made him appear to offer a higher sum;¹⁰ where, by the failure to deliver the message, a person failed to obtain a salaried position;¹¹ where the message as sent read, "Cover two hundred September and one hundred August," and transmitted it read, "Cover two hundred September and two hundred August."¹²

Unless the plaintiff proves special injury or actual damage, he can recover nominal damages only.¹³ But

¹ *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605.

² *Sprague v. Western Union Tel. Co.*, 6 Daly, 200; 67 N. Y. 590; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *De Rutte v. New York etc. Tel. Co.*, 1 Daly, 547; 30 How. Pr. 403; *Davis v. Tel. Co.*, 1 Cin. Rep. 100; *Parks v. Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *Western Union Tel. Co. v. Brown*, 58 Tex. 170; 44 Am. Rep. 610.

³ *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8.

⁴ *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 448.

⁵ *Rittenhouse v. Indiana etc. Tel. Co.*, 1 Daly, 474; 44 N. Y. 263; 4

Am. Rep. 673; *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751.

⁶ *De Rutte v. New York etc. Tel. Co.*, 1 Daly, 547; 30 How. Pr. 403.

⁷ *Landsberger v. Magnetic etc. Tel. Co.*, 32 Barb. 530.

⁸ *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38.

⁹ *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437.

¹⁰ *Western Union Tel. Co. v. Shotter*, 71 Ga. 760.

¹¹ *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511.

¹² *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480.

¹³ *Little Rock etc. Tel. Co. v. Davis*, 41 Ark. 79; *Clay v. Western Union Tel. Co.*, Ga. 1888; *Cutts v. Western Union Tel. Co.*, 71 Wis. 46.

where a penalty is imposed by statute for the failure of a telegraph company to transmit or deliver a message intrusted to it, the amount of the penalty may be recovered, without alleging or proving any actual damage.¹ Exemplary damages may be recovered where there is such gross negligence on the part of the agents of the company as to indicate wantonness or a malicious purpose in failing to transmit and deliver the message.²

ILLUSTRATIONS.—A. sent a message informing P. that he would sell him apples at \$1.75 per barrel. The company delivered the message, stating \$1.55 as the price per barrel. P. then ordered the apples, and had to pay the \$1.75 to have them delivered to him. *Held*, that this was the measure of his damages: *Western Union Tel. Co. v. Du Bois*, Ill. 1889. L.'s agents at Chicago sent to him at Oswego this message: "Send five thousand sacks of salt immediately." The company delivered the message, reading "casks" instead of "sacks." L. shipped the casks, but there being no market for that kind of salt in Chicago at the time, it sold for less there than it was selling for at Oswego. *Held*, that the measure of damages was the difference between the market value at Oswego and at Chicago, together with the cost of transportation: *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446. A, by telegraph, ordered the purchase of one thousand shares of stock, but the message as transmitted called for one hundred shares. *Held*, that the measure of damages was the difference in the value of the shares at that time and their increased value at the time when, after discovery of the mistake, they might have been purchased: *Marr v. Western Union Tel. Co.*, 85 Tenn. 529. P. delivered to the telegraph agent the following, to be sent to his broker at New York: "Sell one hundred (100) Western Union." As delivered to the broker, it read: "Sell one thousand (1,000) Western Union." The agent thereupon sold one thousand shares of the stock of the Western Union, and to replace the nine hundred shares had to buy on a rising market. *Held*, that the difference between the buying and the selling price was the measure of damages: *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38. P., in reply to a message from his agent informing him of the failure of a certain firm, and inquiring the amount due from them to him, sent this message: "Due, eighteen hundred; attach if you can find property. Will

¹ *Little Rock etc. Tel. Co. v. Davis*, 41 Ark. 79; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

² *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530.

send note by to-morrow's stage." The message was delayed, and when it reached its destination all the property of the firm had been attached, so that P.'s claim was lost. *Held*, the loss of the debt was the measure of damages: *Parks v. Alta California Tel. Co.*, 13 Cal. 422; 73 Am. Dec. 589.¹ W. sent to his broker a dispatch directing him to buy certain railroad stocks. The defendant failed to deliver the message. In the mean time the stocks advanced in price, and W. was compelled to pay more for them. *Held*, that the difference between what he would have had to pay had the message been properly delivered and what he did pay when he afterwards bought was the measure of his damages: *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751. H. & Co. sent a message to their agents at Mobile to purchase on their account 500 bales of cotton. The message as delivered read 2,500 bales. Before the mistake was discovered 2,078 bales had been purchased. *Held*, that the measure of damages was what was lost on the resale at Mobile of the excess of the cotton above that ordered, or if not sold there, what would have been the loss on the resale at Mobile in the condition and circumstances in which it was when the mistake was ascertained, including all the proper costs and charges thereon: *Washington etc. Tel. Co. v. Hobson*, 15 Gratt. 122. H. had sold cattle for future delivery, at the option of the purchaser. The latter sent a dispatch informing him that he would take the cattle in the morning of the next day. It was the custom of stock dealers to take the weight of cattle at early daylight. Through the negligence of the telegraph company to promptly deliver the message, the weighing of the cattle was delayed, whereby their weight decreased. *Held*, that it was liable in damages for the loss of weight resulting: *Hadley v. Western Union Tel. Co.*, 115 Ind. 191. A message was sent to D., a commission merchant at San Francisco, ordering him to buy a ship-load of wheat at an extreme limit of twenty-two francs per hectoliter delivered at Bordeaux. The message as delivered read twenty-five francs instead of twenty-two francs. Wheat of the kind ordered was then selling at San Francisco at from twenty-four to twenty-five francs per hectoliter, and the plaintiff purchased a cargo at those rates, and chartered a vessel to carry it to Bordeaux. On learning of the mistake in the dispatch, he immediately resold the wheat, and got rid of the charter at a loss of over two thousand dollars: *Held*, that this sum was the measure of his damages: *De Rutte v. New York etc. Tel. Co.*, 1 Daly, 547; 30

¹The measure of damages for failure to deliver a telegram, by reason of which a creditor loses his debt, is the value of such debt at the time, with interest thereon at eight per cent until the day

of trial, together with the cost of the message: *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; 10 Am. St. Rep. 570.

How. Pr. 403. The telegraph company had contracted to furnish to B Chicago market reports. It furnished to him an incorrect report, by reason of which B was induced to purchase a quantity of grain to fill a contract for future delivery. *Held*, that the measure of his damages was the difference between the actual purchase price and the price as represented by the report: *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605. T., in reply to an offer of a cargo of corn, sent this message: "Ship cargo named at ninety, if you can secure freight at ten." The message was not delivered. The price of corn and freight advanced immediately after, and T. was obliged to buy at the advanced rate. *Held*, that T. was entitled to recover the "sum which would be compensation for the direct loss and injury sustained by the non-delivery of this message is the difference (if at a higher rate) between the ninety cents named and the sum which the plaintiffs were or would have been compelled to pay at the same place, in order, by due and reasonable diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of the same species of merchandise; and the same rule applies to any increase of freight from the sum named, if it be shown that the corn could have been shipped by the sellers at that rate, if the telegram had been duly received": *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156. M.'s correspondent sent him this message: "Ship your hogs at once." The delivery of the message was delayed four days. *Held*, that M. could recover the difference between the market value of the hogs on the day when they would have been delivered had the message been promptly delivered and the market value on the day M. was able to deliver them after the actual receipt of the message: *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8. A telegram directed the party to whom it was directed to "get \$10,000 of A." *Held*, that the damages recoverable were the lawful interest on the money during the delay in getting the money: *Landsberger v. Tel. Co.*, 32 Barb. 530. A telegram was sent to the plaintiff offering him one hundred and fifty dollars per month to go on a trip as a steamboat pilot, and for the season, if he suited. Through the negligence of the company the message was not delivered until after the boat had sailed, and the plaintiff lost the employment, and failed to get other employment for a considerable time thereafter. *Held*, that the loss of wages thereby sustained was the measure of his damages: *Western Union Tel. Co. v. Fenton*, 52 Ind. 1.¹ A telegram was

¹ In *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57, the plaintiff lost a year's employment through the defendant's negligence in failing to seasonably deliver a message, and it was held that the measure of his damages was the difference between what he would have received and what he

sent to a physician, summoning him to go on a professional visit to a patient. The message was not delivered until it was too late, and the order had been countermanded. Five hundred dollars was a reasonable fee for the services expected to be performed, and the sender of the message was solvent. *Held*, that the measure of the physician's damages was the difference between that sum and the amount that he earned during the time he would have been absent on the visit: *Western Union Tel. Co. v. Longwill*, N. Mex. 1889. S. sent to an attorney at B. the message: "Hold my case till Tuesday or Thursday. Please reply." The company never delivered the message, and S., receiving no reply, concluded that a postponement of his case could not be obtained. He therefore went with his counsel to B., where he ascertained that the case had been continued, and in consequence he was compelled to make another trip to B. *Held*, that he could recover the expense of himself and his attorney on the first trip, and also the fee which he was obliged to pay his attorney for making that trip: *Sprague v. Western Union Tel. Co.*, 6 Daly, 200; 67 N. Y. 590.

§ 1968. **What Damages are not Recoverable.**—Losses or damages are not recoverable which are not the natural and proximate result of the failure of the telegraph company to transmit and deliver a message intrusted to it, and which cannot be considered to have been in the contemplation of the parties to the contract when it was made;¹ nor are uncertain and contingent profits recoverable.²

actually made during the year. But in *Merrill v. Western Union Tel. Co.*, 78 Me. 97, it was held that where the employment lost through the default of the telegraph company was terminable at the will of either party, nominal damages only could be recovered.

¹ *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191; *First Nat. Bank of Barnesville v. Telegraph Co.*, 30 Ohio St. 555; 27 Am. Rep. 485; *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394; 44 Am. Rep. 620; *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775; *Western Union Tel. Co. v. Crall*, 39 Kan. 580; *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 126; *Squire v. Western Union*

Tel. Co., 98 Mass. 232; 93 Am. Dec. 157; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530; *McColl v. Western Union Tel. Co.*, 44 N. Y. Sup. Ct. 487; 7 Abb. N. C. 151; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; 19 Am. Rep. 154. The sender cannot recover of the company damages sustained by the receiver of a message, although the sender has been obliged by the judgment of a court of another state to pay damages sustained by such receiver, in consequence of the wording of the dispatch being changed in transmission: *Pegram v. Western Union Tel. Co.*, 100 N. C. 28; 6 Am. St. Rep. 57.

² *Kinghorne v. Mont. Tel. Co.*, 18 U. C. Q. B. 60; *Lane v. Mont. Tel. Co.*,

ILLUSTRATIONS.—B telegraphs to A to send him five hundred dollars. The message, as negligently delivered, asked for five thousand dollars. In accordance with the request, A sent five thousand dollars, which B absconded with. *Held*, that the company was not responsible at the suit of B: *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; 19 Am. Rep. 154.¹ A telegraph company delayed transmitting a message directing the purchase of oil in open market so that when it was delivered oil had gone up, and no purchase was made. If the message had been received promptly, and had the oil been bought at once, and sold on the rising market, there would have been a profit; but on the trial of the action against the telegraph company it did not appear that the oil would have been resold at that time if it had been bought. *Held*, that nominal damages only were recoverable: *Western Union Tel. Co. v. Hall*, 124 U. S. 444.² L., having applied to a bank to have two drafts on parties in New York cashed, it wrote to its correspondent in New York to inquire whether the drawees were responsible, and whether the drafts would be honored. If the parties were not responsible, or if they were unwilling to accept, the correspondent was requested to telegraph, but otherwise not. The bank, not having heard from its correspondent before three, p. m., on February 15th, cashed the drafts. At 4:55, p. m., of the same day the correspondent telegraphed this message: "Parties will accept if bill lading accompanies the draft. Parties stand fair." But

7 U. C. C. P. 73; *Beaupre v. Pacific etc. Tel. Co.*, 21 Minn. 155; *Breese v. United States Tel. Co.*, 45 Barb. 275; 48 N. Y. 132; 8 Am. Rep. 526; *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775; *Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *McColl v. Western Union Tel. Co.*, 7 Abb. N. C. 151.

¹ The court saying: "The embezzlement could not reasonably have been expected, and did not naturally flow from the wrong of the defendant. The cause of the loss was the criminal act of Brown, conceived and executed after the defendant had ceased to have any relation to the money. The plaintiff's right of action for the negligence was complete before the money was misappropriated by Brown; and if suit had then been brought, the damages would not have been measured by the amount of money sent by the

plaintiff. The most that can be said is, that by the negligence of the company an opportunity was afforded Brown to commit a fraud upon the plaintiff. This does not, within the cases, make the company chargeable with the loss resulting from the conversion."

² The court saying: "It is clear that in point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid, and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place."

the message was never received by the bank. The drafts, amounting to three thousand dollars, were never accepted or paid. L., having obtained the money, went away with it. The bank sued to recover the three thousand dollars thus lost by it, alleging that if it had received the message in a reasonable time after it had been paid to L. it could have recovered it back from him. And L. testified that he would have returned it if he had been informed that the drafts would not be accepted. *Held*, that the damages were too remote: *First Nat. Bank of Barnesville v. Tel. Co.*, 30 Ohio St. 555; 27 Am. Rep. 485. Owing to delay in delivering a dispatch, a barge did not reach a lot of staves in time to prevent their being lost by a flood. *Held*, that the loss was not proximately caused by the company's negligence, and it was not liable: *Bodkin v. Western Union Tel. Co.*, 31 Fed. Rep. 134. A message asking the plaintiff to meet the sender at a certain place, on the arrival of a certain train, to arrange for certain services, was not delivered to the plaintiff, and he did not, therefore, meet the sender. *Held*, that he was not entitled to damages: *Clay v. Western Union Tel. Co.*, Ga. 1888.¹ A message directed H.'s agent to buy a certain quantity of wheat, to be delivered at any time in June, at seller's option. The price of wheat fluctuated during the month of June, but was at the close of the month less than on the day when the message should have been delivered. *Held*, that the court could not presume that H. would have sold at the right time to make a profit, had the wheat been bought; and that he was, therefore, only entitled to nominal damages: *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775. The company inaccurately transmitted a message ordering a race-horse of C. to be sent to a certain place. Owing to the mistake in the telegram, the horse was sent to another place, and could not be entered for the races. *Held*, that C. could not recover for the loss of the prize purses which

¹ The court saying: "The telegraph company failed to deliver this telegram in time for Clay to meet the train and comply with the directions of the sender. Clay brought his action against the company for damages. We cannot see from the allegations in the declaration, how Clay was damaged. It does not appear that he suffered any damage. It appears that he lost a mere opportunity or possibility to make something. If he had received the telegram, and had appeared at the depot in time to meet the remains, and if Mr. Hughes had declined his services, all that he could

have recovered from Hughes would have been his expenses and a proper compensation for his trouble in getting ready to perform these services. Clay did not go to meet the remains, and did not spend anything on this account. He was in the same condition after receiving the telegram that he was before. No loss came to him. It is contended that if he had received the telegram, he would have made a considerable amount of money as profits from services rendered. He might have made it, or he might not. As stated, this was a mere possibility."

the horse might have won had he been present at the races: *Western Union Tel. Co. v. Crall*, 39 Kan. 580. The company negligently failed to deliver this message: "Ship oil as soon as possible, at very best rates you can." Owing to the non-receipt of the dispatch, the oil was not sent, and plaintiff claimed that he lost great gains and profits by the delay caused in the shipping of his oil. *Held*, that plaintiff could not recover the profits which he might have made upon the oil, because they could not be fairly considered as having been in the contemplation of the parties to the contract when it was made, but that he was entitled to recover, in addition to the price of the message, the increased price of freight which he was subsequently obliged to pay for transporting the oil, and all other expenses that he was obliged to incur by reason of the company's failure to fulfill its contract: *Western Union Tel. Co. v. Graham*, 1 Col. 230; 9 Am. Rep. 136. P.'s agent telegraphed him the price at which he could buy apples, but, owing to mistakes by the company in the address and signature, P. paid no attention to it. The price of apples advanced, and P. was obliged to pay more than the price named in the telegram. There was no evidence of any difference between the cost of a car-load at the price named and the value thereof in the same market at the same time. *Held*, that only the amount paid for the telegram could be recovered: *Pennington v. Western Union Tel. Co.*, 67 Iowa, 631; 56 Am. Rep. 367. S.'s brokers in New York, who had previously purchased other railroad stocks for him, sent him a telegram to K., where he then lived, informing him that they had bought for him additional railroad stocks. This message was never delivered, and he was left in ignorance of the purchase. On the day the stocks were bought, — November 18, 1879, — stocks began to decline, and continued to decline until the 21st of November, known as "black Friday," when it was the greatest. He could have sold on the 19th at a loss of not more than one thousand dollars, and on the 20th at a loss of not more than four thousand dollars. But on the 21st the stock had so far declined that its value, together with S.'s deposit with his brokers, did not equal what they had paid for it, and they thereupon sold it, leaving him in debt to them. By the 28th of November a reaction had occurred, and the stocks were then selling for more than S. had paid for them. *Held*, that he could recover nominal damages only: *Smith v. Western Union Tel. Co.*, 83 Ky. 104; 4 Am. St. Rep. 126.¹

¹ The court saying: "The consequence which resulted to the appellant was not the ordinary result of the failure to deliver the message in question, and hence cannot be supposed to

have been in contemplation when the company undertook to transmit it. If the minds of the contracting parties had at the time been drawn to the contingency of a failure of perform-

§ 1969. **Knowledge by Company of Importance of Message Essential.**—Where a message is written in cipher, which is not understood by the agent who receives it for transmission, and its meaning is not made known to him by the sender, or where the message is so worded that it conveys no idea of its meaning or importance to the agent of the company, nominal damages only—usually the price paid for its transmission—are recoverable from the company for its default; because, as the meaning and importance of the message were unknown to the company, no other loss or injury could “reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.”¹ But though damages are not recoverable where the terms of the message, as delivered to the operator, are obscure, and are so unintelligible to him that he is unable to understand its import or its importance, this rule is subject to the qualification that the agents of a telegraph company will

ance, they could not possibly, from the nature of the dispatch, have contemplated the loss of which the appellant now complains; and in such a case, the company is only liable for nominal damages for its default.”

¹ Mackay v. Union Tel. Co., 16 Nev. 222; Behm v. Tel. Co., 8 Biss. 131; Candee v. Western Union Tel. Co., 34 Wis. 471; 17 Am. Rep. 452; Daniel v. Western Union Tel. Co., 61 Tex. 452; 48 Am. Rep. 305; Western Union Tel. Co. v. Martin, 9 Ill. App. 587; United States Tel. Co. v. Gildersleve, 29 Md. 232; 96 Am. Dec. 519; Cannon v. Western Union Tel. Co., 100 N. C. 300; 6 Am. St. Rep. 590; Beaupre v. Pacific etc. Tel. Co., 21 Minn. 155; Landsberger v. Tel. Co., 32 Barb. 530; Baldwin v. United States Tel. Co., 45 N. Y. 744; 6 Am. Rep. 135; Sanders v. Stuart, L. R. 1 C. P. D. 326; McColl v. Western Union Tel. Co., 44 N. Y. 487. But in some states, on the other hand, it is held that the company is liable for transmitting incorrectly a cipher dispatch, whose meaning was

unknown to the operator, to the same extent as though the message was written in the ordinary way, and its meaning known to him: Daughtery v. American Union Tel. Co., 75 Ala. 168; 51 Am. Rep. 435; Western Union Tel. Co. v. Way, 83 Ala. 542; Western Union Tel. Co. v. Hyer, 22 Fla. 637; 1 Am. St. Rep. 222; Western Union Tel. Co. v. Blanchard, 68 Ga. 299; 45 Am. Rep. 480; Western Union Tel. Co. v. Fatman, 73 Ga. 285; 54 Am. Rep. 877; Western Union Tel. Co. v. Reynolds, 77 Va. 173; 46 Am. Rep. 715; Hart v. Western Union Tel. Co., 66 Cal. 579; 55 Am. Rep. 119. Where by statute the company is liable in damages for failing to transmit a dispatch, a company failing altogether to deliver a cipher dispatch is liable: Western Union Tel. Co. v. Reynolds, 77 Va. 173; 46 Am. Rep. 715. And it is liable in damages for unreasonable delay in delivering a cipher dispatch: Western Union Tel. Co. v. Fatman, 73 Ga. 285; 54 Am. Rep. 877.

be held to possess such experience as to enable them to comprehend what might be unintelligible to others; in other words, the employees of telegraph companies will be presumed to be acquainted with the language of merchants, and the forms used by business men in telegraphing their orders, replies, and contracts.¹ Abbreviations commonly used in trade, and understood by the telegraph company, do not make a telegram a cipher communication;² and where a subject to which a telegram relates (as a proposition to sell goods at a given rate) is understood by the company, it is not necessary, in order to make it liable in compensatory damages for negligence in transmission, that the company should be able to foresee the exact amount of pecuniary loss which such negligence is likely to cause.³

In the case of the following messages the agents of the company have been held to have had sufficient knowledge from the face of the message to apprise them of its importance, viz.: "Buy fifty Northwestern — Fifty Prairie du Chien, limit forty-five";⁴ "Car cribs six sixty, c. a. f., prompt," sent in reply to the following: "Quote cribs loose, and strips packed";⁵ "You had better come and attend to your claim at once";⁶ "Send bay horse to-day. Mock loads to-night", — Mock being a well-known horse-buyer in the habit of shipping horses from the vicinity of the place from which the message was sent;⁷ "Cover two hundred September, one hundred August";⁸ "Ten cars new two whites Aug. shipment, fifty-six half";⁹

¹ Thompson on Negligence, 857, and cases *post*. But see *contra*, and apparently irreconcilable with all the other authorities, *Beaupre v. Pacific etc. Tel. Co.*, 21 Minn. 155.

² *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699.

³ *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699.

⁴ *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751.

⁵ *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554; 10 Am. St. Rep. 699.

⁶ *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570; 10 Am. St. Rep. 570.

⁷ *Thompson v. Western Union Tel. Co.*, 64 Wis. 531.

⁸ *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; 45 Am. Rep. 480.

⁹ *Western Union Tel. Co. v. Harris*, 19 Ill. App. 347, 353.

"Sell one hundred Western Union. Answer price";¹
 "Want your cattle in the morning; meet me at pasture";²
 "Ship your hogs at once";³ "Ship cargo named at 90,
 if you can secure freight at 10";⁴ "If we have any Old
 Southern on hand, sell same before board. Buy five
 Hudson at board";⁵ "Will take two cars sixteens. Ship
 soon as convenient via West Shore."⁶

ILLUSTRATIONS.—E., who had purchased a flock of sheep, which he wished to drive to his ranch, directed a telegram to a servant to meet him at a certain place and "bring Shep" (meaning a sheep-dog on the ranch). The message was delivered so as to read "bring sheep." The servant accordingly drove E.'s sheep from the ranch to meet him. In an action for damages to the newly purchased sheep, additional expense in keeping them, and for loss, exposure, and injury to both flocks, etc., E. alleged that when he sent the dispatch he informed the agent in charge of its office that he wanted the dog to assist in driving the sheep to his ranch. *Held*, that the company had direct notice of the object of the dispatch, and was chargeable with notice of all attendant details: *Western Union Tel. Co. v. Edsall*, Tex. 1889. B., who had been offered a certain price for his interest in a certain oil-well, telegraphed to his agent this message: "Telegraph me at R. what that well is doing." This dispatch was not delivered until several days after it was sent. In the mean time B. went to R., and not receiving any reply, sold his interest in the well for much less than it was worth. *Held*, that nominal damages only could be recovered: *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165.⁷ L. & Co. contracted with parties in San Francisco to purchase for them in New York three hundred Colt's revolvers, and to deliver them at San Francisco by the steamer which was to sail from New York on the 20th of January, 1857. L. & Co. were to receive a commission for their services, and were bound to pay a penalty of five hundred dollars if they failed to perform their agreement. They sent to New York by the Pacific Mail Company ten thousand

¹ *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38.

² *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 200.

³ *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8.

⁴ *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156.

⁵ *Rittenhouse v. Independent L. of T.*, 44 N. Y. 263; 4 Am. Rep. 673.

⁶ *Mowry v. Tel. Co.*, 51 Hun, 126.

⁷ The court saying: "For all the purposes for which the plaintiffs desired the information the message might as well have been in a cipher or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it."

dollars to be used in purchasing the revolvers, and sent this message to their firm in New York: "Get ten thousand dollars of the Mail Company." This message was negligently delayed so long that the contract could not be performed, and the plaintiffs were compelled to pay the penalty. *Held*, that as the company had no information as to the importance of the dispatch, it was not liable to L. & Co. for the loss of his commissions, or for the penalty, because those damages could not fairly be supposed to have been in the contemplation of the parties when they undertook to transmit the message: *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530. "J. M. Brown, Sulphur Springs: Willie died yesterday evening at six o'clock. Will be buried at Marshall Sunday evening. Weston Livingston." *Held*, not to import any family relationship between "Willie" and the party to whom it is addressed, so as to affect agents of the telegraph company with notice of such relationship, and to render the company liable for injury to his feelings caused by his being prevented from attending the funeral: *Western Union Tel. Co. v. Brown*, 71 Tex. 723.

§ 1970. **Injuries to Feelings.**—In a recent and well-considered case in Tennessee, on the ground that while in an ordinary contract only pecuniary benefits are contemplated by the contracting parties, and therefore the damages resulting from the breach of such a contract must be measured by pecuniary standards, yet where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied in the ascertainment of the damages resulting from the breach, it was held that damages for injury to the feelings may be recovered against a telegraph company.¹ In this case two telegrams were sent to the plaintiff, the one informing her that her brother was in a dying condition, and the other announcing his death. The telegrams were negligently delayed by the company, whereby she was prevented from attending her dying brother, and from making preparations for his funeral. It was held that she could recover for the wrong and injury done to her feelings and affections. In the federal courts it has been held that a

¹ *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864.

husband may recover for disappointment and anguish caused by his being unable to be present at his wife's death-bed, owing to the failure of the company to deliver a message.¹

In Texas the decisions are not harmonious. In a Texas case decided in 1881 it was held that the company was liable for injury to the feelings of a son caused by its willful neglect to deliver him a message announcing the death of his mother, whereby he was prevented from attending the funeral.² But two years later, in the same court, an action was brought by a plaintiff to recover damages of a telegraph company for delay in delivering a telegram announcing the death of his son's wife and child, whereby he was prevented from attending the funeral. The court held he could not recover, and overruled the case in 1881.³ But the sender of the message in this last case was held entitled to recover exemplary damages for its non-delivery.⁴ In a case in 1886 the plaintiff was held entitled to recover for injury to his feelings caused by being prevented from seeing his brother in his last illness, and attending his funeral.⁵ Two years later, it was held that a mother prevented from attending her son's funeral might recover damages.⁶ In the same year, where, by neglecting to deliver a telegram to a physician, a woman was prevented from having his attendance at her confinement, damages for injuries to her feelings were held proper.⁷

¹ *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

² *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805.

³ *Gulf C. & S. R. R. Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278.

⁴ *Gulf C. & S. R. R. Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 269.

⁵ *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623.

⁶ *Loper v. Tel. Co.*, 70 Tex. 689.

⁷ *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772, the court saying: "The very question raised here was before the supreme

court in the case of *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, and the court, after discussing the *So Relle* case (*So Relle v. Tel. Co.*, 55 Tex. 310; 40 Am. Rep. 805) and the two *Levy* cases (*Gulf etc. R. R. Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; *Gulf etc. R. R. Co. v. Levy*, 59 Tex. 542; 46 Am. Rep. 269), the case of *Hays v. R. R. Co.*, 46 Tex. 272, and other authorities, use the following language: "But it is claimed that the mental is an incident to the bodily pain, and that without the latter the former cannot be considered as actual

In the same year it was held that damages for injury to feelings caused by failure to deliver this message: "Willie died yesterday at six o'clock; will be buried at Marshall Sunday evening,"—could not be recovered, on the ground that the message contained nothing to put the defendant on notice that the deceased was a near relative of the plaintiff.¹ Two cases were decided by the same court in 1889. In one, the plaintiff telegraphed from Los Angeles to her agent at Galveston, informing him that her husband had just died, and that she would leave with his body next day, and asking him to send her money by telegraph immediately. She informed the company's agent when she sent the telegram of her distress and urgent need of the money. The message, when delivered at Galveston, appeared to have been sent from San Francisco, instead of Los Angeles, and, in consequence of the mistake, the receipt of the money was delayed, and the plaintiff suffered great mental anguish and humiliation. It was held that the mental anguish suffered by her was a proper element of damage.² In the other, the telegram was sent to a husband announcing the bringing of his wife's body. The operator to whom the message was delivered knew his wife was dead, and that the body was to be conveyed

damages. In cases of bodily injury, the mental suffering is not more directly and naturally the result of the wrongful act than in this case,—not more obviously the consequences of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in doing the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness as well as by a wound to the person.' The conclusion derived from the opinion in the case from which the foregoing extract is taken is, that injury to feelings caused by a failure to deliver a message relating to domestic affairs, where the failure is the

result of negligence on the part of the company or its servants, is an element of actual damage. The same principle was decided by the commissioner of appeals in the case of *Miller v. R. R. Co.* (erroneously styled in the reports *Wilson v. R. R. Co.*), 69 Tex. 739, and it was held that the right to recover would not depend upon the degree of negligence causing the injury. If the inexcusable negligence of the defendant's servants is found to be the proximate cause of the injury, damages may be recovered commensurate with the injury."

¹ *Western Union Tel. Co. v. Brown*, 71 Tex. 723.

² *Western Union Tel. Co. v. Simpson*, Tex. 1889.

to another town, and that unless the message was sent that night the body would reach there first. The plaintiff was held entitled to recover for his mental suffering and anguish, and a verdict for \$1,168 was considered not excessive.¹

In Dakota, it has been decided that one to whom a message was sent announcing the death of his sister, and the time when her funeral was to take place, could not recover damages for shocked, injured, and outraged feelings, and mental distress and anguish, resulting from the negligent delay of the company in not delivering the message until it was too late to attend the funeral;² and the same ruling has been made in Kansas in the case of a brother.³

ILLUSTRATIONS. — M. sent a message to E., directing that the family carriage should be sent to P. to meet him. The company had no office at E., and the message did not reach its destination. The carriage was not sent, and when the plaintiff arrived at P. he was compelled to go in a "jerkey," and on a buckboard, by a route which was more than twice as long as the road he could have gone by had the carriage been at P. to meet him. On the journey he was oppressed by forebodings as to the cause of the failure of the carriage to meet him, imagining that his father must be either dead or sick. *Held*, that he could not recover damages for the jars and jolts endured by him on the journey, because they were not the natural consequence of the default of the company; nor for the mental suffering alleged, because that was due to his imagining things that had no existence: *McAllen v. Western Union Tel. Co.*, 70 Tex. 243. The company failed to deliver a telegram in these words: "Come at once; bring Laurie; Josephine sick. J. M. C." The telegram was addressed to Dr. K. Josephine was the wife of C., then about to be confined, and Laurie was the sister of Josephine, and wife of Dr. K. The nature of the message was explained to the operator at the time it was sent. By the failure to deliver it, Dr. K. did not arrive. *Held*, 1. That the wife was entitled to damages for increased physical pain and mental anxiety and alarm caused by the absence of Dr. K.; 2. That for the death of the child and the bereavement and grief of the

¹ *Western Union Tel. Co. v. Broesche*, Tex. 1889.

² *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530.

³ *Russell v. Tel. Co.*, 3 Dak. 315.

parents, damages were not recoverable; 3. That damages for injuries to the feelings of the husband were not recoverable: *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772.¹

§ 1971. **Connecting Lines.**—It has been held in New York that a telegraph company receiving a message directed to a place beyond its lines, and receiving payment for the extra service, is liable for the negligence of any connecting lines; for they are its agents in the service, and not the sender's.² The first company may, by special contract with the sender, limit its liability to defaults occurring upon its own line, and protect itself against any loss occasioned by the negligence of the connecting company.³ But the second company may also be sued,

¹ The court saying: "We do not think the death of the child before birth, and the grief or sorrow occasioned thereby, can be an element of damages in this character of suit. If it is made to appear, from the testimony, that Mrs. Cooper suffered more physical pain, mental anxiety, and alarm on account of her own condition than she would have done if Dr. Keating had been in attendance upon her, and the failure to secure his services is shown to be due to the want of proper care on the part of defendant's servants, whose duty it was to deliver the message, a fair and reasonable compensation should be allowed for such increased pain and mental suffering; but the death of the child—the bereavement of the parents and their grief for its loss—cannot be considered as an element of damages. Such damages are too remote; they are the result of a secondary cause, and ought not to be allowed to enter into a verdict. This is not an action under the statute by the parents for the death of a child, and if it were, injury to the feelings of the parents could not be a basis of recovery by them: 3 Wood on Railway Law, 1538, and note 3. Injury to the mother alone, her physical pain and mental suffering because of her own condition, would be a proper consideration, and it would be correct to allow proof that the child was still-born, if such fact tended to show that

the labor was thereby prolonged, and her suffering so increased. 4. It is impossible to see upon what principle the husband can claim damages for injury to his feelings. His suffering could only be from alarm and sympathy for his wife's suffering; his distress is merely a reflection from her distress, and that might be very considerable, but it is too remote and consequential. She is allowed to recover in this suit, or rather he is, under the forms of law, on account of her injuries of body and mind; to allow him damages for the same injuries would be to allow two recoveries upon the same cause of action. We know of no authority that would justify such a conclusion. The person who suffers the injuries proximately resulting from the wrong done, and such person alone, is entitled to compensation, except in cases where death results, and the cause of action is made to survive to the relatives by virtue of a statute. The husband can sue for such injuries to his wife, but he cannot recover on his own account for his anxiety and sympathy."

² *De Rutte v. Albany etc. Tel. Co.*, 1 Daly, 547; *Baldwin v. U. S. Tel. Co.*, 1 Lans. 125; 54 Barb. 505; *Bank of New Orleans v. Western Union Tel. Co.*, 27 La. Ann. 49. But see *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165.

³ *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630.

and cannot avail itself of the terms and conditions in the blank limiting the liability of the first company, and thus escape liability for negligence in delivering the message.¹ Although the address of the message is changed through the negligence of the first company in transmitting it to a connecting line, yet if the loss occasioned by delay in the delivery of the message was not in consequence of such error, but was the result solely of the subsequent and independent negligence of the connecting company, the former is not liable for the damage sustained. The change of address is not the proximate cause of the loss.²

§ 1972. **Who may Bring Action.**—In England, the recipient of a message cannot maintain an action against the company for damages caused by its negligence. The obligation on the part of the company is one of contract with the sender, to which the receiver is not a party, and under which he can claim no rights. In the United States, this technical rule is not recognized, but a telegraph company may be sued by the party to whom a message is addressed for damage resulting from its neglect.³ As between the sender and receiver of a message by telegraph, any loss occasioned by a change of the terms of the message during transmission must fall upon the party who elected that means of communication for that message. He has his remedy over against the telegraph company, in case the error resulted from its negligence.⁴ And the

¹ *Squire v. Western Union Tel. Co.*, 98 Mass. 232; 93 Am. Dec. 157.

² *Western Union Tel. Co. v. Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630.

³ *New York etc. R. R. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; 6 Am. Rep. 140; *Wolfskihl v. Western Union Tel. Co.*, 46 Hun. 542; *Rose v. United States Tel. Co.*, 6 Robt. 305; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Aiken v. Tel. Co.*, 5 S. C. 358; *Western Union Tel. Co. v. Hope*, 11 Ill.

App. 289; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530. Under a statute imposing a penalty, etc., on telegraph companies for failure to transmit a message, to be recovered by the person whose dispatch is postponed or neglected, the sender is the person to sue: *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; 48 Am. Rep. 692.

⁴ *Ayer v. Western Union Tel. Co.*, 79 Me. 493; 1 Am. St. Rep. 353.

undisclosed principal of the person by whom the message is sent or to whom it is addressed may sue.¹ But there being no contractual relation between the company and the recipient, the latter's remedy for damages caused by the former's negligence in transmission is in tort.²

¹ *Harkness v. Western Union Tel. Co.*, 73 Iowa, 190; 5 Am. St. Rep. 672. ² *Western Union Tel. Co. v. Du Bois*, Ill., 1889.

TITLE XXII.
TRUSTS.

TITLE XXII.

TRUSTS.

CHAPTER XCVII.

TRUSTS.

- § 1973. Uses at common law.
- § 1974. The statute of uses.
- § 1975. Exceptions to statute — Chattels or chattel interests.
- § 1976. Use upon a use.
- § 1977. Active or special uses.
- § 1978. Married women.
- § 1979. Trusts defined — Express trusts — How created.
- § 1980. The statute of frauds.
- § 1981. Executed and executory trusts.
- § 1982. Voluntary trusts — When enforceable.
- § 1983. Deeds of trust to secure debts.
- § 1984. Powers, rights, and liabilities of trustee.
- § 1985. Assignments for benefit of creditors — In general.
- § 1986. Void when intended to delay or defraud creditors.
- § 1987. Giving preferences to creditors.
- § 1988. Illegal provisions in assignments — Reserving benefits to debtor.
- § 1989. Exacting release from creditor.
- § 1990. Other provisions held illegal.
- § 1991. Circumstances raising presumption of fraud.
- § 1992. Provisions in assignments held valid.
- § 1993. Secret agreement with creditor.
- § 1994. Who may avoid fraudulent assignment.
- § 1995. Assent of creditors.
- § 1996. What property passes to assignee.
- § 1997. What property does not pass to assignee.
- § 1998. Form of assignment.
- § 1999. Delivery of possession requisite.
- § 2000. Powers and duties of assignee — His liabilities.
- § 2001. The assignee's bond.
- § 2002. Assignment not revocable by debtor.
- § 2003. Effect of bankruptcy laws upon assignment.

- § 2004. Powers in nature of trusts.
- § 2005. What language will create a trust.
- § 2006. Precatory words.
- § 2007. Trusts of personalty may be created verbally.
- § 2008. Resulting trusts — In general.
- § 2009. To purchaser on conveyance to stranger.
- § 2010. Children and relatives — Presumption of advancement.
- § 2011. When trust fails or does not exhaust trust property.
- § 2012. Arising out of joint tenancies.
- § 2013. Constructive trusts — In general.
- § 2014. Money equitably belonging to another.
- § 2015. Trust property in hands of third person.
- § 2016. Fiduciary persons purchasing property with trust funds.
- § 2017. Renewal of leases by partners or fiduciary persons.
- § 2018. Money expended in improvements on estate.
- § 2019. Who may be trustee — Trustee de son tort.
- § 2020. Who may be cestui que trust.
- § 2021. Estate of trustee, and of cestui que trust.
- § 2022. Powers of trustee.
- § 2023. Powers of cestui que trust.
- § 2024. Acceptance of trust — Equity never wants a trustee.
- § 2025. Duties of trustee — To conform to directions of trust.
- § 2026. To account and keep accounts — Liabilities of trustees in general.
- § 2027. Not to delegate his authority.
- § 2028. As to care and diligence.
- § 2029. As to investments.
- § 2030. Not to deal with trust property to his own advantage — Not to take advantage of his fiduciary position.
- § 2031. Duties and liabilities of co-trustees.
- § 2032. Compensation of trustees.
- § 2033. Renunciation of trust.
- § 2034. Removal of trustees.
- § 2035. Acquiescence of cestui que trust — Release.
- § 2036. Lapse of time — Effect of on trust.

§ 1973. **Uses at Common Law.** — Originally at common law there were no estates in land which were not accompanied with the legal seisin and possession.¹ But in the reign of Edward III. a new species of estate unknown to the common law sprung into existence. The statutes of mortmain had prohibited lands from being given for religious purposes. In order to evade the stringency of these statutes, the device was invented of taking grants to third persons to the use of the religious corporation.² This

¹ 1 Greenl. Cruise, 294. ² Snell's Equity, 50.

method of holding lands was subsequently extended to cases other than religious gifts. The court of chancery fostered the new order of things, and without its assistance it would have been of little avail. The courts of law considered the person, and him only, to whom the land was given and the seisin delivered as the owner of the land, and looked no further. But the chancellor charged the conscience of the legal owner, and compelled him to carry out what he was equitably bound to do.¹ At first the court of chancery interfered no further than to compel payment of the rents and profits to the *cestui que use*;² but it was afterwards established as a rule that the *cestui que use* had a right to call on the feoffee for a conveyance of the land to himself, or to such person as he should select, and also to compel him to defend the title to the land against any adverse claimant.³

Shifting or secondary uses are such as take effect in derogation of some other estate, and are either limited expressly by the deed creating them, or are authorized to be created by some person named in the deed.⁴ Uses limited to arise on a future event, either certain or contingent, without any preceding estate to support them, are usually called springing uses.⁵ In all cases of springing uses the estate remains in the original owner till the use arises.⁶

§ 1974. **The Statute of Uses.**—By the English statute of uses passed in the year 1535 it was enacted that where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, the persons that have any such use, confidence, or trust (by which were meant the persons beneficially entitled) shall be deemed in lawful

¹ Snell's Equity, 50.

² Greenl. Cruise, 301.

³ Chudleigh's Case, 1 Rep. 121; Tudor's Lead. Cas. 252.

⁴ 4 Kent's Com. 296, 297; 1 Greenl. Cruise, 770.

⁵ 1 Greenl. Cruise, 768; Mutton's

Case, Dyer, 274 b; Moody, 517; Weale v. Lower, Pol. 65.

⁶ 1 Greenl. Cruise, 770; Shapleigh v. Pilsbury, 1 Me. 271; 4 Kent's Com. 298; Weale v. Lower, Pol. 65; Woodliff v. Drury, Cro. Eliz. 439; Mutton's Case, Dyer, 274 b; Moody, 517.

seisin and possession of the same lands and hereditaments for such estates as they have the use, trust, or confidence.¹ In Vermont, Ohio, and Tennessee the statute of uses is not effective or recognized. In Alabama, Arkansas, Connecticut, Delaware, Georgia,² Indiana, Maine, Iowa, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Rhode Island, South Carolina, and Texas the statute of uses has practically been re-enacted. In Massachusetts and Rhode Island the statute has been partially adopted, and if for any reason it is necessary, in order to give effect to the conveyance, the statute will be construed as operative. In Virginia, North Carolina, Florida, Illinois, Kentucky, and Mississippi the statute is enforced so as to transfer the possession to the use in cases of bargain and sale deeds, lease and re-lease, and deeds operating by way of covenant to stand seised to uses. As to uses or trusts raised in any other manner, they remain mere equitable estates as before the statute. In New York, and in Michigan³ and Wisconsin, which follow the New York rule, all uses and trusts are abolished, except where expressly authorized. In Louisiana and California (the real property law of which states comes from the civil, French, and Spanish law) the statute of uses has little or no influence.

§ 1975. Exceptions to Statute — Chattels or Chattel Interests.—The statute of uses is confined in its operation, both by its language and the construction which the courts have put upon its provisions, to freeholds. Leaseholds and chattel interests in either land or personal property were not affected by it, and the use in such case remained unexecuted as before the statute.⁴

¹ *Chapman v. Glassell*, 13 Ala. 50; 13 Am. Dec. 717; *Ioor v. Hodges*, 48 Am. Dec. 41; *Ware v. Richardson*, 3 Md. 505; 56 Am. Dec. 762.

² *Knorr v. Raymond*, 73 Ga. 749.

³ *Loring v. Palmer*, 118 U. S. 321.

⁴ *Ramsay v. Marsh*, 2 McCord, 252; *Slevin v. Brown*, 32 Mo. 176.

§ 1976. **Use upon a Use.**—The construction given to the statute by the courts in another respect restricted in a great measure its operation; viz., the adoption of the rule that it did not extend to a use upon a use. Thus if A, the legal owner of the land, was directed to hold the land to the use of B, who was directed to hold it to the use of C, the statute would carry the land to B, at law, but carry it no further, however plainly the intention might appear that the use or benefit was really designed for C. The ultimate use in favor of C was “a use upon a use”; i. e., a second use upon or after a first use, which second use the statute, having (in the opinion of the courts of common law) exhausted itself over the first use in favor of B, could not reach.¹

§ 1977. **Active or Special Uses.**—The only uses to which the statute applied were passive uses;² for in regard to active uses, being uses which impose (as the name denotes) some active duties on the feoffee, e. g., to sell the land and divide the money, or to pay debts, or to preserve contingent remainders, or protect property for the sole and separate use of a married woman, or from the creditors of the *cestui que trust*,³ etc., the statute was not operative, and such use was not executed by it.⁴ Thus the following directions or duties imposed on the trustee have been held to make the use an active one, and hence

¹ *Cueman v. Broadnax*, 37 N. J. L. 508; *Hutchins v. Heywood*, 50 N. H. 496; *Croxall v. Shererd*, 5 Wall. 268; *Reed v. Gordon*, 35 Md. 183; *Durant v. Ritchie*, 4 Mason, 65; *Hurst v. McNeil*, 1 Wash. C. C. 70; *Ramsay v. Marsh*, 2 McCord, 252; 13 Am. Dec. 717; *Wilson v. Chester*, 1 McCord, 233.

² *Turley v. Marsengill*, 7 Lea, 353; *Phila. etc. Co.'s Appeal*, 93 Pa. St. 209; *Shallan's Estate*, 13 Phila. 374.

³ *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399. Whenever it is necessary for the accomplishment of any object of the creator of a trust that the legal estate should remain in the

trustee, then the trust is a special active one: *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351.

⁴ *Snell's Equity*, 58; *Mott v. Buxton*, 7 Ves. 201; *Wright v. Pearson*, 1 Edw. Ch. 125; *Norton v. Leonard*, 12 Pick. 152; *Wood v. Wood*, 5 Paige, 596; 28 Am. Dec. 451; *Striker v. Mott*, 2 Paige, 387; 22 Am. Dec. 646; *Meecham v. Steele*, 93 Ill. 135; *Manice v. Manice*, 43 N. Y. 203; *Forsly's Appeal*, 106 Pa. St. 508; *Williams's Estate*, 13 Phila. 325; *Earp's Appeal*, 75 Pa. St. 119; *Ward v. Ward*, 16 Abb. N. C. 253; *Dodson v. Ball*, 60 Pa. St. 492; 100 Am. Dec. 586.

not within the statute, viz.: To pay over the rents or income;¹ to lease the property, collect rents, etc.;² to apply rents to the maintenance of the beneficiary,³ or in making repairs;⁴ to invest the proceeds or principal, or apply the income of the estate;⁵ to dispose of the estate by sale;⁶ to sell or mortgage for the payment of debts, legacies, or annuities, or to purchase other lands to be settled to particular uses;⁷ to raise a certain sum of money for some prescribed purpose from the income of the estate;⁸ to exercise control over the estate for the purpose of preserving contingent remainders;⁹ or to protect the estate for a given time, or until the death of some person, or until division;¹⁰ where A conveys land to B, to be by B afterwards reconveyed to him;¹¹ that a certain share shall be retained in the hands of trustees, and the income alone appropriated to the *cestui's* support;¹² a bequest of income to A for the support of his family;¹³ "or if my trustee shall see proper, he shall give my two children part of the principal sum."¹⁴

But the rule is otherwise where the direction is to "per-

¹ *Barker v. Greenwood*, 4 Mees. & W. 429; *Leggett v. Perkins*, 2 N. Y. 297; *McCosker v. Brady*, 1 Barb. Ch. 575; *Barnett's Appeal*, 46 Pa. St. 392; 86 Am. Dec. 503; *Deibert's Appeal*, 78 Pa. St. 296; *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575; *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351; *Hubery v. Harding*, 10 Lea, 392.

² *Kellogg v. Hale*, 108 Ill. 164.

³ *Sylvester v. Wilson*, 2 Term Rep. 444; *Doe v. Edlin*, 4 Ad. & E. 582; *Doe v. Ironmonger*, 3 East, 533; *Vail v. Vail*, 4 Paige, 317; *Gerard Ins. Co. v. Chambers*, 46 Pa. St. 485; *Porter v. Doby*, 2 Rich. Eq. 52.

⁴ *Shapland v. Smith*, 1 Bro. C. C. 75; *Tierney v. Moody*, 3 Bing. 3; *Brown v. Ramsden*, 3 Moore, 612.

⁵ *Exeter v. Odiorne*, 1 N. H. 232; *Ashhurst v. Given*, 5 Watts & S. 323; *Vaux v. Parke*, 7 Watts & S. 19; *Nickell v. Handly*, 10 Gratt. 336.

⁶ *Bagshaw v. Spencer*, 1 Ves. 143; *Wood v. Mather*, 38 Barb. 473.

⁷ *Doe v. Ewart*, 7 Ad. & E. 636; *Curtis v. Price*, 12 Ves. 89; *Bagshaw v. Spencer*, 1 Ves. 142; *Spence v. Spence*, 12 Com. B., N. S., 199; *Smith v. Smith*, 11 Com. B., N. S., 121; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390; *Vaux v. Parke*, 7 Watts & S. 19.

⁸ *Stanley v. Leonard*, 1 Edw. Ch. 87; *Wright v. Pearson*, 1 Edw. Ch. 110.

⁹ *Vanderheyden v. Crandall*, 2 Denio, 9; *Barker v. Crandall*, 4 Mees. & W. 431; *Biscoe v. Perkins*, 1 Ves. & B. 485.

¹⁰ *Williams v. McConico*, 36 Ala. 22; *Nelson v. Davis*, 35 Ind. 474; *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575; *Posey v. Cook*, 1 Hill (S. C.), 413; *McNish v. Guerard*, 4 Strob. Eq. 66.

¹¹ *Hearst v. Pugot*, 44 Cal. 230.

¹² *Cooper v. Cooper*, 36 N. J. Eq. 121.

¹³ *Phelps v. Phelps*, 143 Mass. 570.

¹⁴ *Deibert's Appeal*, 78 Pa. St. 296.

mit and suffer" the beneficiary to occupy the estate or receive the rents;¹ or where the words are, "I appoint A B trustee for C D," without more;² or if the only duty of the trustee is to convey at a future day.³

§ 1978. **Married Women.**—The law favoring trusts for married women, if an estate be given in trust for a married woman for her sole and separate use, or the like, or to permit and suffer a married woman to receive rents to her separate use, the trustees will take the legal estate, and it will not, as in other cases, be executed in the beneficiary.⁴ In Pennsylvania it is held that an express trust for the separate use of a woman, even where active duties are given to the trustee, so that the trust is really active, cannot be created unless she is already married, or unless it is made in contemplation of her marriage.⁵

§ 1979. **Trusts Defined—Express Trusts—How Created.**—A trust is a beneficial interest in or a beneficial ownership of real or personal property unattended with the legal ownership thereof.⁶ It is a use not executed by the statute of uses.⁷ Therefore an express trust may be always created where the use is not executed by the statute as shown in the previous sections; e. g., where a use is limited upon a use; where the use is active; where it concerns the property of a married woman; where the

¹ *Right v. Smith*, 12 East, 455; *Witham v. Brower*, 63 Ill. 158.

² *Bowman v. Long*, 26 Ga. 142.

³ *Adams v. Guerard*, 29 Ga. 651; 76 Am. Dec. 624. But see *Sprague v. Sprague*, 13 R. I. 701.

⁴ *Robinson v. Grey*, 9 East, 1; *Hartton v. Harton*, 7 Term Rep. 652; *Neville v. Saunders*, 1 Vern. 415; *Ayer v. Ayer*, 16 Pick. 330; *Richardson v. Stodder*, 100 Mass. 528; *Rodgers v. Ludlow*, 3 Sand. Ch. 104; *Franciscus v. Reigart*, 4 Watts, 109; *Williamson v. Holmes*, 4 Rich. Eq. 475; *Eschator v. Smith*, 4 McCord, 452; *Steady v. Rice*, 27 Pa. St. 75; 67 Am. Dec. 447.

⁵ *Lancaster v. Dolan*, 1 Rawle, 231;

18 Am. Dec. 625; *Smith v. Starr*, 3 Whart. 63; 31 Am. Dec. 498; *Hammersley v. Smith*, 4 Whart. 129; *McBride v. Smyth*, 54 Pa. St. 250; *Yarnall's Appeal*, 70 Pa. St. 339; *Ogden's Appeal*, 70 Pa. St. 501; *Wells v. McCall*, 64 Pa. St. 207; *Springer v. Arundell*, 64 Pa. St. 218; 7 Phila. 224; *Credlant's Estate*, 7 Phila. 58; *Kay v. Scates*, 37 Pa. St. 31; 78 Am. Dec. 399; *Snyder's Appeal*, 92 Pa. St. 504; *In re Sterling*, 11 Phila. 150.

⁶ *Wallace v. Wainwright*, 87 Pa. St. 263.

⁷ 1 Greenl. Cruise, 351; 1 Spence's Eq. Jur., 494; *Ware v. Richardson*, 3 Md. 505; 56 Am. Dec. 762.

estate granted is less than a freehold. To constitute a trust, it is enough if the owner of property conveys it to another in trust, or if the owner of personalty unequivocally declares, either orally or in writing, that he holds it *in præsentî* in trust for another.¹ It may be created by any writing which shows that a trust is intended, without using any particular form of words;² nor need the declaration be contemporary with the conveyance.³ The transfer of the subject-matter of the trust is not necessary if the owner thereof makes himself trustee; but if he selects a third party, the subject of the trust must be transferred to him in such mode as will be effectual to pass the legal title.⁴ It is not necessary that the declaration be made to the *cestui que trust*;⁵ though made without his knowledge, it may be affirmed by him, and its execution enforced.⁶ His assent will be presumed when it is for his benefit;⁷ nor is it essential to the creation of a trust that there should be notice to or an acceptance or declaration of the trusts by the trustees in whom the legal interest is vested.⁸ Notice is, however, necessary to protect the *cestui que trust* as against third parties.⁹ Where property is given to a trustee for the use of the beneficiary, the assent of the latter to receive it on the condition of the grant must be signified either to the grantor or to the trustee.¹⁰ No trust can be founded upon an interest derived from an illegal contract, or in contravention of the law;¹¹ and trusts cannot, generally, be created with a

¹ Ray v. Simmons, 11 R. I. 266; 23 Am. Rep. 447; Kingsbury v. Burnside, 58 Ill. 310; 11 Am. Rep. 67.

² Brown v. Combs, 29 N. J. L. 36; De Laurance v. De Boon, 48 Cal. 581; Ferry v. Larble, 31 N. J. Eq. 566; McLaurie v. Partlow, 53 Ill. 340; Fisher v. Fields, 10 Johns. 475; Raybold v. Raybold, 20 Pa. St. 318.

³ Malin v. Malin, 1 Wend. 625.

⁴ Dickerson's Appeal, 115 Pa. St. 198; 2 Am. St. Rep. 547.

⁵ Barrell v. Joy, 16 Mass. 221.

⁶ Weston v. Banker, 12 Johns. 276; 7 Am. Dec. 319; Woodbury v. Bow-

man, 14 Me. 154; 31 Am. Dec. 40; Shepherd v. McEvers, 4 Johns. Ch. 136; 8 Am. Dec. 561.

⁷ Stockard v. Stockard, 7 Humph. 303; 46 Am. Dec. 79.

⁸ Snell's Equity, 77; Field v. Arrow-smith, 3 Humph. 442; 39 Am. Dec. 185; Stone v. King, 7 R. I. 358; 84 Am. Dec. 557.

⁹ Donaldson v. Donaldson, Kay, 719.

¹⁰ Lockhart v. Wyatt, 10 Ala. 231; 44 Am. Dec. 481.

¹¹ Bettinger v. Bridenbacker, 69 Barb. 395.

provision that the equitable estate of the *cestui* shall not be alienated.¹ A trust illegal in part will be carried into effect, so far as consistent with the rules of law, where the legal part of the trust can be separated from what is illegal.² Although both real and personal property are given upon the same trusts by the same clause of a will, the trusts as to each description of property are severable, and the validity of one does not depend upon that of the other.³ After a trust has been created and accepted, the creator cannot revoke it without the consent of the beneficiaries, unless such power was reserved,⁴ or unless the beneficiary has dissented from the trust.⁵ Courts of equity have exclusive jurisdiction over trusts.⁶ And the jurisdiction in equity over trusts is not ousted by the fact that there exists an adequate remedy at law.⁷ A court of equity alone can compel a trustee to execute or surrender his trust.⁸

ILLUSTRATIONS.—P. purchased certain lands and paid cash therefor. T. agreed to purchase one fourth of these lands and pay cash therefor. P. gave T. a receipt in full as for cash, which receipt was duly witnessed, and set forth that one fourth of the purchase-money had been furnished by T. Instead of cash, P. took from T. a due bill, payable at once. *Held*, that the receipt was a sufficient declaration of trust: *Roberts's Appeal*, 92 Pa. St. 407. A deposited in a savings bank money to the account of himself as trustee for his wife's granddaughter, and informed her and others thereof. He afterwards withdrew the money. *Held*, that a trust was created by the deposit: *Mabie v. Bailey*, 95 N. Y. 206; *Willis v. Smyth*, 91 N. Y. 297.

¹ *Hardenburgh v. Blair*, 30 N. J. Eq. 42. A perpetual trust for a particular purpose, and with no power of alienation in the trustees, leaves no power of alienation in any one else, and is invalid: *Newark Methodist Episcopal Church v. Clark*, 41 Mich. 730.

² *Lorillard v. Coster*, 5 Paige, 172.

³ *Knox v. Jones*, 47 N. Y. 389.

⁴ *Hellman v. McWilliams*, 70 Cal. 449; *Massey v. Huntington*, 118 Ill. 80; *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547.

⁵ *Stockard v. Stockard*, 7 Humph. 303; 46 Am. Dec. 79.

⁶ *Coates v. Woodworth*, 13 Ill. 654; *Callis v. Ridout*, 7 Gill & J. 1; *McCartney v. Bostwick*, 32 N. Y. 53; *Blue v. Patterson*, 1 Dev. & B. Eq. 457; *Thompson v. Peake*, 7 Rich. 353.

⁷ *Hubbard v. United States Mortgage Co.*, 14 Ill. App. 40; *First Cong. Church v. Trustees*, 23 Pick. 148; *McCrea v. Purmort*, 16 Wend. 460; *New York Ins. Co. v. Roulet*, 24 Wend. 505.

⁸ *Guphill v. Isbell*, 1 Bail. 230; 19 Am. Dec. 675.

§ 1980. **The Statute of Frauds.**—Section 7 of the statute of frauds requires all declarations or creations of trusts in real estate, or grants or assignments thereof, to be manifested and proved by some writing, signed by the party creating the trust, or by his last will, in writing. To this there are two exceptions, viz., trusts arising or resulting from any conveyance of lands or tenements by implication or construction of law,¹ and trusts transferred or extinguished by act or operation of law.² This statute is in force in most of the states.³ Therefore, evidence of the creation or transfer of a trust must all be in writing, so as not to necessitate a resort to parol evidence, even to connect different writings together,⁴ except in those states where this provision of the statute of frauds has not been enacted.⁵ No particular form of declaration is prescribed, nor is it necessary that it should be by deed; and a trust may be shown to exist by a letter, note, or memorandum in writing.⁶ Where a trust is clearly and fully established by written evidence, parol evidence is not admissible to rebut it; but where the written evidence

¹ *Enos v. Hunter*, 9 Ill. 211; *Faringer v. Ramsay*, 4 Md. Ch. 33; *Kelly v. Mills*, 41 Miss. 267; *Cloud v. Ivie*, 28 Mo. 578; *Farrington v. Barr*, 36 N. H. 86; *Jackson v. Matsdorf*, 11 Johns. 91; 6 Am. Dec. 355; *Malin v. Malin*, 1 Wend. 625; *Slaymaker v. St. John*, 5 Watts, 27.

² *Caple v. McCollum*, 27 Ala. 461; *Cook v. Kennerly*, 12 Ala. 42; *McGuire v. Ramsey*, 9 Ark. 518; *Dean v. Dean*, 6 Conn. 285; *Peabody v. Tarbell*, 2 Cush. 226; *Hanff v. Howard*, 3 Jones Eq. 440; *James v. Fulcro*, 5 Tex. 512; 55 Am. Dec. 743; *Leakey v. Gunter*, 25 Tex. 400.

³ See 1 Stimson's Statute Law, sec. 1710; *Irwin v. Ivers*, 7 Ind. 308; 63 Am. Dec. 421; *Ratliff v. Ellis*, 2 Iowa, 59; 63 Am. Dec. 471.

⁴ *Rutledge v. Smith*, 1 McCord, 119; *Arms v. Ashley*, 4 Pick. 71; *Abeel v. Radcliff*, 13 Johns. 297; 7 Am. Dec. 377; *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256; *Jackson v. Miller*, 6

Wend. 228; 21 Am. Dec. 316; *McElderry v. Shepley*, 2 Md. 25; 56 Am. Dec. 703; *Sturtevant v. Sturtevant*, 20 N. Y. 39; 75 Am. Dec. 371; *Preston v. Castner*, 104 Ill. 262; *Barr v. O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242.

⁵ *Miller v. Thatcher*, 9 Tex. 482; 60 Am. Dec. 172; *Foy v. Foy*, 2 Hayw. (N. C.) 131; *James v. Fulcro*, 5 Tex. 512; 55 Am. Dec. 743; *Anding v. Davis*, 38 Miss. 574; 77 Am. Dec. 658.

⁶ *Morse v. Morse*, 85 N. Y. 53; *Kingsbury v. Burnside*, 58 Ill. 310; 11 Am. Rep. 67; *Fisher v. Fields*, 10 Johns. 495; *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256; *Tracy v. Tracy*, 3 Bradf. 57; *Throop v. Hatch*, 3 Abb. Pr. 23; *Scituate v. Hanover*, 16 Pick. 222; *Norman v. Burnett*, 25 Miss. 183; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Wright v. Douglass*, 7 N. Y. 564; *Johnson v. Deloney*, 35 Tex. 42; *Loring v. Palmer*, 118 U. S. 321; *More v. Pickett*, 62 Ill. 158.

is vague and ambiguous, parol evidence may be admitted to rebut the presumption.¹ A verbal trust partially performed will be enforced in equity.² Because a trust is created by parol contract, it does not follow that it may not be enforced in equity. But if it is afterwards admitted, and if the statute is not relied on as a defense, a specific performance will be decreed.³ Secret trusts and confidences created for the purpose of defrauding creditors may be proved by parol.⁴

§ 1981. **Executed and Executory Trusts.**—A trust is either executed or executory. A trust is executed when no act is necessary to be done in order to give effect to it, the trust being finally declared by the instrument creating it. A trust is executory when there is a mere direction to convey upon certain trusts, and the instrument containing the direction to convey does not of itself, *proprio vigore*, effect the conveyance which it directs.⁵ In the case of executed trusts, a court of equity will construe technical words as courts of law do. Equity will follow the law in such case.⁶ In the case of executory trusts, equity does not always follow the strict legal rules of construction. "In cases of executory trusts,—that is, where the trusts remain to be executed in the sense of perfect limitation above explained,—a court of equity will not

¹ Steere v. Steere, 5 Johns. Ch. 1; 9 Am. Dec. 256.

² Robbins v. Robbins, 89 N. Y. 251.

³ Flagg v. Mann, 2 Sum. 486.

⁴ Hills v. Eliot, 12 Mass. 26; 7 Am. Dec. 26.

⁵ Cushing v. Blake, 30 N. J. Eq. 689; Tillinghast v. Coggeshall, 7 R. I. 383; Moore v. Shultz, 13 Pa. St. 98; 53 Am. Dec. 446; Nicoll v. Ogden, 29 Ill. 323; 81 Am. Dec. 311; Keyes v. Carleton, 141 Mass. 45; 55 Am. Rep. 446. "All trusts are in a sense executory, because there is always something to be done. But that is not the sense which a court of equity puts upon the term 'executory trust.' A court of

equity, in considering an executory trust as distinguished from a trust executing itself, or executed trust, distinguishes the two in this manner: has the testator been what is called, and very properly called, his own conveyancer? Or has he, on the other hand, left it to the court to make out from general expressions what his intention is? If he has so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates, then the trust is executed; but otherwise it is executory": Egerton v. Brownlow, 4 H. L. Cas. 260.

⁶ Snell's Equity, 62; Cushing v. Blake, 30 N. J. Eq. 689.

invariably construe the technical expressions in the document declaring the trust with legal strictness, but will occasionally execute the trust, and if necessary, mold them according to the intention of the creator of the trusts, even if that intention should be contrary to the strict legal effect of the language he has used. But if no such contrary intention can be collected, either from the instrument itself or from the nature of the case, a court of equity is bound to construe, and always does construe, the technical terms used in the instrument in strict accordance with their legal meaning."¹

§ 1982. **Voluntary Trusts—When Enforceable.**—Voluntary trusts, i. e., trusts without a consideration to support them, will be binding in equity, where the trust has been completely constituted or declared.² So also where the donor, being both the legal and equitable owner of the property, declares himself a trustee for the donee.³ But a trust is not created by a written acknowledgment by one party that another is entitled to certain property.⁴ And where the donor has not made or intended to make any declaration of trust, but has attempted to make a complete legal conveyance or assignment, and has failed to do so, the donee cannot have relief in equity to perfect the gift.⁵ Where the intention was to transfer property, and not to declare a trust, the courts will not perfect an

¹ Snell's Equity, 63; *Cushing v. Blake*, 30 N. J. Eq. 689.

² *Pomeroy's Eq. Jur.*, sec. 997; *Ellison v. Ellison*, 1 Eq. Lead. Cas. 382; *Wadsworth v. Wendell*, 5 Johns. Ch. 224; *Dennison v. Goehring*, 7 Pa. St. 175; 47 Am. Dec. 505; *Lane v. Ewing*, 31 Mo. 75; 77 Am. Dec. 632; *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 358; *Baker v. Evans*, Winst. Eq. 109; 86 Am. Dec. 456; *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609; *Tanner v. Skinner*, 11 Bush, 120; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Reilly v. Whipple*, 2 S. C. 277; *Badgely*

v. Voltram, 68 Ill. 25; 18 Am. Rep. 541; *Cressman's Appeal*, 42 Pa. St. 147; 82 Am. Dec. 498.

³ *Ex parte Pye*, 18 Ves. 140.

⁴ *Thompson v. Branch*, Meigs, 390; 33 Am. Dec. 153.

⁵ *Antrobus v. Smith*, 12 Ves. 39; *Edwards v. Jones*, 1 Mylne & C. 226; *Lane v. Ewing*, 31 Mo. 75; 77 Am. Dec. 632; *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 358; *Bartlett v. Remington*, 59 N. H. 364; *In re Webb*, 49 Cal. 542; *Lloyd v. Brooks*, 34 Md. 27; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137.

imperfect transfer by treating it as a trust.¹ Where the donor has only an equitable interest in the property assigned, if he directs trustees to hold it in trust for the donee, it is good and irrevocable, even though voluntary.²

A deed of trust is irrevocable by the grantor, although voluntary; nor is there an implied right of revocation, although the grantor reserve to himself a life interest.³ Absolute and unconditional trusts created by a father in favor of his children, designating himself trustee, cannot be revoked by the donor undertaking to annex thereto special terms and qualifications not expressed in the original declarations of trust.⁴ But a voluntary settlement of property for the settlor's benefit for life, then to strangers to the consideration, is revocable at the settlor's pleasure, although no power of revocation has been reserved.⁵ So a trust deed for the payment of debts and the support of the grantor, not founded upon any consideration paid by the trustee, is a deed for the personal convenience of the grantor, and revocable.⁶

§ 1983. Deeds of Trust to Secure Debts. — A deed of trust to secure a debt is a conveyance made to a trustee as security for a debt owing to the beneficiary, a creditor of the grantor, and conditioned to be void on payment of the debt by a certain time; but if not paid, the trustee is authorized to sell the land, and apply the proceeds in extinguishing the debt, paying over any surplus to the grantor.⁷ Such conveyances are practically mortgages, and they are so regarded, and have come into general use in the place of mortgages in many of the states.⁸ There

¹ Turner, L. J., in *Milroy v. Lord*, L. R. 4 Eq. 562; *Clark v. Lott*, 11 Ill. 105.

² *Pomeroy's Eq. Jur.*, sec. 999; *Bell v. Curelon*, 2 Mylne & K. 503.

³ *Fellows's Appeal*, 93 Pa. St. 470.

⁴ *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547.

⁵ *Rick's Appeal*, 105 Pa. St. 528.

⁶ *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159.

⁷ *Pomeroy's Eq. Jur.*, sec. 995; *Taylor v. Stearns*, 18 Gratt. 244; *Leavitt v. Palmer*, 3 N. Y. 19; 51 Am. Dec. 333; *Brannock v. Brannock*, 10 Ired. 428; 51 Am. Dec. 398.

⁸ *Pomeroy's Eq. Jur.*, sec. 995.

is a distinction between unconditional deeds of trust to raise funds for the payment of debts, and deeds of trust in the nature of mortgages; the former being absolute and indefeasible conveyances for the purpose of the trust, the latter being merely conveyances by way of security, subject to a condition of defeasance.¹ A deed conveying an absolute title to trustees on a declared trust will not be construed as a mortgage, and there will be no equity of redemption from sale thereunder.² Where an instrument made to secure an indebtedness provides that a trustee shall sell the property mentioned in the instrument, and out of the proceeds pay the debt, it is a trust deed, and a judicial foreclosure and sale is not necessary.³ But in Iowa, Kansas, and Kentucky deeds of trust must be judicially foreclosed.⁴

Under authority to give or take mortgages, deeds of trust are included.⁵ So statutes as to the recording of mortgages embrace deeds of trust,⁶ and so do those relating to powers of sale in mortgages.⁷ An assignment of a deed of trust is not permitted unless it is authorized by the deed.⁸ A deed of trust cannot be released by a part of the grantees only.⁹ On payment of the debt secured by the deed, the trust does not become extinguished, and the title revert to the grantor, until something in the nature of or what is equivalent to a reconveyance has been made.¹⁰ But an actual conveyance is not essential, satisfaction entered on the margin, as in the case of a mort-

¹ *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637; *Turner v. Watkins*, 31 Ark. 429; *Soutter v. Miller*, 15 Fla. 625; *Newman v. Samuels*, 17 Iowa, 528. *Contra*, *State Bank v. Chapelle*, 40 Mich. 447.

² *Gillespie v. Smith*, 29 Ill. 473; 81 Am. Dec. 328.

³ *Koch v. Briggs*, 14 Cal. 256; 73 Am. Dec. 652.

⁴ *Ingle v. Culbertson*, 43 Iowa, 265; *Samuel v. Holliday*, 1 Woolw. 400; *Campbell v. Johnston*, 4 Dana, 178.

⁵ *Wright v. Bundy*, 11 Ind. 398; *Turner v. Watkins*, 31 Ark. 429; *Bennett v. Union Bank*, 5 Humph. 612.

⁶ *Woodruff v. Robb*, 19 Ohio, 212; *Magee v. Carpenter*, 4 Ala. 469; *Crosby v. Huston*, 1 Tex. 203; *Schultze v. Houfes*, 96 Ill. 335.

⁷ *Pomeroy's Eq. Jur.*, sec. 995.

⁸ *Whittelsey v. Hughes*, 39 Mo. 13; *McKnight v. Wimer*, 38 Mo. 132.

⁹ *Barcroft v. Lessieur*, 48 Mo. 418.

¹⁰ *Wolfe v. Dowell*, 13 Smedes & M. 103; 51 Am. Dec. 147.

gage, being sufficient.¹ The transfer of the debt transfers the trust property conveyed to secure it, as the debt is the principal thing, and the trust deed only an incident.²

In sales by a trustee the rule *caveat emptor* applies.³ A purchaser under a trust deed containing a power of sale is chargeable with notice of defects and irregularities attending the sale, and their effect cannot be evaded by him. He is bound to know whether proper notice was given by the trustee of the sale, and whether the sale was made at a time and in the manner required by the power contained in the deed of trust.⁴ But as to remote and subsequent purchasers, the rule is different. If there is nothing upon the face of a deed from the trustee in a deed of trust to the purchaser showing that the sale was made in violation of or contrary to the power contained in the deed of trust, a subsequent purchaser who has no notice in fact of any irregularity in the sale by the trustee will be protected as an innocent purchaser.⁵ Equity will enjoin a sale of land under a deed of trust given to secure the payment of the purchase-money, when there is a cloud over the title thereto arising from an alleged defect therein which would occasion a sacrifice at such sale.⁶

§ 1984. Powers, Rights, and Liabilities of Trustee.—The trustee need not formally accept the trust.⁷ He has no power to impose new terms or conditions, or to alter or vary those contained in the deed.⁸ Where he is authorized to sell for cash upon default of payment of the money for which the deed was given, he

¹ *Ingle v. Culbertson*, 43 Iowa, 265; *Smith v. Doe*, 26 Miss. 291; *Crosby v. Huston*, 1 Tex. 203.

² *Mitchell v. Ladew*, 36 Mo. 526; 88 Am. Dec. 157.

³ *Sutton v. Sutton*, 7 Gratt. 234; 56 Am. Dec. 109.

⁴ *Gunnell v. Cockerill*, 79 Ill. 79.

⁵ *Id.*; *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 271.

⁶ *Faulkner v. Davis*, 18 Gratt. 651; 98 Am. Dec. 698.

⁷ *Leffler v. Armstrong*, 4 Iowa, 482; 68 Am. Dec. 672; *Crocker v. Lowenthal*, 83 Ill. 579; *Furman v. Fisher*, 4 Cold. 626; 94 Am. Dec. 210. Nor need the beneficiary, as his assent will be presumed, where it is for his benefit: *Wiswall v. Ross*, 4 Port. 321; *Shemer v. Lofton*, 26 Ala. 703.

⁸ *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 271.

cannot sell on credit.¹ In making sale of property under the deed he must follow its directions.² The trustee's sale under the power contained in the trust deed should be made with precision to render it valid. The notice of sale should contain such facts as would reasonably apprise the public of the place, time, and terms of sale and the property to be sold. But mere omissions and inaccuracies in these respects not calculated to mislead, and working no prejudice, will not be regarded.³ But where the power has not been executed in accordance with essential conditions, the sale and the deed will be held to be utterly void at law and in equity.⁴ A sale of land under trust will not be set aside in equity because the property was not sold in separate parcels, except upon the ground of fraud, or that some one may have been prejudiced by the sale *en masse*.⁵ He cannot delegate his trust.⁶ He must be present during an entire sale made under his deed of trust, or the sale will be void.⁷ He is not bound to accept every bid. He is clothed with a certain discretion, and will be sustained by the court in refusing a bid the acceptance of which would frustrate the very purpose of the sale, even though such bid was nominally the highest.⁸ A bid made under a misapprehension of the terms of payment may, by consent of the trustee, be retracted without invalidating the sale, though the sale be finally effected on a lower bid.⁹ The trustee must, upon adjourning a sale, give a new notice for the same length of time required in the first instance.¹⁰ He

¹ Cassell v. Ross, 33 Ill. 244; 85 Am. Dec. 271.

² Young v. Van Benthuyssen, 30 Tex. 762; Reeside v. Peter, 33 Md. 129.

³ Powers v. Kueckhoff, 41 Mo. 425; 97 Am. Dec. 281; Chesley v. Chesley, 49 Mo. 540; Stephenson v. January, 49 Mo. 465.

⁴ Powers v. Kueckhoff, 41 Mo. 425; 97 Am. Dec. 281.

⁵ Gillespie v. Smith, 29 Ill. 473; 81 Am. Dec. 329.

⁶ Graham v. King, 50 Mo. 22.

⁷ Brickenkamp v. Rees, 69 Mo. 426. But he may employ an agent to perform mechanical parts of sale, or to act as auctioneer, or to advertise: Gillespie v. Smith, 29 Ill. 473; 81 Am. Dec. 329.

⁸ Gray v. Veirs, 33 Md. 18.

⁹ Waterman v. Spaulding, 51 Ill. 425.

¹⁰ Griffin v. Marine Co., 52 Ill. 130; Judge v. Birge, 47 Mo. 544.

is liable in damages for a failure to use reasonable diligence in his trust, or for abusing his discretionary powers.¹ But his misconduct cannot affect creditors, or impair their rights under the deed.² Having accepted, the trustee cannot renounce without the consent of the beneficiary or the court,³ and he may be compelled to discharge the duties of the trust.⁴

§ 1985. **Assignments for Benefit of Creditors—In General.**—A class of active trusts common in the United States are voluntary and general assignments by failing debtors of their property to trustees to pay the creditors of the assignor and debtor.⁵ At common law a debtor may assign his property to his creditors to be distributed among them ratably, or he may convey it to a trustee to be applied to the payment of all his debts.⁶ A deed of trust for the equal benefit of all the creditors is not void because it was intended to prevent certain creditors from getting priority by obtaining judgment liens.⁷ But in New Jersey it must be made strictly in accordance with the statute allowing assignments for the benefit of creditors.⁸ An assignment for the benefit of creditors must be made by an insolvent.⁹ A general assignment may be effected by more than one instrument. The conveyance to the assignee and the declaration of trusts may be by separate instruments.¹⁰ So a second assignment may be made to cure an illegal provision in a former one.¹¹ A

¹ *Sherwood v. Saxton*, 63 Mo. 78; *State v. Griffith*, 63 Mo. 545; *Ballinger v. Boland*, 87 Ill. 513; 29 Am. Rep. 69.

² *Carter v. Neal*, 24 Ga. 346; 71 Am. Dec. 136.

³ *Drane v. Gunter*, 19 Ala. 731.

⁴ *Sargent v. Howe*, 21 Ill. 148.

⁵ *Pomeroy's Eq. Jur.*, sec. 993.

⁶ *Corning v. White*, 2 Paige, 567; 22 Am. Dec. 659; *Malcolm v. Hall*, 9 Gill, 177; 52 Am. Dec. 688; *Wilson v. Pearson*, 20 Ill. 81. It is not essential that the debtor shall have been at the time unable to pay his debts: *Savey v.*

Spaulding, 8 Iowa, 239; 74 Am. Dec. 300; *Ogden v. Peters*, 21 N. Y. 23; 78 Am. Dec. 122.

⁷ *Hoffman v. Mackall*, 5 Ohio St. 142; 64 Am. Dec. 637; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Bentz v. Rockey*, 69 Pa. St. 77.

⁸ *Knight v. Packer*, 12 N. J. Eq. 214; 72 Am. Dec. 388.

⁹ *Keen v. Preston*, 24 Ind. 395.

¹⁰ *Norton v. Kearney*, 10 Wis. 443; *Van Horn v. Smith*, 59 Iowa, 142; *Van Vleet v. Slauson*, 45 Barb. 317.

¹¹ *Morrison v. Shuster*, 1 Mackey, 190.

corporation as well as an individual may make an assignment.¹ One partner has no implied authority to make a general assignment of the partnership property for the benefit of partnership creditors, unless the other partners are absent at the time, or incapable for some reason of being consulted;² or the other partner has absconded,³ or is dead;⁴ or where no partnership exists, but one is held out as a partner to a few individuals.⁵ An assignment under the Texas statute may be made by the assignor's agent.⁶ A valid assignment for the benefit of creditors is not rendered invalid because of the neglect of the assignee to discharge his duties.⁷ A partial assignment for the benefit of creditors is valid.⁸ Where a mortgagor assigns all his property for the benefit of his creditors, the mortgagee may share equally with unsecured creditors.⁹ But beneficiaries who repudiate and renounce it are entitled to nothing by virtue of the conveyance.¹⁰

§ 1986. **Void when Intended to Hinder, Delay, or Defraud Creditors.**—But assignments are void which are made with intent to hinder or delay creditors in obtaining payment of their claims.¹¹ All provisions which

¹ *Covert v. Rogers*, 38 Mich. 363; 31 Am. Rep. 319; *McCallie v. Walton*, 37 Ga. 611; 95 Am. Dec. 369; *Albany etc. Co. v. Agr. Works*, 76 Ga. 135; 2 Am. St. Rep. 26; *Stockley v. Fisher*, 75 Mo. 498.

² *Loeb v. Pierpont*, 58 Iowa, 469; 43 Am. Rep. 122; *Rumery v. McColluck*, 54 Wis. 565; *Anderson v. Tompkins*, 1 Brock. 456; *Harrison v. Stern*, 5 Cranch, 289; *Robinson v. Crowder*, 4 McCord, 519; 17 Am. Dec. 762; *Deekard v. Case*, 5 Watts, 22; 30 Am. Dec. 287; *Coleman v. Darling*, 66 Wis. 155; 57 Am. Rep. 253; *Lowenstein v. Flaurand*, 18 N. Y. 399. But the other partners may ratify it: *Coleman v. Darling*, 66 Wis. 155; 57 Am. Rep. 253.

³ *Sullivan v. Smith*, 15 Neb. 476; 48 Am. Rep. 354; *Welles v. March*, 30 N. Y. 344.

⁴ *Salsbury v. Ellison*, 7 Col. 167; 49 Am. Rep. 347; *Haynes v. Brooks*, 42 Hun, 528.

⁵ *Whitworth v. Patterson*, 6 Lea, 119; *Windham v. Petty*, 62 Tex. 490; *Adee v. Cornell*, 25 Hun, 78.

⁶ *McKee v. Coffin*, 66 Tex. 304.

⁷ *Eicks v. Copeland*, 53 Tex. 581; 37 Am. Rep. 760.

⁸ *Campbell v. Colorado Coal and Iron Co.*, 9 Col. 60.

⁹ *In re Bates*, 118 Ill. 524; 59 Am. Rep. 383.

¹⁰ *Furman v. Fisher*, 4 Cold. 626; 94 Am. Dec. 211.

¹¹ *Knight v. Packer*, 12 N. J. Eq. 214; 72 Am. Dec. 388; *Livermore v. McNair*, 34 N. J. Eq. 484; *Fairchild v. Hunt*, 14 N. J. Eq. 372; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Ogden v. Peters*, 21 N. Y. 23; 78 Am. Dec. 122. As where it stipulates for a delay of four and a half years before a sale can be had: *Young v. Hail*, 6 Lea, 175.

are intended to delay or hinder creditors by postponing the realization of the assets avoid the assignment;¹ as, for example, a provision postponing the distribution until after the debtor's death.² To make the transfer fraudulent, there must be an intent to defraud, and an act which will actually defraud creditors by hindering, delaying, or preventing the collection of their claims.³ The fraudulent intent must be alleged in the petition and proved on the trial.⁴ The intent must be to defraud, hinder, or delay creditors, or it does not fall within the statute of 13 Eliz., c. 5. An intent to deceive or defraud or hinder or delay the public is not within the statute.⁵ The term "hinder and delay" relates not only to time, but has reference also to the interposition of obstacles with the fraudulent intent to hinder and delay.⁶ An assignment fraudulently intended is not cured by the good faith of the beneficiaries and assignee.⁷ So the grantors may do what they consider perfectly fair to prevent a sacrifice, with the intention of paying all their debts ultimately, or may be actuated purely by motives of compassion or affection, and yet be guilty of gross fraud upon creditors,⁸ if the tendency of such acts and its legitimate effect are to defeat or delay creditors.⁹ A fraudulent intent will not be inferred where an honest intent can be inferred from the language used.¹⁰ By statute in some states preferences are void when made within a certain specified period, where

¹ *Curtis v. Leavitt*, 17 Barb. 316; 15 N. Y. 205; *Arthur v. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; *Knight v. Packer*, 12 N. J. Eq. 214; 72 Am. Dec. 388.

² *Young v. Heermans*, 66 N. Y. 382.

³ *Baldwin v. O'Laughlin*, Minn., 1881.

⁴ *Thompson v. Jackson*, 3 Rand. 504; 15 Am. Dec. 721; *Burr v. Clement*, 9 Col. 1.

⁵ *Griffin v. Stoddard*, 12 Ala. 783; *McCallie v. Walton*, 37 Ga. 611; 95 Am. Dec. 369; *Hefner v. Metcalf*, 1 Head, 577.

⁶ *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 288; *Hefner v. Metcalf*, 1 Head, 577.

⁷ *Craft v. Bloom*, 59 Miss. 69; 42 Am. Rep. 351; *Savage v. Knight*, 92 N. C. 493; 54 Am. Rep. 423. But see *Kruse v. Prindle*, 8 Or. 158.

⁸ *Flood v. Prettyman*, 24 Ill. 597; *Briggs v. Mitchell*, 60 Barb. 288; *Gardner Bank v. Wheaton*, 8 Me. 373.

⁹ *Enders v. Swayne*, 8 Dana, 103.

¹⁰ *Nye v. Van Huse*, 6 Mich. 329; 74 Am. Dec. 690; *Palmer v. Mason*, 42 Mich. 150.

the creditor has "reasonable cause to believe the debtor to be insolvent."

§ 1987. Giving Preferences to Certain Creditors.—

Unless prohibited by statute, voluntary general assignments by failing debtors for the benefit of their creditors, even where certain individuals or classes among them are favored or preferred, are valid.¹ But in some states such preferences are void, sometimes by judicial decision, sometimes by statute;² or though the assignment is not

¹ Pomeroy's Eq. Jur., sec. 994; Wilkes v. Ferris, 5 Johns. 335; 4 Am. Dec. 364; Mackie v. Cairns, 5 Cow. 547; 15 Am. Dec. 477; Williams v. Buzzard, 11 Ark. 718; Cox v. Fraley, 27 Ark. 20; Bates v. Coe, 10 Conn. 280; Wheaton v. Neville, 19 Cal. 41; Thornton v. Tandy, 39 Tex. 544; Morse v. Sloan, 13 Vt. 296; Tompkins v. Wheeler, 16 Pet. 106; Giddings v. Sears, 115 Mass. 505; Hill v. Bowman, 35 Mich. 191; Kuykendall v. McDonald, 15 Mo. 416; 57 Am. Dec. 212; Henderson v. Henderson, 55 Mo. 534; Milburn v. Beach, 14 Mo. 104; 55 Am. Dec. 91; Bull v. Harris, 18 B. Mon. 195; Hopkins v. Beebe, 26 Pa. St. 85; Covanhoven v. Hart, 21 Pa. St. 495; Born v. Shaw, 29 Pa. St. 288; 72 Am. Dec. 633; Funk v. Staats, 24 Ill. 632; Sheed v. Bank, 32 Vt. 709; Waddams v. Humphrey, 22 Ill. 661; Buffum v. Green, 5 N. H. 71; 20 Am. Dec. 562; Somerville v. Horton, 4 Yerg. 541; 26 Am. Dec. 242; Niolon v. Douglas, 2 Hill Eq. 443; 30 Am. Dec. 368; Hull v. Jeffrey, 8 Ohio, 390; Grover v. Wakeman, 11 Wend. 187; 25 Am. Dec. 624; Corning v. White, 2 Paige, 586; 22 Am. Dec. 661; Webb v. Peele, 7 Pick. 247; 19 Am. Dec. 284; Deaver v. Savage, 3 Mo. 252; 25 Am. Dec. 437; Skipwith v. Cunningham, 8 Leigh, 271; 31 Am. Dec. 642; Hempstead v. Johnson, 18 Ark. 123; 65 Am. Dec. 458; York Bank v. Carter, 38 Pa. St. 446; 80 Am. Dec. 494; Wilmer's Appeal, 45 Pa. St. 462; Cuenet v. Lahmer, 16 Kan. 527; Strauss v. Rose, 59 Md. 525; Ring v. Ring, 12 Mo. App. 88; Barnard v. Life Ins. Co., 4 Mackey, 63; Estes v. Gunter, 122 U. S. 450; Burr v. Clement, 9 Col. 1; Haynes v. Brooks, 17 Abb. N. C. 152;

Redpath v. Trutweiler, 108 Ind. 248. A partnership assignment may prefer individual debts: Nye v. Van Huse, 6 Mich. 329; 74 Am. Dec. 690. An assignment by a partnership is not invalid because preference over other partnership debts is given to debts not originally contracted by the firm, but which they subsequently, for a good consideration, agreed to pay: Turner v. Jaycox, 40 N. Y. 470. An assignment with preferences is not void because made in anticipation of the immediate passage of a law prohibiting such an assignment: Bates v. Simmons, 62 Wis. 69. A statute authorizing an attachment, where "the debtor has assigned or disposed of . . . his property . . . with intent to defraud his creditors, or give an unfair preference to some of them," does not forbid a preference made *bona fide* and with no intent to benefit himself: Fitzpatrick v. Flannagan, 106 U. S. 648.

² Crawford v. Taylor, 6 Gill & J. 323; 26 Am. Dec. 579; Widgery v. Haskell, 5 Mass. 144; 4 Am. Dec. 41; Varnum v. Camp, 13 N. J. L. 326; 25 Am. Dec. 476; Garretson v. Brown, 26 N. J. L. 425; Moore v. Bonnell, 31 N. J. L. 90; Hurd v. Silsby, 10 N. H. 108; 34 Am. Dec. 142; Pringle v. Rhame, 10 Rich. 72; 67 Am. Dec. 569; Perry Trust Co. v. Foster, 58 Ala. 502; 29 Am. Rep. 779; Wharton v. Clements, 3 Dill. 209; Newman v. Mining Co., 57 Mich. 97; Austin v. Morris, 23 S. C. 393; McKee v. Scobie, 80 Ky. 124; Webb v. Armistead, 26 Fed. Rep. 70; Hahn v. Salmon, 20 Fed. Rep. 801; Winner v. Hoyt, 66 Wis. 227; 57 Am. Rep. 257. In New York, an insolvent preferring a creditor is deprived of the benefit of

void,—the title passing to the trustee,—the provisions making preferences are void.¹ Where a trust is created for the benefit of creditors without giving the trustee any authority to give a preference, all creditors have a right to share ratably.²

ILLUSTRATIONS.—An insolvent debtor transferred all his property to one creditor by chattel mortgage, and later, by bill of sale and deed, for the benefit of such creditor and another, to the exclusion of all other creditors. *Held*, a violation of the statute forbidding preferential assignments: *Wilks v. Walker*, 22 S. C. 108; 53 Am. Rep. 706. An assignment provided that after the payment of certain claims “any other legal claims properly established” shall be paid “that I [the assignee] may see proper to pay and satisfy.” *Held*, void, as giving the assignee power to declare future preferences as to non-preferred creditors: *Moody v. Paschal*, 60 Tex. 483.

§ 1988. **Illegal Provisions in Assignments—Reserving Benefits to Debtor.**—And a transfer made with the design of securing some benefit or advantage therefrom to the debtor is fraudulent and illegal.³ Thus a condition that the debtor is to have control or possession of the property voids the conveyance,⁴ especially where it enables him to

the insolvent laws: *Egberts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236. In a general assignment by a partnership, a preference of an individual creditor of one partner invalidates the whole assignment: *Windmuller v. Dodge*, 67 How. Pr. 253; *O'Kayne v. Hyde*, 70 Cal. 6. An assignment containing a preference given in pursuance of a previous agreement is invalid: *Park Bank v. Whitmore*, 40 Hun, 499. An assignment is not necessarily void because, by mistake, a creditor has been preferred therein for more than is due him: *Brown v. Halsted*, 17 Abb. N. C. 197.

¹ *Bryan v. Brisbin*, 26 Mo. 423; 72 Am. Dec. 219.

² *Egberts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236.

³ *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477; *Banfield v. Whipple*, 14 Allen, 13; *Embry v. Clapp*, 38 Ga. 245; *Bentz v. Rockey*, 69 Pa. St. 71; *Somer-*

ville v. Horton, 4 Yerg. 541; 26 Am. Dec. 242; *Doyle v. Smith*, 1 Cold. 20; *Austin v. Bell*, 20 Johns. 442; 11 Am. Dec. 297; *Arthur v. Bank*, 9 Smedes & M. 394; 48 Am. Dec. 719; *Pettibone v. Stevens*, 15 Conn. 19; 38 Am. Dec. 57; *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 282; *Lawrence v. Norton*, 15 Fed. Rep. 853; *Kayser v. Heavenrich*, 5 Kan. 324; *Muller v. Norton*, 19 Fed. Rep. 719.

⁴ *Haydock v. Coope*, 53 N. Y. 69; *Anderson v. Fuller*, 1 McMull. Eq. 27; 36 Am. Dec. 290; *Place v. Langworthy*, 13 Wis. 629; 80 Am. Dec. 758 (citing *Brooks v. Wimer*, 20 Mo. 403; *Walter v. Wimer*, 24 Mo. 63; *Stanley v. Bunce*, 27 Mo. 269; *Billingsley v. Bunce*, 28 Mo. 547; *Davis v. Rawson*, 18 Mo. 396); *McCormick v. Atkinson*, 78 Va. 8; *Means v. Montgomery*, 23 Fed. Rep. 421; *Keovil v. Donaldson*, 20 Kan. 165; *Whallon v. Scott*, 10 Watts, 237.

make or withhold payment according as the creditors assent or refuse to assent to his terms.¹ So where the debtor reserves any portion of the property for his own or his family's benefit;² or stipulates for a continuance of the business for the benefit of the debtor;³ or provides for the return of any surplus to the assignor;⁴ or for the support of the grantor or his family;⁵ or reserves a power to revoke it.⁶

To be valid, the deed should show on its face that it conveys all the debtor's property.⁷ A reservation of property not conveyed does not vitiate the assignment; for it is still liable to creditors as if no assignment had been made.⁸ So the assignment is not avoided by the debtor's retaining property specified in the instrument as being assigned.⁹ Retaining possession of trust property by the debtor, when not inconsistent with the object of the trust, is not fraudulent;¹⁰ nor is a reservation of a surplus after paying the creditors;¹¹ nor a reservation of property exempt by law.¹²

§ 1989. Exacting Release from Creditor.—An assignment which provides that the assenting creditors must

¹ *Niolen v. Douglas*, 2 Hill Eq. 443; 30 Am. Dec. 368.

² *McClurg v. Lecky*, 3 Penr. & W. 83; 23 Am. Dec. 65; *Beck v. Burdett*, 1 Paige, 305; 19 Am. Dec. 436; *McAllister v. Marshall*, 6 Binn. 338; 6 Am. Dec. 458; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259; *Wilson's Accounts*, 4 Pa. St. 130; 45 Am. Dec. 701; *Truitt v. Caldwell*, 3 Minn. 364; 74 Am. Dec. 764; *Barning v. Sibley*, 3 Minn. 397; *Farrington v. Sexton*, 43 Mich. 454; *McCormick v. Atkinson*, 78 Va. 8; *Probst v. Welden*, 46 Ark. 405; *Hoopes v. Knell*, 31 Md. 550.

³ *Lowenstein v. Love*, 16 Lea, 658.

⁴ *Greeley v. Dixon*, 21 Fla. 413; 58 Am. Dec. 773; *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 643.

⁵ *Lawson v. Funk*, 108 Ill. 502; *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477.

⁶ *Reinchenbach v. Winkhaus*, 12 Daly, 525.

⁷ *Barnitz v. Rice*, 14 Md. 24; 74 Am. Dec. 513; *Citizens' Fire Ins. Co. v. Wallis*, 23 Md. 182.

⁸ *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 808; *McClurg v. Lecky*, 3 Penr. & W. 83; 23 Am. Dec. 64.

⁹ *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259.

¹⁰ *Somerville v. Horton*, 4 Yerg. 541; 26 Am. Dec. 242; *Farquharson v. McDonald*, 2 Heisk. 418; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 808.

¹¹ *Beck v. Burdett*, 1 Paige, 305; 19 Am. Dec. 436; *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637.

¹² *Richardson v. Marqueze*, 59 Miss. 80; 42 Am. Rep. 353; criticising *Sugg v. Tillman*, 2 Swan, 208; *Rainwater v. Stevens*, 15 Mo. App. 544; *Hartzler v. Tottle*, 85 Mo. 23; *Goll v. Hubbell*, 61 Wis. 293; *Madison Bank v. Hackett*, 61 Wis. 335; *Hildebrand v. Bowman*, 100 Pa. St. 580.

within a specified time release their whole debt, or be denied a share in the proceeds of the property assigned, is, in some states, void.¹ On the other hand, in other states, such assignments, if otherwise valid, and if the assignment is of all the debtor's property, are legal.² In some cases it is held that a condition in an assignment giving a preference to releasing over non-releasing creditors is not invalid.³ If the assignment requires a release, the creditor cannot give a conditional release.⁴

§ 1990. Other Provisions Held Illegal.—So the following provisions have been held to avoid the assignment, viz.: Authorizing the assignee to sell on credit;⁵ author-

¹ *Atkinson v. Jordan*, 5 Ohio, 293; 24 Am. Dec. 281; *Borden v. Sumner*, 4 Pick. 265; 16 Am. Dec. 338; *Hyslop v. Clark*, 14 Johns. 458; *Grover v. Wakeman*, 11 Wend. 187; 25 Am. Dec. 624; *Spaulding v. Strang*, 38 N. Y. 9; *Brown v. Knox*, 6 Mo. 302; *Drake v. Rogers*, 6 Mo. 317; *Wilde v. Rawlings*, 1 Head, 34; *Hafner v. Irwin*, 1 Ired. 201; *Hurd v. Silsby*, 10 N. H. 108; 34 Am. Dec. 142; *Bennett v. Ellison*, 23 Minn. 242; *Carlton v. Baldwin*, 22 Tex. 724; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Miller v. Conklin*, 17 Ga. 430; 63 Am. Dec. 248; *McBride v. Bohanan*, 50 Ga. 527; *Pearson v. Crosby*, 23 Me. 261; *Wheeler v. Evans*, 26 Me. 133; *Austin v. Bell*, 20 Johns. 442; 11 Am. Dec. 297; *Stewart v. Spenser*, 1 Curt. 165; *Graves v. Roy*, 13 La. 454; 33 Am. Dec. 568; *Goddard v. Hapgood*, 25 Vt. 351; 60 Am. Dec. 273; *Gadsden v. Carson*, 9 Rich. Eq. 252; 70 Am. Dec. 207; *Hubbard v. McNaughton*, 43 Mich. 220; 38 Am. Rep. 176; *Duggan v. Bliss*, 4 Col. 223; 34 Am. Rep. 80; *Greeley v. Dixon*, 21 Fla. 413; 58 Am. Rep. 673; *Francis v. Herz*, 55 Ga. 249; *Mayer v. Shields*, 59 Miss. 107; *Donohoe v. Fish*, 58 Tex. 164; *Ware v. Wanless*, 2 Wyo. 144.

² *Coakley v. Weil*, 47 Md. 277; *Dockray v. Dockray*, 2 R. I. 547; *Nightingale v. Harris*, 6 R. I. 321; *Le Prince v. Guillemot*, 1 Rich. Eq. 187; *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 642; *Kevna v.*

Branch, 1 Gratt. 274; *Gordon v. Cannon*, 18 Gratt. 387; *Clayton v. Johnson*, 36 Ark. 406; 38 Am. Rep. 40; *Dodd v. Martin*, 15 Fed. Rep. 338; *Clarke v. Figgins*, 27 W. Va. 613; *Lippincott v. Barker*, 2 Binn. 174; 4 Am. Dec. 433; *Pearpont v. Graham*, 1 Wash. C. C. 232; *Brashear v. West*, 7 Pet. 608; *Livingston v. Beel*, 3 Watts, 108; *Hennessey v. Bank*, 6 Watts & S. 300; *Thomas v. Jenks*, 5 Rawle, 221; *Lee's Appeal*, 9 Pa. St. 504; *Wilson's Accounts*, 4 Pa. St. 430; 45 Am. Dec. 701; *Green v. Friebar*, 3 Md. 11.

³ *Burrill on Assignments*, sec. 195; *Bump on Fraudulent Conveyances*, 428.

⁴ *Agnew v. Dorr*, 5 Whart. 131; 34 Am. Dec. 539; *Tyson v. Dorr*, 6 Whart. 262.

⁵ *Porter v. Williams*, 9 N. Y. 142; 59 Am. Dec. 519; *Nicholson v. Leavitt*, 6 N. Y. 510; 57 Am. Dec. 499; *D'Ivernois v. Leavitt*, 23 Barb. 63; *Jessup v. Hulse*, 29 Barb. 542; *Ruhl v. Phillips*, 2 Daly, 49; *Loeschigk v. Addison*, 19 Abb. Pr. 181; 42 N. Y. 429; *Potter v. Clark*, 12 How. Pr. 110; *Wilson v. Robertson*, 19 How. Pr. 351; 21 N. Y. 589; *Hutchinson v. Lord*, 1 Wis. 286; 60 Am. Dec. 381; *Keep v. Sanderson*, 2 Wis. 42; 60 Am. Dec. 404; 12 Wis. 362; *Billings v. Billings*, 2 Cal. 107; 56 Am. Dec. 319; *Carpenter v. Underwood*, 19 N. Y. 522; *Bens v. Shaughnessy*, 2 Utah, 492; *Gates v. Andrews*, 37 N. Y. 657; 97 Am. Dec.

izing the trustee to convert the assets into "money or available means";¹ that the trust property shall "be converted into cash, or otherwise disposed of to the best advantage";² that the trustee shall dispose of the property "gradually, and in the manner in which the assignor in his business has disposed of his merchandise,"³ or "in ordinary course of business";⁴ providing that, after the expiration of nine months for collection, the assignée should sell all choses in action belonging to the assignor;⁵ giving the trustee power to vary the trust, and to pay in full or in part, as he may think fit;⁶ authorizing the

765; *Richardson v. Rogers*, 45 Mich. 591. *Contra*, *Hoffman v. Mackall*, 5 Ohio St. 124; 64 Am. Dec. 637; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806; *Nealy v. Ambrose*, 21 Pick. 185; *Richardson v. Marquese*, 59 Miss. 80; 42 Am. Rep. 353.

¹ *Brigham v. Tillinghast*, 13 N. Y. 218.

² *Rapalee v. Stewart*, 27 N. Y. 318.

³ *Inloes v. Bank*, 11 Md. 173; 69 Am. Dec. 190.

⁴ *Truitt v. Caldwell*, 3 Minn. 364; 74 Am. Dec. 764.

⁵ *Richardson v. Stapleton*, 60 Miss. 97.

⁶ *Gazzam v. Poyntz*, 4 Ala. 374; 37 Am. Dec. 745; *McConnell v. Sherwood*, 61 How. Pr. 72; 84 N. Y. 531. See *Coque v. Weaver*, 84 N. Y. 386. In *Gazzam v. Poyntz*, it is said: "A deed of assignment, to be valid, must distinctly declare the uses; and one reserving to the grantor the right to declare them subsequently would be void. The reason of this is apparent. Whilst the debtor retains his property in his hands, subject to the legal pursuit of his creditors, he may compound with them and obtain an abatement of their claims. The parties meet on equal ground, and the creditor may either assent to the debtor's proposition or take his chance by suit. But if the debtor could, by an assignment, place his property beyond the reach of his creditors, by suit, and be at the same time permitted to compromise with them, or offer terms of compromise, the odds would be fearfully in

his favor. The making of an assignment with preferences is an admission on the part of the debtor of inability to pay all his debts, or at least renders such payment doubtful; and those who are placed in the class of those who are to be paid *pari passu*, the true meaning of which generally proves to be not to be paid at all, naturally feel alarmed for the safety of their debts; and if the debtor through his trustee, who is a person usually not very hostile to his interests, can appeal to their fears, and offer them the certainty of receiving a portion of their debt, instead of the doubtful provision made for them in the deed for any portion of it, he would be enabled to exercise a control over them which few could resist. Even the preference given to some of the creditors would be an illusion, and they would be merely placed on the preferred list to hold out inducements to those whose chance of payment, from the position assigned them, being doubtful, if not desperate, to abate something of their demands, and thus make it, in the language of the deed, 'advantageous to the interest of the party of the first part and his creditors that a compromise or settlement should be effected.' Such a provision, if tolerated, would enable a debtor to set his creditors at defiance, and compel them to bid against each other for his favors, and would be virtually vesting him with powers which no one would suppose he could in terms reserve to himself in the deed of assignment."

assignee to continue the business, and to invest funds in the completion of certain articles in course of manufacture;¹ authorizing partnership effects to be applied to individual debts of a partner;² that the assignee shall be liable only for gross negligence or willful misfeasance;³ providing for the payment of the assignee's services;⁴ providing that the estate be administered and closed up under the supervision of the creditors who assent;⁵ giving power to the trustees to carry on the business so long as they should deem best for the creditor's interests, to give new notes, indorsements, leases, and mortgages, their powers to cease when a majority of the creditors should so direct;⁶ providing that the schedule of creditors be annexed at some future time;⁷ not designating a time within which the creditors are to come in;⁸ unreasonably postponing the time of sale.⁹ Giving the assignee discretion to sell in violation of a statute is void.¹⁰ The deposit of an assignment after execution, to be held until further orders from the assignor, or until in the judgment of the depositary the interests of creditors are best served by filing, is a reservation of the power of revocation which renders the assignment void.¹¹

ILLUSTRATIONS.—An assignment for the benefit of creditors directed the trustee, "when he shall have realized cash from

¹ *Dunham v. Waterman*, 6 Abb. Pr. 369; 17 N. Y. 9; 72 Am. Dec. 406. *Contra*, *De Forest v. Bacon*, 2 Conn. 633; *Perry Ins. Co. v. Foster*, 58 Ala. 502; 29 Am. Rep. 779; *Kendall v. Carpet Co.*, 13 Conn. 383; *Cunningham v. Freeborn*, 11 Wend. 240; *Wood v. Marshall*, 22 Pick. 468.

² *Ruhl v. Phillips*, 2 Daly, 49; 48 N. Y. 125; *Schiele v. Healy*, 61 How. Pr. 73.

³ *Litchfield v. White*, 7 N. Y. 438; 57 Am. Dec. 534; *Metcalf v. Van Brunt*, 37 Barb. 627; *McIntyre v. Benson*, 20 Ill. 502; *August v. Seeskind*, 6 Cold. 166; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282.

⁴ *Jacobs v. Remsen*, 36 N. Y. 668.

⁵ *Collier v. Davis*, 47 Ark. 367; 58 Am. Rep. 758.

⁶ *Gardner v. Commercial Bank*, 13 R. I. 155.

⁷ *Kercheis v. Schloss*, 49 How. Pr. 284.

⁸ *Collier v. Davis*, 47 Ark. 367; 58 Am. Rep. 758.

⁹ *Harden v. Osborne*, 60 Ill. 103; *Mitchell v. Beal*, 8 Yerg. 134; 29 Am. Dec. 198. See *Rundskoff v. Guggenheim*, 3 Cold. 284; *Bennett v. Bank*, 5 Humph. 612. A provision allowing an unreasonable delay in winding up the estate does not avoid the assignment: *Wert v. Schneider*, 64 Tex. 327.

¹⁰ *Jaffray v. McGehee*, 107 U. S. 361; *Raleigh v. Griffith*, 37 Ark. 155; *Schoolfield v. Johnson*, 3 McCrary, 551.

¹¹ *Reichenbach v. Winkhaus*, 67 How. Pr. 512.

said assets, in such sums as he may deem proper, that he pay out the same *pro rata* to the said creditors by installments or dividends, or he may retain the same until all the assets are converted, then pay out the whole, and close up the entire matter at once." *Held*, not void: *Eicks v. Copeland*, 53 Tex. 581; 37 Am. Rep. 760. A general assignment for the benefit of creditors authorized the assignee to "collect the notes, accounts, and choses in action, and the taking a part of the whole when" the assignee "shall deem it expedient," also, "to compromise with the creditors . . . for all his debts and liabilities, . . . if in his opinion . . . it would be advantageous to the" assignor and the creditors. *Held*, that the first clause did not invalidate the assignment, but that the second did: *McConnell v. Sherwood*, 84 N. Y. 522; 38 Am. Rep. 537.

§ 1991. Circumstances Raising Presumption of Fraud.

—The following have been held circumstances raising a presumption of fraud or bad faith in making the assignment: Where the assignor introduces fictitious debts into his schedule;¹ or where, purporting to transfer all of the assignor's property, portions thereof are fraudulently omitted;² where an unreasonable amount of the debtor's property is assigned for the benefit of a certain portion of the creditors only;³ where to a single creditor a larger amount of property is conveyed than will satisfy his debt;⁴ where the debtor is employed as the agent of the trustee to manage the trust property;⁵ where the assignee selected is a known insolvent.⁶ In respect to the unauthorized retention of possession by the assignor, it has been held in Pennsylvania, Vermont, Illinois, and South Carolina that it is conclusive evidence of fraud.⁷ In

¹ *Talcott v. Hess*, 31 Hun, 282. But an assignment is not vitiated by mistake in computation, whereby, no fraud being intended, the indebtedness to certain creditors is stated as more than it actually is: *Barroilhet v. Fisch*, 63 Cal. 462.

² *Bagley v. Bowe*, 50 N. Y. Sup. Ct. 100. An omission from the schedule of a worthless item is no evidence of fraud; nor is an unintentional omission: *Shultz v. Hoagland*, 85 N. Y. 464; *Parsell v. Patterson*, 47 Mich. 505.

³ *Beck v. Burdett*, 1 Paige, 305; 19 Am. Dec. 436.

⁴ *Mitchell v. Beal*, 8 Yerg. 134; 29 Am. Dec. 108.

⁵ *Lum v. Wright*, 18 Tex. 317; 70 Am. Dec. 282. Employment of assignor as clerk by assignee held not evidence of fraud in *Savey v. Spaulding*, 8 Iowa, 237; 74 Am. Dec. 300.

⁶ *Reed v. Emery*, 8 Paige, 417; 35 Am. Dec. 720; *Connah v. Sedgwick*, 1 Barb. 214.

⁷ *Dawes v. Cope*, 4 Binn. 258; *Hall v. Parsons*, 17 Vt. 271; *Thornton v.*

Massachusetts, Connecticut, New York, Indiana, Arkansas, Maine, New Hampshire, New Jersey, Ohio, Mississippi, Kentucky, Tennessee, Virginia, Georgia, Texas, Missouri, Louisiana, Wisconsin, and Michigan it is only *prima facie* evidence of fraud.¹ And the rule is inferred from that respecting sales and mortgages. In New York the rule is statutory. In Virginia, Mississippi, North Carolina, Alabama, and Kentucky it is no evidence of fraud.² Where the retention is authorized by the instrument, and is consistent with its general nature and object, it has been held valid.³ The rule generally applies only to chattels.⁴

An assignment is not void for fraud because under its terms the assignee, if dishonest, might favor some creditors at the expense of other;⁵ or for uncertainty, if, in connection with the inventory afterwards filed, it can be made certain;⁶ or that an agreement existed between the debtor and creditor that the former would execute the assignment if at any time it became necessary for the latter's protection;⁷ or by the insertion in a deed of trust of a provision that the trustee shall employ the assignor at a fixed salary to help dispose of the property conveyed;⁸ or because it does not direct payment *pro rata*, if there is not enough to pay in full;⁹ or that the assignee purchased goods upon a credit that had not expired when he made a preferential assignment, and that he had no reasonable

Davenport, 1 Scam. 296; 9 Am. Dec. 358. But not where the retention is consistent with the deed: *Anderson v. Fuller*, 1 McMull. Eq. 27; 36 Am. Dec. 290.

¹ *Boyden v. Moore*, 11 Pick. 362; *Ingraham v. Wheeler*, 6 Conn. 279; *Caldwell v. Rose*, 1 Smith, 190; *Field v. Simes*, 7 Ark. 269; *Goodwin v. Kerr*, 80 Mo. 276.

² *Land v. Jeffries*, 5 Rand. 252; *Comstock v. Rayford*, 12 Smedes & M. 369; *Dewey v. Littlejohn*, 2 Ired. Eq. 495; *Vernon v. Morton*, 8 Dana, 247; *Ravi-*

sies v. Alston, 5 Ala. 297; *Armitage v. Rector*, 62 Miss. 600.

³ *Meeker v. Wilson*, 1 Gall. 423; *Bartlett v. Williams*, 1 Pick. 295; *Brooks v. Marbury*, 11 Wheat. 78; *Dawes v. Cope*, 4 Binn. 258; *Clow v. Woods*, 5 Serg. & R. 278; 9 Am. Dec. 346; *Land v. Jeffries*, 5 Rand. 252.

⁴ See *Burrill on Assignments*, c. 19.

⁵ *Brown v. McLean*, 5 Mackey, 559.

⁶ *Bates v. Simmons*, 62 Wis. 69.

⁷ *Anderson v. Lachs*, 59 Miss. 111.

⁸ *Frank v. Robinson*, 96 N. C. 28.

⁹ *Lindsay v. Guy*, 57 Wis. 200.

hope of being able to pay for them;¹ or that, before A's general assignment to B, A, at B's request, promised to render services which might be needed; or to A's then remarking to B that he expected the assignment would prove temporary only;² or that the grantor offered to compromise with his creditors after the execution of the assignment.³

§ 1992. **Provisions in Assignments Held Valid.**—The assignment is not void because it provides for the payment of a usurious debt;⁴ or for a debt barred by the statute of limitations;⁵ or by the insolvent laws;⁶ or for the payment of an attorney's fee.⁷ And the following clauses or provisions have been held not to avoid the assignment, viz.: That the assignee may appoint agents and attorneys to collect debts, with power to dismiss them;⁸ exempting the assignee from losses not due to his lack of fidelity;⁹ giving more time to foreign than to resident creditors to execute releases;¹⁰ forbidding the assignee to sell on credit;¹¹ authorizing the trustees to dispose of the property on such terms as they shall think best, and most for the interest of the parties concerned;¹² empow-

¹ Talcott v. Rosenthal, 22 Hun, 573.

² North River Bank v. Schumann, 63 How. Pr. 476.

³ Mattison v. Judd, 59 Miss. 99.

⁴ Merchants' Bank v. Commercial Warehouse Co., 49 N. Y. 643, note; Curtis v. Leavitt, 17 Barb. 350; Merritt v. Millard, 5 Bosw. 651; Yard v. New York etc. Co., 1 Flipp. 555; Berdan v. Sedgwick, 44 N. Y. 30. Or even prefers such a debt: Murray v. Judson, 9 N. Y. 73; 59 Am. Dec. 516.

⁵ Thompson v. Sickles, 46 Barb. 53.

⁶ Wilson v. Russell, 13 Md. 495; 71 Am. Dec. 645.

⁷ Hill v. Agnew, 12 Fed. Rep. 230; Iselm v. Dalrymple, 27 How. Pr. 137; Wooldridge v. Irving, 23 Fed. Rep. 676. *Contra*, Wolfsheimer v. Rivinus, 64 Md. 230; 54 Am. Rep. 769.

⁸ Hennessy v. Western Bank, 6 Watts & S. 300; 40 Am. Dec. 560.

⁹ Hennessy v. Western Bank, 6 Watts & S. 300; 40 Am. Dec. 560. *Contra*, Hutchinson v. Lord, 1 Wis. 286; 60 Am. Dec. 381.

¹⁰ Hennessy v. Western Bank, 6 Watts & S. 300; 40 Am. Dec. 560.

¹¹ Carpenter v. Underwood, 19 N. Y. 522; Grant v. Chapman, 38 N. Y. 294.

¹² Kellogg v. Slauson, 11 N. Y. 302; Townshend v. Stearns, 32 N. Y. 216; Hoffman v. Mackall, 5 Ohio St. 124; 64 Am. Dec. 637; Nye v. Van Husan, 6 Mich. 329; 74 Am. Dec. 690; Norton v. Kearney, 10 Wis. 450; Whipple v. Pope, 33 Ill. 336; Booth v. McNair, 14 Mich. 22; Jessup v. Hulse, 21 N. Y. 168; Mussey v. Noyes, 26 Vt. 462; Meeker v. Saunders, 6 Iowa, 68; Berry v. Hayden, 7 Iowa, 469; McCallie v. Walton, 37 Ga. 611; 95 Am. Dec. 369; Brahmstead v. McWhirter, 9 Neb. 6; 31 Am. Rep. 396; Richardson v. Mar-

ering the assignee, if necessary, to finish uncompleted buildings or work, making the expense a prior claim to the claims of creditors generally, such provision giving no power beyond that which the law would impose;¹ authorizing the assignee to appoint attorneys to assist in carrying out the purposes thereof, and to revoke the appointment at pleasure;² authorizing the assignee to sell at public or at private sale,³ or for such consideration in money or other things as he should deem sufficient;⁴

queze, 59 Miss. 80; 42 Am. Rep. 353; Lord v. Devendorf, 54 Wis. 491; 41 Am. Rep. 58; Wickham v. Green, 61 Miss. 463. *Contra*, Shufelt v. Abernethy, 12 N. Y. Leg. Obs. 175; Hutchinson v. Lord, 1 Wis. 286; 60 Am. Dec. 381; Keep v. Sanderson, 2 Wis. 42; 60 Am. Dec. 404; Jones v. Lyer, 52 Md. 211; 36 Am. Rep. 366; McCleery v. Allen, 7 Neb. 21; 29 Am. Rep. 377. In Lord v. Devendorf, 54 Wis. 491, 41 Am. Rep. 58, the conflicting Wisconsin cases are reviewed by the court as follows: "In our opinion the assignment is not void upon its face by reason of the following clause: 'Shall, with all convenient diligence, sell and dispose of the same at public or private sale, as he may deem most beneficial to the interests of the creditors of said party of the first part, and convert the same into money.' In Hutchinson v. Lord, 1 Wis. 294, 60 Am. Dec. 381, the particular words which rendered the assignment void were: 'In such manner, either at public or private sale, and upon such terms and for such prices, as to the said party of the second part shall seem advisable,' and those which further expressly exempted the assignee from all liability, 'while acting in good faith.' The court in that case put particular stress upon the words in Italics. In Keep v. Sanderson, 2 Wis. 42, the words which avoided the assignment were: 'To sell and dispose of the assigned property upon such terms and conditions as in their judgment may appear best and most to the interest of the parties concerned.' In Norton v. Kearney, 10 Wis. 443, it was held that 'an assignment in which the assignee is 'to dispose of the property to the best advantage, in his discretion,' is valid, and does

not imply an authority to sell on credit." Dixon, C. J., distinguishing that case from Hutchinson v. Lord, 1 Wis. 294, 60 Am. Dec. 381, and Keep v. Sanderson, 2 Wis. 42 said: 'We are of the opinion that the discretion here vested must be understood as a legal discretion; that is, a discretion to be exercised within the limits which the law fixes in such cases. There is ample room for the exercise of this discretion without transcending any rule of law.' The second case of Keep v. Sanderson, 12 Wis. 352, turned upon the same language as the first, and was decided the same way, and the opinion clearly distinguishes it from Norton v. Kearney, 10 Wis. 443. The above cases are harmonized by Ryan, C. J., in his dissenting opinion in Bound v. R. R. Co., 45 Wis. 574, 575. In the case before us there is nothing said about 'terms and conditions,' nor 'prices,' but the assignee is required to sell and dispose of the property, and convert the same into money with all convenient diligence, and such sale and disposition is to be 'at public or private sale,' as he may deem most beneficial. The thing thus left to his discretion is, whether he will sell at public or private sale, and not whether he will sell for cash, or on credit or otherwise."

¹ Watson v. Butcher, 37 Hun, 391; Robbins v. Butcher, 104 N. Y. 575.

² Langdon v. Thompson, 25 Minn. 509.

³ Lord v. Devendorf, 54 Wis. 491; 41 Am. Rep. 58; Hoffman v. Mackall, 5 Ohio St. 124; 64 Am. Dec. 637; Kyle v. Harveys, 25 W. Va. 716; 52 Am. Rep. 235.

⁴ Bagley v. Bowe, 105 N. Y. 171; 59 Am. Rep. 488.

directing the assignee to convert the property into cash as soon as it can be conveniently and properly done;¹ giving the assignee authority to compound or compromise debts owing to the assignor;² or expressly waiving a bond from the trustee, "having the fullest confidence in his capacity and integrity";³ or by omitting to insert therein a provision that wages due to the assignor's employees shall be preferred as the statute required;⁴ or reserving to the assignor the surplus remaining after the payment of the debts provided for.⁵

A firm, in making an assignment of its effects and the effects of each individual to a trustee for the benefit of their creditors, may stipulate in the deed of assignment that whatever remains after the firm creditors are paid shall be applied to the payment of their individual debts by the assignee.⁶ The assignment cannot be avoided by acts or omissions of the debtor after it has been executed and possession taken of the property;⁷ nor by the acts of the assignee or his servants under similar circumstances.⁸

ILLUSTRATIONS.—An assignment for the benefit of creditors of a plantation, with the personal property used in cultivating crops upon it, was made in the spring, and provided that the sale should be delayed until the 1st of December next, and that meantime the property should remain in possession of the assignors, to be used in cultivating the crops, and that the crops when gathered should be delivered to the assignee, and distributed under the assignment. Such property could not advantageously be rented in the spring, and would be sacrificed by a sale then, or if stripped of the personal property. *Held*, valid: *Perry Insurance and Trust Co. v. Foster*, 58 Ala. 502; 29 Am. Rep. 779. The assignment was of all of one's estate, part of

¹ *Ogden v. Peters*, 21 N. Y. 23; 78 Am. Dec. 122; *Mattison v. Judd*, 59 Mich. 99.

² *Bagley v. Bowe*, 105 N. Y. 171; 59 Am. Rep. 488; *McConnell v. Sherwood*, 19 Hun, 519; *Ginther v. Richmond*, 18 Hun, 232.

³ *Whitworth v. Patterson*, 6 Lea, 119.

⁴ *Richardson v. Thurber*, 104 N. Y. 606; *Johnston v. Kelly*, 43 Hun, 379.

⁵ *Anderson v. Lachs*, 59 Miss. 111; *In re Mann*, 32 Minn. 60; *Livinger v. Raymond*, 9 Neb. 40.

⁶ *Crook v. Rindskopf*, 105 N. Y. 476.

⁷ *Gates v. Andrews*, 37 N. Y. 659; 97 Am. Dec. 764; *Hardman v. Bowen*, 39 N. Y. 200; 5 Abb. Pr. 337.

⁸ *Savery v. Spaulding*, 8 Iowa, 239; 74 Am. Dec. 300; *Juliand v. Rathbone*, 39 Barb. 100.

which was under mortgage. It empowered the assignee to sell at public or private sale, to buy in the premises, to resell without responsibility for loss, and also to mortgage, and from the proceeds to pay, first, the creditors secured by mortgage, and then the other creditors of the assignor. *Held*, valid: *Waldron v. Wilcox*, 13 R. I. 518.

§ 1993. **Secret Agreement with Creditor.**—A secret agreement by a debtor to pay a certain creditor in full as an inducement to his consenting to the assignment is void.¹

§ 1994. **Who may Avoid Fraudulent Assignment.**—An assignment may be valid between the parties, though void as to non-assenting creditors.² A common-law assignment can be attacked only by the assignor's creditors;³ and an assignee cannot show that the assignment was executed in fraud of creditors.⁴ But a fraudulent assignment for the benefit of creditors may be avoided by any creditor who has not assented thereto, whether mentioned therein or not.⁵ But an assenting creditor cannot attack such an assignment.⁶ And it cannot be questioned by a creditor who has received a dividend under it;⁷ or by a

¹ *Ramsdell v. Edgerton*, 8 Met. 227; 41 Am. Dec. 503. See *post*, Title Contracts—Illegal Contracts.

² *Mackie v. Cairns*, 5 Cow. 547; 15 Am. Dec. 477; *Lemay v. Bibeau*, 2 Minn. 291; *Schuman v. Peddicord*, 50 Md. 560. The statute only makes such deeds void as to creditors and *bona fide* purchasers. If the grantor is stopped by the deed, those who subsequently become his grantees are in like manner stopped: *Finley v. McConnell*, 60 Ill. 259.

³ *Butler v. Wendell*, 57 Mich. 62; 58 Am. Rep. 329.

⁴ *In re Ward*, 10 Daly, 66.

⁵ *Leitch v. Hollister*, 4 N. Y. 215; *Hone v. Henriquez*, 13 Wend. 240; 27 Am. Dec. 204; *Teat v. Roth*, 39 Ark. 66. The legality of an assignment for the benefit of creditors under the statutes of Minnesota may be contested by a creditor in a federal court, he having otherwise a standing there: *Adler v. Ecker*, 1 McCrary, 256.

⁶ *Rapalee v. Stewart*, 27 N. Y. 314; *Wheeler v. Whedon*, 9 How. Pr. 301; *Powers v. Gradon*, 10 Bosw. 648; *Spalding v. Strang*, 38 N. Y. 15; *Fox v. Clark*, Walk. Ch. 542; *Frierson v. Branch*, 30 Ark. 453. But he may purchase a claim from another creditor who has not assented, and as to that claim may impeach the assignment: *Johnson v. Rogers*, 15 Nat. Bank. Reg. 1. A creditor who assents to his debtor's assignment cannot maintain a trustee process inconsistent therewith: *Jones v. Tilton*, 139 Mass. 418. A creditor who becomes a party to an assignment which contemplates an extension of the time of payment cannot repudiate the assignment and proceed against the property because the extension notes are not paid when they mature: *Greene v. Mfg. Co.*, 52 Conn. 330.

⁷ *Adlum v. Yard*, 1 Rawle, 163; 18 Am. Dec. 608; *Ingram v. Hartz*, 48 Pa. St. 381; *Lemay v. Bibeau*, 2 Minn. 291; *Scott v. Edes*, 3 Minn. 377; *Rich-*

creditor who has entered into an agreement with the assignee regarding the management of the property.¹ When an assignment for the benefit of creditors is made, under the statute, the rights of creditors attach, and no act of the assignor or assignee, or of both, before or after, will authorize a creditor to treat the assignment as void, or will justify his attaching the assigned property to the prejudice of other creditors.² That it fails to include all the property of the debtor will not entitle a creditor to have the deed declared void for his benefit.³

§ 1995. **Assent of Creditors.**—The assent of creditors to a deed of trust for their benefit is not necessary to vest the legal title in the trustee.⁴ An assignment for the benefit of such creditors as shall sign it is not void by the omission of such creditors to sign.⁵ The assignment is operative as to all those consenting to the deed,⁶ and the consent of all is not essential to make the deed valid.⁷ The assent of creditors to a deed providing that the debtor shall be allowed to retain the property to a certain day is essential to its validity.⁸ It is not essential to the validity of an assignment for the benefit of creditors that it should be signed by the assignees, if they accept it.⁹ Creditors may become parties to an assignment in other ways than by actually signing the instrument; as by coming in under it for the purpose of obtaining a dividend.¹⁰

ards v. White, 7 Minn. 349; Burrows v. Alter, 7 Mo. 424; Lanahan v. Latrobe, 7 Md. 268; Farmers' Bank v. Thomas, 37 Md. 258; Loney v. Bailey, 45 Md. 450; Rapalee v. Stewart, 27 N. Y. 311. *Aliter*, where he did not know the fraudulent nature of the assignment when he received the dividend: Van Nest v. Yoe, 1 Sand. Ch. 16.

¹ Rapalee v. Stewart, 27 N. Y. 310.

² Leon v. Welborne, 58 Tex. 157.

³ Eicks v. Copeland, 53 Tex. 581; 37 Am. Rep. 760.

⁴ Tennant v. Stoney, 1 Rich. Eq. 222; 44 Am. Dec. 213; Hempstead v.

Johnston, 18 Ark. 123; 65 Am. Dec. 458.

⁵ Gale v. Mensing, 20 Mo. 461; 64 Am. Dec. 197.

⁶ Towne v. Rublee, 51 Vt. 62. Assignments for the benefit of creditors, the only consideration for which is the acceptance of the trust, are of no effect against creditors who do not assent to them: Swan v. Crafts, 124 Mass. 453.

⁷ Ashley v. Robinson, 29 Ala. 112; 65 Am. Dec. 387.

⁸ Lockhart v. Wyatt, 10 Ala. 231; 44 Am. Dec. 481.

⁹ Morrison v. Shuster, 1 Mackey, 190.

¹⁰ Wallace v. Cumming, 27 La. Ann. 631.

And although an assignment evidently contemplates that it shall be signed by creditors, they may accept its provisions without signing it.¹ If the assignment is beneficial to the creditors, they are presumed, if they do not reject it, to assent to it,² but not when its intent was to defraud creditors.³ A creditor cannot claim under an assignment for the benefit of creditors, after resisting the assignment, by setting up a claim antagonistic to it.⁴ A creditor who has assented to an assignment cannot attach without attacking the assignment for fraud or otherwise.⁵ A general assignment with no provision for a release by creditors accepting its benefits does not preclude such creditors from collecting, by suit, balances remaining due upon these claims after they had received their dividends from the assignee.⁶

§ 1996. What Property Passes to Assignee — His Rights.—An assignee for the benefit of creditors takes the property subject to all equities against the debtor.⁷ He takes only such rights as the assignor had and could claim at the time of the assignment.⁸ Neither he nor the creditors whom he represents are purchasers for valuable consideration without notice as against prior equitable

¹ *Windham v. Patty*, 62 Tex. 490.

² *Bump on Assignments*, 326; *Hempstead v. Johnston*, 18 Ark. 123; 65 Am. Dec. 458; *Washington v. Ryan*, 5 Baxt. 622. *Contra*, *Naylor v. Fosdick*, 4 Day, 146; 4 Am. Dec. 187; *Widgery v. Haskell*, 5 Mass. 144; 4 Am. Dec. 41.

³ *Ashley v. Robinson*, 29 Ala. 112; 65 Am. Dec. 387; *Baldwin v. Peet*, 22 Tex. 708; 75 Am. Dec. 806.

⁴ *Ewing v. Cook*, 85 Tenn. 332; 4 Am. St. Rep. 765.

⁵ *Elling v. Kirkpatrick*, 6 Mont. 119.

⁶ *Sanborn v. Norton*, 59 Tex. 308.

⁷ *Slade v. Van Vechten*, 11 Paige, 23; *In re Howe*, 1 Paige, 124; 19 Am. Dec. 395; *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146; *Williams v. Winsor*, 12 R. I. 9.

⁸ *Ludwig v. Higley*, 5 Pa. St. 138; *Wilson's Accounts*, 4 Pa. St. 430; 45 Am. Dec. 701; *Crain v. Paine*, 4 Cush. 483; 50 Am. Dec. 807; *Hawks v. Pritzleff*, 51 Wis. 163; *In re Fulton*, 51 Pa. St. 211; *Millhiser v. Erdman*, 98 N. C. 292; 2 Am. St. Rep. 334; *Gannon v. Holman*, 11 Or. 284. Under the Iowa statute the deed vests in the assignee all of the assignor's property, including that fraudulently conveyed by him on the same day: *Schaller v. Wright*, 70 Iowa, 667. The execution of the deed of assignment and the delivery of the property to the assignee vest the title in him as against one claiming under an execution levied afterwards, but before the recording of the deed: *Myer v. Fales*, 12 Ill. App. 351.

liens.¹ Mortgages, confessions of judgment, etc., made shortly before but not in contemplation of a general assignment, are not a part of the assignment.² Whether they were in contemplation of the assignment or not is a question of fact for the jury.³ It has been held that a prior mortgage executed in contemplation of a general assignment was a part of the assignment, when the mortgagee was the same person as the assignee;⁴ but not when the mortgagee and assignee were different persons.⁵ An assignment for the benefit of creditors will pass the title to the assignor's lands in another state, if his creditors in the latter state are not prejudiced thereby.⁶ So it will pass a demand pending by suit against railroad companies for damages to the assignor's foundry, and to an incorporeal hereditament appurtenant to it;⁷ or the equity of redemption in premises; or chattels mortgaged by the debtor;⁸ or a right to a lease.⁹ Unpaid subscriptions pass to an assignee under an assignment by a corporation.¹⁰ The right of the assignee to sue for the recovery of a claim embraced in the assignment is not affected by an

¹ *Dobbins v. Walton*, 37 Ga. 614; 95 Am. Dec. 371; *Schieffelin v. Hawkins*, 1 Daly, 289; *Maas v. Goodman*, 2 Hilt. 281; *Van Heusen v. Radcliff*, 17 N. Y. 580; 72 Am. Dec. 480; *Jones v. Graham*, 77 N. Y. 629; *Wiles v. Clapp*, 41 Barb. 647; *Thompson v. Van Vechten*, 27 Barb. 581; *Bridgford v. Barbour*, 80 Ky. 529.

² *Van Patten v. Marks*, 55 Iowa, 224; *Gage v. Parry*, 69 Iowa, 605; *Perry v. Vezina*, 63 Iowa, 25; *Farwell v. Jones*, 63 Iowa, 316; *Baldwin v. Freyendall*, 10 Ill. App. 106; *Lyon v. McIlvaine*, 24 Iowa, 9.

³ *Mower v. Hunford*, 6 Minn. 535, 545; *Coots v. Chamberlain*, 39 Mich. 565.

⁴ *Perry v. Holden*, 22 Pick. 269.

⁵ *Fairbanks v. Haynes*, 23 Pick. 323; *Housatonic and Lee Banks v. Martin*, 1 Met. 294.

⁶ *Wharton's Conflict of Laws*, sec. 275; *Hutcheson v. Peshine*, 16 N. J. Eq. 167; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Osborn v. Adams*, 18 Pick. 245;

Rogers v. Allen, 3 Ohio, 488; *Richardson v. Rogers*, 45 Mich. 591; *Danner v. Brewer*, 69 Ala. 191; *Gardner v. Com. Bank*, 95 Ill. 298; *Bethell v. Bethell*, 54 Ind. 428; 23 Am. Rep. 650; *Moore v. Church*, 70 Iowa, 208; 59 Am. Rep. 439; *Moseby v. Burrow*, 52 Tex. 396; *Day v. Postal Tel. Co.*, 66 Md. 354; *Heyer v. Alexander*, 108 Ill. 385; *Gregg v. Sloan*, 76 Va. 497; *Chaffee v. New York Bank*, 71 Me. 514; 36 Am. Rep. 345; *Sortwell v. Jewett*, 9 Ohio, 180; *Thurston v. Rosenfield*, 42 Mo. 474; 97 Am. Dec. 351; *First National Bank v. Hughes*, 10 Mo. App. 7; criticised in *Zuppan v. Bauer*, 17 Mo. App. 683; *Green v. Green*, 12 Neb. 117.

⁷ *Mayo v. Snead*, 78 Ky. 634.

⁸ *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163; *Gamble v. Ferguson*, 58 Iowa, 414.

⁹ *Crouse v. Frothingham*, 97 N. Y. 105.

¹⁰ *Shockley v. Fisher*, 75 Mo. 498; *Boeppler v. Menown*, 17 Mo. App. 447; *Eppright v. Nickerson*, 78 Mo. 482.

arrangement under which the assignors are permitted to deal with the assigned claims and property to a certain extent, or by the fact that in the end, through the settlement of his trust, the collection may inure to his personal benefit.¹

§ 1997. What Property does not Pass to Assignee.—An assignment for the benefit of creditors does not transfer property held by the assignors as factors, nor the proceeds of the sales of such goods;² nor a right of action founded on a tort;³ nor a fund acquired by the debtor subsequent to his assignment;⁴ nor a claim of the assignor for services rendered after the date of the assignment, but before its delivery;⁵ nor property which has been put into the debtor's hands for the fraudulent purpose of giving him a false credit, although some of his creditors may have been defrauded thereby.⁶ A debtor of the assignor whose debt falls due after the assignment may set off a debt due from the assignor at the time.⁷ The assignee cannot impeach a previous chattel mortgage because it was not filed.⁸ An assignee for the benefit of creditors may set aside fraudulent conveyances made by his assignor before the assignment; in some states, however, the power is statutory.⁹ And in other states it is held that the assignee represents simply the assignor, in

¹ *Stanford v. Lockwood*, 95 N. Y. 582.

² *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. 7; 16 Am. Dec. 367.

³ *Bird v. Clark*, 3 Day, 272; 3 Am. Dec. 269.

⁴ *Lorenz v. Orlady*, 87 Pa. St. 226.

⁵ *Crow v. Colton*, 7 Daly, 52.

⁶ *Audenried v. Betteley*, 5 Allen, 383; 81 Am. Dec. 755.

⁷ *Jordan v. Sharlock*, 84 Pa. St. 366; 24 Am. Rep. 198.

⁸ *Van Heusen v. Radcliff*, 17 N. Y. 580; 72 Am. Dec. 480.

⁹ *Kilbourne v. Fay*, 29 Ohio St. 264; 23 Am. Rep. 741; *Hallowell v. Bayliss*, 10 Ohio St. 537; *Gibbs v. Thayer*, 6 Cush. 30; *Blake v. Sawin*, 10 Allen,

340; *Freeland v. Freeland*, 102 Mass. 475; *Lynde v. McGregor*, 13 Allen, 182; 90 Am. Dec. 188; *Waters v. Dashiell*, 1 Md. 455; *Simpson v. Warren*, 55 Me. 18; *Shipman v. Ætna Ins. Co.*, 29 Conn. 245; *Shibley v. Long*, 6 Rand. 735; *Clough v. Thompson*, 7 Gratt. 26; *Staton v. Pittman*, 11 Gratt. 99; *Doyle v. Peckham*, 9 R. I. 21; *Southard v. Benner*, 72 N. Y. 424; *McMahon v. Allen*, 35 N. Y. 403; *Moncure v. Hanson*, 15 Pa. St. 385; *Laws v. Bullitt*, 35 Pa. St. 308; *Pillsbury v. Kingon*, 33 N. J. Eq. 287; 36 Am. Rep. 556. The assignee may set aside a judgment by confession by the assignor: *Nichols v. Kribs*, 10 Wis. 76; 76 Am. Dec. 294.

respect to the assigned property, and will not be allowed to urge that a sale of the same previous to the assignment was fraudulent as to the creditors of the assignor in order to defeat it.¹ An assignment of goods to which the debtor has acquired no title passes no title to the assignee as against the true owner thereof.² So a fraudulent purchase of goods passes no title to them by an assignment.³

ILLUSTRATIONS.—Goods were forwarded for acceptance, if satisfactory; but acceptance and payment were unreasonably delayed, and the consignee meanwhile made an assignment for the benefit of creditors. *Held*, that the title had not passed, and the goods were not covered by the assignment: *Shipman v. Graves*, 41 Mich. 675. Two chattel mortgages *bona fide* executed by an insolvent debtor for the benefit of creditors were followed the next day by a general assignment for creditors. *Held*, not to be a single transaction, and both mortgages and assignment were valid: *Bailey v. Kansas Mfg. Co.*, 32 Kan. 73. A banking firm, just before it had determined on assigning, marked a package of money with the name of a general depositor and the word "private." The money did not amount to the depositor's full credit. On making the assignment, the firm asked the assignee to give said package to the depositor, who knew nothing of these facts till afterwards. *Held*, that the money was not thereby delivered, and was covered by the assignment: *Coots v. McConnell*, 39 Mich. 742. L. and B., partners, executed a voluntary assignment for the benefit of creditors, in which their wives joined, transferring all the property, real and personal, of L. and B., except such as was exempt, and signed by them as individuals. In the caption, L. and B. were described as copartners, doing business under the firm name of L. & Co., parties of the first part, and in the body of the instrument the direction was to pay the debts due from L. and B., "partners as aforesaid." *Held*, that the assignment

¹ *Housel v. Cremer*, 13 Neb. 298; *Fouche v. Brower*, 74 Ga. 251; *Estabrook v. Messersmith*, 18 Wis. 545; *Browning v. Hart*, 6 Barb. 91; *Leach v. Kelsey*, 7 Barb. 466; *Maiders v. Culvers*, 1 Duvall, 164; *Carr v. Gale*, 3 Wood. & M. 68; *Flower v. Cornish*, 25 Minn. 473; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71; *Hahn v. Salmon*, 20 Fed. Rep. 801; *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163. But where the transfer is a fraud upon the assignor, so that he might attack it, his assignee may

avoid it: *Pillsbury v. Kingon*, 31 N. J. Eq. 619.

² *Millhiser v. Erdman*, 98 N. C. 292; 2 Am. St. Rep. 334.

³ *Knowles v. Lord*, 4 Whart. 500; 34 Am. Dec. 525; *Farley v. Lincoln*, 51 N. H. 577; 12 Am. Rep. 182; *Davis v. Stewart*, 4 McCrary, 174. But the assignee is entitled to a demand before a suit can be brought against him for the recovery of goods obtained by his assignor by false representations: *Goodwin v. Goldsmith*, 49 N. Y. Sup. Ct. 101.

conveyed the separate property of L. and B. as well as the partnership effects: *Williams v. Hadley*, 21 Kan. 350; 30 Am. Rep. 430.

§ 1998. **Form of Assignment.**—The form of the instrument by which an assignment for the benefit of creditors is effected is not material.¹ Any conveyance which will pass title according to the laws of the state is sufficient. Thus it may be by a simple transfer without writing;² by mortgage;³ or by confession of judgment;⁴ or by a conveyance absolute on its face;⁵ or by a power of attorney to collect money and distribute it among the creditors;⁶ or by a lease of a railroad, the earnings, after certain payments, to be paid to certain creditors;⁷ or by an assignment of choses in action to an attorney in payment of certain claims represented by him.⁸ A conveyance by an insolvent of his effects to certain creditors, in trust, to pay themselves and their other creditors, is a general assignment,⁹ even though the property is only sufficient to pay the grantee.¹⁰ But a statutory assignment should be made, executed, and acknowledged in the manner and according to the forms prescribed by the statute.¹¹ The assignment is good, though there are defects in the inventory or schedule of the property, or though it do not contain a schedule of the property at all,¹² or of the creditors provided

¹ *Vallance v. Ins. Co.*, 42 Pa. St. 441.

² *Brown v. Chamberlain*, 9 Fla. 464; *Shenbar v. Winding*, 1 Cheves, 218.

³ *Harkrader v. Leiby*, 4 Ohio St. 602; *Bloom v. Noggle*, 4 Ohio St. 45. Even where by its terms no sale could take place until default: *Bloom v. Noggle*, 4 Ohio St. 45; *Livermore v. McNair*, 34 N. J. Eq. 478.

⁴ *Mitchell v. Gendell*, 7 Phila. 107.

⁵ *Truitt v. Caldwell*, 3 Minn. 364; 74 Am. Dec. 764.

⁶ *Watson v. Bagaley*, 12 Pa. St. 164; 51 Am. Dec. 595; *Britton v. Loring*, 45 N. Y. 81. But see *Beans v. Bullitt*, 57 Pa. St. 231; *Griffin v. Rogers*, 4 Phila. 77; *Johnson v. Ogilbee*, 2 Phila. 80.

⁷ *Bittenbender v. R. R. Co.*, 40 Pa. St. 276.

⁸ *Wallace v. Wainwright*, 87 Pa. St. 263.

⁹ *Dickson v. Rawson*, 5 Ohio St. 218; *Page v. Smith*, 24 Wis. 368.

¹⁰ *Goodrich v. Downs*, 6 Hill, 438; *Barney v. Griffin*, 2 N. Y. 365.

¹¹ *Kercheis v. Schloss*, 49 How. Pr. 284; *Bonns v. Carter*, 20 Neb. 566; *Coggins v. Stephens*, 73 Ga. 414.

¹² *Deaver v. Savage*, 3 Mo. 252; 25 Am. Dec. 437; *Nye v. Van Husan*, 6 Mich. 329; 74 Am. Dec. 691; *Coots v. Chamberlain*, 39 Mich. 565; *Wilt v. Franklin*, 1 Binn. 502; 2 Am. Dec. 474; *Hartzler v. Tootle*, 85 Mo. 23; *Emerson v. Senter*, 118 U. S. 3; *Siebert*

for;¹ nor because it does not convey all the assignor's property; nor because it contains a provision for a preference;² nor because it does not state that the property assigned is all of the assignor's property.³ Yet in some states it is held that the filing of a complete inventory or schedule of the debtor's property is essential to the validity of the assignment. A schedule being required by statute, an incomplete schedule is equal to no schedule at all.⁴ Where the property assigned is explained and particularized by a schedule, only what is stated in the schedule will pass by the assignment.⁵ But the rule that general words in an assignment are restricted by a subsequent clause referring to a schedule annexed is subordinate to the rule requiring all instruments to be so construed as to give effect to the intention of the parties.⁶ An assignment may be acknowledged without the state.⁷

§ 1999. **Delivery of Possession Requisite.**—An assignment of personalty must, to be valid against third persons, be consummated by a delivery of possession to the grantee.⁸ An assignment not accompanied by delivery

v. Milligan, 110 Ind. 106; *Hill v. Alexander*, 16 Lea, 496; *Rosenbaum v. Moller*, 85 Tenn. 653. The generality of description of property intended to be conveyed by the assignment for the benefit of creditors does not affect its validity when by parol evidence a definite application of the terms may be made; *Clark v. Few*, 62 Ala. 243. Absence of schedule held evidence of fraud in *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 283.

¹ *Deaver v. Savage*, 3 Mo. 252; 25 Am. Dec. 437.

² *Johnson v. Robinson*, 68 Tex. 399; *McIlhenny Co. v. Craddock*, 68 Tex. 359.

³ *McCart v. Maddox*, 68 Tex. 456.

⁴ *Hill v. Alexander*, 16 Lea, 496; *Coggins v. Stephens*, 73 Ga. 414; *Turnipseed v. Schaefer*, 76 Ga. 109; 2 Am. St. Rep. 17; *McMillan v. Knapp*, 76 Ga. 171; 2 Am. St. Rep. 29. Unless

the omission was by mistake: *Batten v. Smith*, 62 Wis. 96. Or the property or creditors omitted were of small value, or the holders of trifling claims: *Turnipseed v. Schaefer*, 76 Ga. 109; 2 Am. St. Rep. 17. But as against rights acquired the assignee cannot show that the omission from the schedule was the result of mistake: *Southerland v. Bradner*, 39 Hun, 134.

⁵ *Scott v. Coleman*, 5 Litt. 349; 15 Am. Dec. 71; *Wilkes v. Ferris*, 5 Johns. 335; 4 Am. Dec. 364; *Mims v. Armstrong*, 31 Md. 87; 1 Am. Rep. 25. See *Platt v. Lott*, 17 N. Y. 481.

⁶ *Emigrant Industrial Savings Bank v. Roche*, 93 N. Y. 374.

⁷ *Zimmerman v. Willard*, 114 Ill. 364.

⁸ *Ramsay v. Stevenson*, 5 Mart. (La.) 23; 12 Am. Dec. 468; *Walters v. Whitlock*, 9 Fla. 86; 76 Am. Dec. 607; *Ray v. Raymond*, 6 Col. 467; *Nichol v. Spooners*, 105 N. Y. 1.

will not defeat the right of creditors before a delivery to attach the goods assigned.¹ A delivery of a portion of the goods assigned in token of a delivery of the whole is a good constructive delivery of all the goods mentioned in the assignment.² So the formal delivery of keys to a store, and pointing out of stock in pens, is a sufficient taking possession by an assignee.³

ILLUSTRATIONS. — A storekeeper in M. executed an assignment for the benefit of creditors to a creditor residing at D., who had previously promised to settle up his business if he had to suspend. The assignor delivered the assignment to an agent of the assignee, who, leaving the assignor in possession, notified his principal by telegraph, and next day delivered the assignment to him at D., and he indorsed his acceptance, and set out to take possession. On the previous day, after the execution of the assignment, another creditor levied an attachment on the goods: *Held*, that the attachment must yield to the assignment: *Stamp v. Case*, 41 Mich. 267; 32 Am. Rep. 156. S., a resident of Ohio and a creditor of W., who resided in the state of Missouri, prepared and sent to W., for execution, a deed of assignment to himself, in trust of all the debtor's property, real and personal, situate in Ohio, "for the benefit of all his creditors, under the insolvent laws of Ohio," which deed W. duly executed and placed in a post-office in the state of Missouri, addressed to S. in the state of Ohio, who received the same by due course of mail, and immediately entered upon the execution of the trust. *Held*, the assignment was complete and effectual to pass title to the assignee, from the time the deed was placed in the post-office, as against subsequent attaching creditors: *Johnson v. Sharp*, 31 Ohio St. 611; 27 Am. Rep. 529.

§ 2000. **Powers and Duties of Assignee—His Liabilities.** — The person named as assignee in the deed may refuse to act; for one cannot be made to act against his will.⁴ But no formal acceptance is necessary; it may be implied from acts, such as taking possession of the trust property.⁵ Such deed creates a trust for the benefit of

¹ *Woolson v. Pipher*, 100 Ind. 306.

² *Legg v. Willard*, 17 Pick. 140; 28 Am. Dec. 694.

³ *Sullivan v. Smith*, 15 Neb. 476.

⁴ *Scull v. Reeves*, 3 N. J. Eq. 84; 29 Am. Dec. 694.

⁵ *Scull v. Reeves*, 3 N. J. Eq. 84; 29 Am. Dec. 694.

creditors who were not aware of its existence.¹ After accepting the trust, the trustee cannot divest himself of the legal estate by refusing to carry the trust into execution so as to give the assignor a right to make another conveyance of the property.² The court will not allow the trust to fail for want of a trustee.³ It does not avoid the assignment that the assignee was a stockholder of the assignor, and a former officer.⁴ A debtor may select his own trustee; he need not be a creditor.⁵ The assignee may maintain actions necessary to protect the trust estate.⁶ He may enforce a mechanic's lien existing in favor of his assignors.⁷ He has authority to work up materials on hand when for the benefit of the estate.⁸ In selling the property, a trustee may use a reasonable discretion, and need not always sell immediately and for cash,⁹ unless this is required by the deed.¹⁰ An authority in the assignment to dispose of the assets as in his judgment will best promote the interest of the creditors does not give the assignee authority to carry on the business indefinitely.¹¹ The assignee has no authority to give a warranty on a sale made by him.¹² An allowance of a demand by the assignee is a judgment, and is appealable from, and conclusive as such.¹³

An assignee is chargeable with the care of an ordinary owner of property, and is responsible for a loss occasioned by ordinary negligence.¹⁴ Where one of two assignees

¹ *Scull v. Reeves*, 3 N. J. Eq. 84; 29 Am. Dec. 694.

² *Seal v. Duffy*, 4 Pa. St. 274; 45 Am. Dec. 691.

³ *Scull v. Reeves*, 3 N. J. Eq. 131; 29 Am. Dec. 703.

⁴ *Covert v. Rogers*, 38 Mich. 363; 31 Am. Rep. 319.

⁵ *Wilt v. Franklin*, 1 Binn. 502; 2 Am. Dec. 474.

⁶ *Smith v. Jones*, 18 Neb. 481.

⁷ *German Bank v. Schloth*, 59 Iowa, 316.

⁸ *Patten's Estate*, 2 Pars. Sel. Cas. 108.

⁹ *Inloes v. Bank*, 11 Md. 173; 69 Am. Dec. 190.

¹⁰ *Cox v. Palmer*, 60 Miss. 793; *Shuler v. Isreal*, 27 Fed. Rep. 851; *Bagley v. Bowe*, 105 N. Y. 171; 59 Am. Rep. 488.

¹¹ *Richardson v. Marqueze*, 59 Miss. 80; 42 Am. Rep. 353.

¹² *Welch v. Davis*, 3 S. C. 110; 16 Am. Rep. 690.

¹³ *Nanson v. Jacob*, 93 Mo. 331; 3 Am. St. Rep. 531.

¹⁴ *Conwell v. Deck*, 8 Hun, 124; *James v. Cowing*, 17 Hun, 267; *In re Davis*, 5 Whart. 530; 34 Am. Dec. 574; *In re Dean*, 86 N. Y. 398; *Clark v. Craig*, 29 Mich. 398; *Chambersburg Ass'n's Appeal*, 76 Pa. St. 203.

voluntarily places trust money in the sole custody of his co-assignee, an individual banker, and the money is lost by the failure of the banker, both are liable.¹ If the assignee carries on the business, he must bear the loss, and also the expenses incurred if his action was not for the benefit of the estate.² But he does not become personally liable for the rent of a building leased to his assignor, by continuing in possession in the conduct of the business of his trust.³ He is bound to account in the state court, notwithstanding a composition in bankruptcy, unless the bankruptcy court orders otherwise or creditors waive their right to an account.⁴

§ 2001. **The Assignee's Bond.**—The giving of a bond by the assignee is generally required by the statutes on his taking possession of the property. But it is held that this is a condition subsequent to the vesting of title in him.⁵ The failure of the assignee to give the bond does not invalidate the assignment and restore the title of the property to the assignor;⁶ nor does the giving of a defective bond.⁷ But the conveyance of property by the assignee before filing his bond is void.⁸ A provision in an assignment that the assignee shall not be required to give a bond, as provided by statute, avoids it;⁹ so where the provision is that he shall take possession before giving

¹ *Bruen v. Gillet*, 44 Hun, 298.

² *In re Marklin*, 10 Daly, 122; *In re Petchell*, 10 Daly, 102; *In re Orsor*, 10 Daly, 26.

³ *White v. Thomas*, 75 Mo. 454.

⁴ *In re Straus*, 9 Abb. N. C. 131; *In re Allen*, 24 Hun, 408.

⁵ *Clayton v. Johnson*, 36 Ark. 406; 38 Am. Rep. 40. But see *Winchester v. Union Bank*, 2 Gill & J. 70; 19 Am. Dec. 255; *Kingman v. Barton*, 24 Minn. 295.

⁶ *Furman v. Fisher*, 4 Cold. 626; 94 Am. Dec. 213; *Brennan v. Wilson*, 71 N. Y. 502; *Thrasher v. Bentley*, 59 N. Y. 649; *Worthy v. Benham*, 13

Hun, 176; *Barbour v. Everson*, 16 Abb. Pr. 366; *Bostwick v. Bennett*, 74 N. Y. 317; *Van Vleet v. Slauson*, 45 Barb. 317; *Syracuse etc. R. R. Co. v. Collins*, 59 N. Y. 649; 1 Abb. N. C. 47; *Winn v. Madden*, 18 Mo. App. 261; *Fuller v. Hasbrouck*, 46 Mich. 78. *Contra*, *Goll v. Hubbell*, 61 Wis. 293.

⁷ *Munson v. Ellis*, 58 Mich. 334.

⁸ *Brennan v. Wilson*, 71 N. Y. 502; *Woodworth v. Seymour*, 22 Hun, 245. *Contra*, *Dallam v. Fitler*, 6 Watts & S. 323; *Heckman v. Messenger*, 49 Pa. St. 465.

⁹ *Milligan v. O'Connor*, 19 Ill. App. 487.

his bond.¹ But he need not wait until he has filed his bond before he can procure insurance on the property.²

§ 2002. **Assignment not Revocable by Debtor.**—In the United States³ the rule is, that an assignment in trust for creditors, executed and delivered by the assignor, creates a trust which cannot be revoked by the assignor or annulled by the joint act of assignor and assignee.⁴ The debtor cannot revoke an assignment voidable by the creditors if they choose to affirm it,⁵ and the death of the debtor does not revoke the trust.⁶ But it has been held that an assignment in trust for creditors, made by a person not in failing circumstances, but able to pay his debts, may be revoked even after part of the debts have been paid under it.⁷ It has been held that the bankruptcy of the debtor before the deed is accepted by the creditors revokes it.⁸ Where a debtor had made a general assignment for the benefit of his creditors, and the creditors afterwards made a composition with him, it was held that the assignment was vacated and the creditors must share equally.⁹ A revocation and the execution of a new assignment to correct an error may be permitted.¹⁰ A reconveyance of the property to the grantor by the trustee, where the object of the trust has not been completed, is void.¹¹

¹ *Rice v. Frayser*, 24 Fed. Rep. 460; *Aaronson v. Deutsch*, 24 Fed. Rep. 465.

² *Sibley v. Prescott Ins. Co.*, 57 Mich. 14.

³ *Aliter* in England: *Acton v. Woodgate*, 2 Mylne & K. 495; *Garrard v. Lauderdale*, 3 Sim. 1.

⁴ *Scully v. Reeves*, 3 N. J. Eq. 131; 29 Am. Dec. 703; *Sevier v. McWhorter*, 27 Miss. 442; *Hall v. Dennison*, 17 Vt. 318; *Messonnier v. Kauman*, 3 Johns. Ch. 3; *Ingram v. Kirkpatrick*, 6 Ired. Eq. 463; 51 Am. Dec. 428; *Walker v. Crowder*, 2 Ired. Eq. 485; *Ward v. Lewis*, 4 Pick. 521; *Watson v. Bagaley*, 12 Pa. St. 164; 51 Am. Dec. 595; *Ward v. Winslow*, 4 Pick. 518; *Petrikín v. Davis*, 1 Morris, 296; *Jones v. Dougherty*, 10 Ga. 274; *Furman v.*

Fisher, 4 Cold. 626; 94 Am. Dec. 210; *Union Bank v. Com. Bank*, 94 Ill. 271.

⁵ *Mills v. Argall*, 6 Paige, 577.

⁶ *Jones v. Dougherty*, 10 Ga. 274.

⁷ *Oakley v. Hibbard*, 1 Pinn. 674; 44 Am. Dec. 425.

⁸ *Ashley v. Robinson*, 29 Ala. 112; 65 Am. Dec. 387.

⁹ *Guggenheimer v. Groeschel*, 23 S. C. 274; 55 Am. Rep. 20.

¹⁰ *Hone v. Woolsey*, 3 Edw. Ch. 290.

¹¹ *Briggs v. Davis*, 20 N. Y. 15; 75 Am. Dec. 363; *Russell v. Russell*, 36 N. Y. 585; 93 Am. Dec. 540; *Juliand v. Rathbone*, 39 Barb. 102; 39 N. Y. 369; *In re Ludlington*, 5 Abb. N. C. 329; *Griswold v. Perry*, 7 Lans. 104; *Hardman v. Bowman*, 39 N. Y. 196; 5 Abb. Pr., N. S., 337.

§ 2003. Effect of Bankruptcy Laws upon Assignments.

— Under the United States bankrupt laws, it was generally held that an assignment for the benefit of creditors, made by a debtor in contemplation of bankruptcy, was an act of bankruptcy, and voidable by the assignee in bankruptcy.¹ Whether under the bankrupt laws an assignment for the benefit of creditors was a bar to a discharge was not settled; the cases are conflicting.²

§ 2004. Powers in Nature of Trusts.—Where a power to appoint or dispose is given, and is not executed, a court of equity cannot execute it.³ But equity will interpose and grant equitable relief in all cases where trusts or powers in the nature of trusts are required to be executed by a trustee in favor of particular persons, and they fail in being so executed by casualty or accident.⁴

§ 2005. What Language will Create a Trust.—No precise words are necessary to create a trust,—the technical words “trust” or “trustee” need not have been used,—it is sufficient if the language unequivocally shows an intention that the estate or property shall be held for the purpose or on behalf of another.⁵ Thus where duties are devolved by a will upon executors, which they could not perform without the legal estate were vested in them, the courts will hold them to be vested with it and to be trustees.⁶ So an express trust is created if one executes a

¹ *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 Nat. Bank. Reg. 311; *Barnes v. Rettew*, 8 Phila. 133; *In re Burt*, 1 Dill. 439. See *Burrill on Assignments*, 3d ed., secs. 50, 52; *Beck v. Parker*, 65 Pa. St. 262; 3 Am. Rep. 625.

² See note in 28 Am. Dec. 215, to the case of *Dulaney v. Hoffman*, 7 Gill & J. 170, 28 Am. Dec. 207, where the cases are collected.

³ See *post*, Title Real Property—Powers.

⁴ *Stewart v. Stokes*, 33 Ala. 494; 73 Am. Dec. 429; *Brown v. Higgs*, 8 Ves.

561; *Pomeroy's Eq. Jur.*, sec. 1002; *Withers v. Yeadon*, 1 Rich. Eq. 324.

⁵ *Ante*, secs. 1979, 1982; *Pomeroy's Eq. Jur.*, sec. 1009; *Tobias v. Ketchum*, 32 N. Y. 319; *Norman v. Burnett*, 25 Miss. 183; *Pratt v. Ayer*, 3 Chand. 265; *Compo v. Iron Co.*, 49 Mich. 39; *Lake v. Freer*, 11 Ill. App. 576; *McCandless v. Warner*, 26 W. Va. 754; *Brooke's Appeal*, 109 Pa. St. 188; *Maught v. Getzendanner*, 65 Md. 527; *Randolph v. Randolph*, 40 N. J. Eq. 73.

⁶ *Pomeroy's Eq. Jur.*, sec. 1011; *Tobias v. Ketchum*, 32 N. Y. 319.

declaration stating that he holds property in trust for himself and others.¹

§ 2006. **Precatory Words.**—Where property is given absolutely to any person, and the same person is by the giver, who has power to command, recommended, or entreated, or wished to dispose of that property in favor of another, the recommendation, entreaty, or wish is held to create a trust.² But it is essential that the precatory words shall be certain and imperative. No technical words are necessary, but the question is, whether the wish, or desire, or recommendation, that is expressed by the testator, is meant to govern the conduct of the party to whom it is addressed; or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of such party, leaving it to him, however, to exercise that discretion as he may see fit. If the former, there is a trust created; if the latter, none.³ Thus the following words have been held to constitute a trust, viz.: “Willing and desiring,”⁴ “wish and desire,”⁵ “wish and request,”⁶ “have fullest confidence,”⁷ “heartily beseech,”⁸ “well know,”⁹ “of course he will give,”¹⁰ “it is my wish and will he shall give,”¹¹ “in full confidence,”¹²

¹ *Culbertson v. Witbeck Co.*, 127 U. S. 326.

² *Noe v. Kern*, 93 Mo. 367; 3 Am. St. Rep. 544; *Knight v. Knight*, 3 Beav. 172; *Gilbert v. Chapin*, 19 Conn. 342; *Bohan v. Barrett*, 79 Ky. 378; *Warner v. Bates*, 98 Mass. 274; *Reed v. Reed*, 30 Ind. 313; *Prewett v. Land*, 36 Miss. 495; *Gamble v. Dabney*, 20 Tex. 69; *Brasher v. Marsh*, 15 Ohio St. 103.

³ *Harrison v. Harrison*, 2 Gratt. 1; 44 Am. Dec. 365, and see note to this case in 44 Am. Dec. 372-379; *Lucas v. Lockhart*, 10 Smedes & M. 466; 48 Am. Dec. 766; *Pennock's Estate*, 20 Pa. St. 268; 59 Am. Dec. 718; *Harper v. Phelps*, 21 Conn. 257; *Collins v. Carlisle*, 7 B. Mon. 14; *Thompson v. McKisick*, 3 Humph. 631; *Ellis v. Ellis*,

15 Ala. 296; 50 Am. Dec. 132; *Lines v. Darden*, 5 Fla. 51; *Bohm v. Barrett*, 79 Ky. 378.

⁴ *Snell's Equity*, 100.

⁵ *Cockrill v. Armstrong*, 31 Ark. 580.

⁶ *Godfrey v. Godfrey*, 11 Week. Rep. 554; *Liddard v. Liddard*, 28 Beav. 266; *Ward v. Peloubet*, 10 N. J. Eq. 305.

⁷ *Shovelton v. Shovelton*, 32 Beav. 143; *Harrison v. Harrison*, 2 Gratt. 1; 44 Am. Dec. 365; *Warner v. Bates*, 98 Mass. 274; *Eddy v. Harstone*, 34 N. J. Eq. 419.

⁸ *Meredith v. Heneage*, 1 Sim. 553.

⁹ *Bardswell v. Bardswell*, 9 Sim. 319; *Briggs v. Penny*, 3 Macn. & G. 546.

¹⁰ *Robinson v. Smith*, 6 Madd. 194.

¹¹ *McRee v. Means*, 34 Ala. 349.

¹² *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414.

"requires and entreats,"¹ "to be divided among my children as she thinks proper,"² "in the full confidence."³ But precatory words will not create a trust where full discretion is clearly given to the legatee.⁴ Thus the following were held not to create a trust: A recommendation of his mother, sister, and two daughters to her (the wife's) care, with request to make such provision for them as she in her judgment and love for them might choose to exercise;⁵ "hoping and believing they will do justice hereafter to my grandson D., to the amount of one half of the said homestead farm";⁶ a devise to A "in full trust that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease";⁷ where a testator left nothing to one of his sons, but "assumed" that the other sons would do what, in the circumstances, the truest fraternal regard might require.⁸

Secondly, the subject-matter of the recommendation or wish must be certain.⁹ Where there is an absolute gift of property to a person, and a recommendation to give to a certain object "what shall be left at his death," "or what he shall die possessed of," the subject will be considered uncertain.¹⁰ Lastly, the objects or persons intended to be benefited must be certain.¹¹ Thus where a testator bequeathed the residue of his property to his wife, not doubting that she would consider his near relations as he would have done if he had survived her, it was

¹ *Taylor v. George*, 2 Ves. & B. 378.

² *Green v. Collins*, 6 Ired. 139.

³ *Warner v. Bates*, 98 Mass. 274.

⁴ *Corby v. Corby*, 85 Mo. 371; *Ellis v. Ellis*, 15 Ala. 296; 50 Am. Dec. 133.

⁵ *Colton v. Colton*, 21 Fed. Rep. 594.

⁶ *Van Duyne v. Van Duyne*, 14 N. J. Eq. 397.

⁷ *In re Adams*, 32 Week. Rep. 120.

⁸ *Rose v. Porter*, 141 Mass. 309.

⁹ *Snell's Equity*, 100; *Williams v. Worthington*, 49 Md. 572; 33 Am. Rep. 286; *Ingram v. Fraley*, 29 Ga. 553; *Tolson v. Tolson*, 10 Gill & J.

159; *Harper v. Phelps*, 21 Conn. 257; *Handley v. Wrightson*, 60 Md. 198; *Lines v. Darden*, 5 Fla. 51; *Buggins v. Yates*, 9 Mod. 122; *Curtis v. Rippon*, 5 Mad. 434.

¹⁰ *Pope v. Pope*, 10 Sim. 1; *Green v. Marsden*, 1 Drew. 646; *Constable v. Bull*, 3 De Gex & S. 411; *Pennock's Estate*, 20 Pa. St. 268; 59 Am. Dec. 718; *Smith v. Bell*, Mart. & Y. 302; 17 Am. Dec. 798.

¹¹ *Green v. Marsden*, 1 Drew. 646; *Harper v. Phelps*, 21 Conn. 257; *Handley v. Wrightson*, 60 Md. 198; *Lines v. Darden*, 5 Fla. 51.

held that the objects were uncertain.¹ Some of the later American cases show a strong tendency to restrict the doctrine as to precatory words, if not to reject it altogether.² In several cases it has been held that no technical significance attaches to recommendatory words, and that they are not sufficient *per se* to convert a devise or bequest into a trust; that the true rule of interpretation is, to give to such recommendatory words their natural and ordinary effect, and having arrived at the true intention of the testator, to let that intention, if lawful, be the rule of decision in the particular case.³

ILLUSTRATIONS. — A testator gave the residue to his daughter, and “to her heirs and assigns forever,” and then declared that he committed his granddaughter to the daughter’s charge, and enjoined upon her to make such provisions for the grandchild out of the residue as she might judge expedient, and as her own sense of justice and Christian duty should dictate. *Held*, that no trust was created: *Lawrence v. Cooke*, 104 N. Y. 632. A testator gave his property to his wife by a clause which standing alone imposed no restraint on her full ownership. By a subsequent clause he made the request that at her death she should divide among their daughters, share and share alike. *Held*, no trust in the daughters’ favor: *Hopkins v. Glunt*, 111 Pa. St. 287. In a will was the following clause: “I desire that the said J. W. should, at his discretion, appropriate a part of the income of my estate aforesaid, not exceeding fifty dollars a year, to the support of the widow M. E.,” etc. *Held*, that this clause, coupled with some other expressions, rendered the devise to J. W. a trust to the above amount: *Erickson v. Willard*, 1 N. H. 217. A will recited that the testator had confidence in A. B., and felt sure that he would conform to his verbal directions, and thereupon devised all the property to him. *Held*, that a trust was attached to the property, but as the terms thereof were not declared, it resulted for the distributees at law: *Ingram v. Fraley*, 29 Ga. 553.

§ 2007. Trusts of Personalty may be Created Verbally. —
As regards personal estate, — for the statute of frauds does

¹ *Sale v. Moore*, 1 Sim. 534.

² *Pomeroy’s Eq. Jur.*, sec. 1015; *Harper v. Phelps*, 21 Conn. 257; *Pennock’s Appeal*, 20 Pa. St. 268; 59 Am.

Dec. 78; *Biddle’s Appeal*, 70 Pa. St. 153.

³ *Walker v. Hall*, 34 Pa. St. 483; *Harper v. Phelps*, 21 Conn. 257.

not apply to personalty, even though it is money received by mortgage or other charge on land,—it is not essential even that there should be any express declaration or direction of trust, but the intention of the donor to constitute himself a trustee, or to direct a third person to hold upon trust, may be gathered from the mere conduct of the party, or the facts and circumstances of the case.¹ *A fortiori*, a declaration of trust in personal property may be declared and proved by parol.² An oral or written direction communicated to a debtor to hold the money due in trust for a third person creates an effectual trust in favor of the donee, especially where the debtor acts on the direction.³ If personal property is transferred by a conveyance absolute in form, it may be shown to have been in trust by the subsequent declarations of the transferrer, assented to and acted upon by the transferee.⁴ While a trust in personalty may be established by parol evidence, such evidence must be clear and convincing, not doubtful, uncertain, and contradictory; nor may it consist of loose declarations.⁵ To create a trust where the donor retains the property, there must be unequivocal acts or words implying that he holds the property as trustee.⁶

¹ Snell's Equity, 80; Clapp v. Emery, 98 Ill. 523; Hon v. Hon, 70 Ind. 135; Chace v. Chapin, 130 Mass. 128; Davis v. Coburn, 128 Mass. 377; Reiff v. Horst, 52 Md. 255; Gadsden v. Whaley, 14 S. C. 210; Silvey v. Hodgdon, 52 Cal. 363; Eaton v. Cook, 25 N. J. Eq. 55; Ray v. Simmons, 11 R. I. 266; 23 Am. Rep. 447; Kirkpatrick v. Davidson, 2 Ga. 297; Gordon v. Green, 10 Ga. 534; Berry v. Norris, 1 Duv. 302; Kimball v. Morton, 5 N. J. Eq. 26; 43 Am. Dec. 621; Hooper v. Holmes, 11 N. J. Eq. 122; Day v. Roth, 18 N. Y. 448; Higgenbottom v. Peyton, 3 Rich. Eq. 398; Saunders v. Harris, 1 Head, 185; Gilman v. McArdle, 99 N. Y. 451; 52 Am. Rep. 41; Towles v. Burton, Rich. Eq. 146; 24 Am. Dec. 409.

² Robson v. Harwell, 6 Ga. 589. Higgenbottom v. Peyton, 3 Rich. Eq. 398; Crissman v. Crissman, 23 Mich. 218; Gordon v. Green, 10 Ga. 534; Kirkpatrick v. Davidson, 2 Ga. 297; Hooper v. Holmes, 11 N. J. Eq. 122; Hunnewell v. Lane, 11 Met. 163; Thorp v. Owens, 5 Beav. 224; Peckham v. Taylor, 3 Beav. 250; Hawkins v. Gordon, 2 Smale & G. 451; Maffit v. Rynd, 69 Pa. St. 30; Berry v. Norris, 1 Drew. 302; Simmons v. Smith, 11 Ga. 195; Kimball v. Morton, 5 N. J. Eq. 26; 43 Am. Dec. 621; Day v. Roth, 18 N. Y. 448.

³ Eaton v. Cook, 25 N. J. Eq. 55.

⁴ Chace v. Chapin, 130 Mass. 128.

⁵ Allen v. Withrow, 110 U. S. 119.

⁶ Young v. Young, 80 N. Y. 422; 36 Am. Rep. 634.

ILLUSTRATIONS.—A made a conveyance of real estate to B, who held it in trust for A. Afterwards B sold the realty to C, and by parol agreement kept the proceeds for the use and benefit of A. *Held*, that such parol agreement created a trust that may be enforced after the sale: *Thomas v. Merry*, 113 Ind. 83. Defendant held land on a trust, void because in parol. He repeatedly admitted that he held the land in trust, and after he sold it he admitted that he held its proceeds in trust. *Held*, that he should be charged as trustee on the strength of his admissions after the land was sold: *Calder v. Moran*, 49 Mich. 14. A widow collected the amount of a policy on her husband's life, payable to herself, and set apart a portion upon a parol trust for their infant daughter. She afterwards bought land in her own name with the portion so set aside, and afterwards repudiated the trust. *Held*, that it was valid, and, being proved, could be enforced, and that the land should be deemed charged with the trust: *Cobb v. Knight*, 74 Me. 253.

§ 2008. **Resulting Trusts — In General.** — Resulting trusts are those which arise where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition or from the accompanying facts and circumstances that the beneficial interest is not to go or to be enjoyed with the legal title.¹ A trust in such case is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner.² Implied or resulting trusts arise in all those cases where it would be contrary to the rules and principles of equity that he in whom the property becomes vested should hold it otherwise than as a trustee.³ Thus one who buys land for another, and wrongfully takes the title in his own name, will be charged as trustee.⁴ So the entry of land by one in his own name, with the money of another, creates a

¹ Pomeroy's Eq. Jur., sec. 1031.

² Pomeroy's Eq. Jur., sec. 1031; *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 135; *Beegle v. Wentz*, 55 Pa. St. 369; 93 Am. Dec. 762; *Lingenfelter v. Ritchey*, 58 Pa. St. 485; 98 Am. Dec. 308.

³ Story's Eq. Jur., sec. 1195; *Dex-*

ter v. Stewart, 7 Johns. Ch. 52; *East-erbrook v. Tillinghast*, 5 Gray, 17; *Phillips v. Crammond*, 2 Wash. C. C. 441; *Kisler v. Kisler*, 2 Watts, 323; 27 Am. Dec. 308.

⁴ *Kibby v. Cold*, 63 Iowa, 663; *Springer v. Springer*, 114 Ill. 550.

resulting trust.¹ The doctrine of resulting trusts applies to both real and personal property.² They may in all cases be proved by parol, as they are expressly excepted from the provisions of the statute of frauds.³ But parol evidence to establish a trust must be clear and satisfactory.⁴ So the presumption of a resulting trust may be rebutted by parol.⁵ A resulting trust cannot arise out of an act forbidden by law, statute, or public policy;⁶ thus there can be no valid trust where the conveyance is made to defraud creditors,⁷ or to defraud the government.⁸ And a resulting trust can attach to a title only at the time of the purchase; it must arise out of the state of facts then existing, and not out of any subsequent contract or transaction.⁹ The interest of the *cestui que trust* in a resulting trust is not a mere equity, but is an equitable estate,

¹ Cloud v. Ivie, 28 Mo. 578.

² Rider v. Rider, 10 Ves. 363; Kelley v. Jenness, 50 Me. 455.

³ Pritchard v. Brown, 4 N. H. 397; 17 Am. Dec. 431; Gay v. Hunt, 1 Murph. 141; 3 Am. Dec. 681; Perry on Trusts, sec. 138; Browne's Statute of Frauds, sec. 91; Neill v. Keese, 5 Tex. 23; 51 Am. Dec. 746; Hoxie v. Carr, 8 Sum. 187; Morgan v. Clayton, 61 Ill. 35; Hidden v. Jordan, 21 Cal. 93; Lipscomb v. Nichols, 6 Col. 290; Foote v. Bryant, 47 N. Y. 544; Ward v. Armstrong, 84 Ill. 151; Irwin v. Ivers, 7 Ind. 308; 63 Am. Dec. 420; Barry v. Lambert, 98 N. Y. 300; 50 Am. Rep. 677; German v. Gabbald, 3 Binn. 302; 5 Am. Dec. 372; Wallace v. Duffield, 2 Serg. & R. 521; 7 Am. Dec. 660; Beach v. Beach, 14 Vt. 28; 39 Am. Dec. 204; Osborne v. Endicott, 6 Cal. 149; 65 Am. Dec. 498; Dryden v. Hanway, 31 Md. 254; 100 Am. Dec. 61; Boskowitz v. Davis, 12 Nev. 446; Reynolds v. Sumner, 126 Ill. 58; 9 Am. St. Rep. 523; Faris v. Dunn, 7 Bush. 276; McGinity v. McGinity, 63 Pa. St. 38.

⁴ Woodward v. Sibert, 82 Va. 441; Snelling v. Utterback, 1 Bibb, 609; 4 Am. Dec. 661; Baker v. Vining, 30 Me. 121; 50 Am. Dec. 617; Hollida v. Shoop, 4 Md. 465; 59 Am. Dec. 88;

Trout v. Trout, 44 Iowa, 471; Hayden v. Hayden, 6 Baxt. 408; Whitmore v. Learned, 70 Me. 276; Parker v. Snyder, 31 N. J. Eq. 164; Thomas v. Standeford, 49 Md. 181; Lehman v. Lewis, 62 Ala. 129; Agricultural Society v. Brewster, 51 Tex. 257; McKeon v. McKeon, 33 N. J. Eq. 384; Laughlin v. Mitchell, 14 Fed. Rep. 382; Wilts v. Howney, 59 Md. 584; Green v. Dietrich, 114 Ill. 636; Donohoe v. Tanor, 81 Va. 132; Bible v. Hunter, 79 Ala. 351; Reynolds v. Caldwell, 80 Ala. 232; Heneke v. Floring, 114 Ill. 554.

⁵ Baker v. Vining, 30 Me. 121; 50 Am. Dec. 617; Adams v. Guerard, 29 Ga. 651; 76 Am. Dec. 624; Tryon v. Huntton, 67 Cal. 325.

⁶ Perry on Trusts, 131; Leggett v. Dubois, 5 Paige, 114; 28 Am. Dec. 413.

⁷ Murphy v. Hubert, 16 Pa. St. 56; Eastham v. Rountree, 56 Tex. 110; Dudley v. Bosworth, 10 Humph. 9; 51 Am. Dec. 690; Brantley v. West, 27 Ala. 542; Bartlett v. Bartlett, 13 Neb. 456.

⁸ Jackson v. Miller, 6 Wend. 228; 21 Am. Dec. 316. But see Buren v. Buren, 79 Mo. 538.

⁹ McClure v. Doak, 6 Baxt. 364; Olcott v. Bynum, 17 Wall. 44. See next section.

which may be transferred or dealt with as with other kinds of property.¹ It may be enforced against the trustee, his heirs and representatives, and all subsequent purchasers or encumbrancers, with notice, actual or constructive;² but not against mortgagees or *bona fide* purchasers without notice.³

ILLUSTRATIONS.—A, who desired to convey land to his wife, conveyed it to B, induced by B's oral promise to convey it to A's wife on request. *Held*, a trust which equity would enforce: *Fischbeck v. Gross*, 112 Ill. 208. A recovered judgments against B, and recorded them. B became assignee in bankruptcy of C, and invested assets in his possession in land which he took in his own name; for this he was removed, and compelled to convey the land to a new assignee. *Held*, that the land standing in B's name was subject to a resulting trust in favor of the bankrupt estate, and that A acquired no lien on said land: *Flanders v. Thompson*, 3 Woods, 9. A surety on a note upon which judgment had been recovered purchased and paid for the land of his principal at an execution sale; but doubting whether it was lawful for him to bid at said sale, he had the sheriff issue the certificate of purchase to another. *Held*, that he had a resulting trust in the land: *Mathis v. Stufflebeam*, 94 Ill. 481. A son owning a farm not fully paid for, and holding in trust for his mother three hundred dollars, to be invested in a home for her use during her life, and after her death to go to her children, by agreement with her used the money in paying off the debt, and in consideration thereof set apart one hundred acres of the tract as a home for her, to which she moved. *Held*, that on her death her heirs could assert a resulting trust in this one hundred acres: *Burks v. Burks*, 7 Baxt. 353. A sold land to B, executing a deed. It was agreed that if the purchase-money were not paid the sale should be rescinded. B failed to pay the money, but gave the deed to C, together with one from himself to C, who placed them both on record. *Held*, that the uncompleted sale from A to B created a resulting trust in favor of A for the whole land; that B was trustee of the dry legal title, and C acquired no title: *Bennett v. Hutson*, 33 Ark. 762.

§ 2009. **Resulting Trust to Purchaser on Conveyance to Stranger.**—Where property is purchased and the

¹ Pomeroy's Eq. Jur., sec. 1043.

² *Ferrin v. Errol*, 59 N. H. 234.

³ Pomeroy's Eq. Jur., sec. 1043;
Brooks v. Dent, 1 Md. 523.

conveyance of the legal title is taken in the name of one person, while the purchase price is paid by another, a trust at once results in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him.¹ And the doctrine applies to both realty and personalty.² The doctrine of resulting trusts is applicable also to cases where two or more persons advance the purchase-money jointly, but the purchase is taken in the name of one of them; and there will be in that case a resulting trust in favor of the other, proportioned to the money which he has advanced.³ So where one pays a part of the purchase-money, a resulting trust *pro tanto* will arise.⁴ But it is essential that the payment should

¹ 1 Perry on Trusts, sec. 126; Pomeroy's Eq. Jur., sec. 1037. "The clear result of all the cases is, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others or in the names of others without that of the purchaser, whether in one name or in several, and whether jointly or successive, results to the man who advances the purchase-money; and it goes in strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor": Dyer v. Dyer, 1 Eq. Lead. Cas. 314; Kisler v. Kisler, 2 Watts. 323; 27 Am. Dec. 308; McLenan v. Sullivan, 13 Iowa, 521; Chadwick v. Felt, 35 Pa. St. 305; Harder v. Harder, 2 Sand. Ch. 17; Turner v. Eford, 5 Jones Eq. 106; De Peyster v. Gould, 3 N. J. Eq. 474; 29 Am. Dec. 723; Rider v. Kidder, 10 Ves. 360; Farrington v. Barr, 36 N. H. 89; Perkins v. Nichols, 11 Allen, 545; Strimpfler v. Roberts, 18 Pa. St. 283; 57 Am. Dec. 606; Paul v. Chouteau, 14 Mo. 580; Johnson v. Quarles, 46 Mo. 423; Harvey v. Ledbetter, 48 Miss. 95; Creed v. Lancaster Bank, 1 Ohio St. 1; Rhodes v. Green, 36 Ind. 11; Bayles v. Baxter, 22 Cal. 575; Tinsley v. Tinsley, 53 Iowa, 14; McCartney v. Bostwick, 32 N. Y. 53; Keller v. Kimkel, 46 Md. 565; Foote v. Colvin, 3 Johns. 216; 3 Am. Dec. 478; Bates v. Kelly, 80 Ala. 142; New York Bank v. Carey, 39 N. J. Eq. 25; Lipscomb v.

Nichols, 6 Col. 290; Law v. Law, 76 Va. 527; Bickel's Appeal, 86 Pa. St. 204; Jackson v. Morse, 16 Johns. 197; 8 Am. Dec. 306; Jackson v. Miller, 6 Wend. 228; 21 Am. Dec. 316; Smith-eal v. Gray, 1 Humph. 491; 34 Am. Dec. 664; Williams v. Hollingsworth, 1 Strob. Eq. 103; 47 Am. Dec. 527; Dudley v. Bosworth, 10 Humph. 9; 51 Am. Dec. 690; Neill v. Keese, 5 Tex. 23; 51 Am. Dec. 746; Mut. Fire Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673; Sullivan v. McLenans, 2 Iowa, 437; 65 Am. Dec. 780.

² Ebrand v. Dancer, 2 Ch. Cas. 26.

³ Wray v. Steele, 2 Ves. & B. 388; Barrows v. Bohan, 41 Conn. 278; Burleigh v. White, 64 Me. 23; McNamara v. Garrity, 106 Ill. 384; Baumgartner v. Guessfeld, 38 Mo. 36; McDonald v. McDonald, 24 Ind. 68; Lipscomb v. Nichols, 6 Col. 290; Dow v. Jewell, 18 N. H. 340; 45 Am. Dec. 371; Buck v. Swazey, 35 Me. 41; 56 Am. Dec. 681; Smith v. Strahan, 16 Tex. 314; 67 Am. Dec. 622; Brown v. Brown, 77 Va. 619; Murray v. Sell, 23 W. Va. 475; Harris v. McIntyre, 118 Ill. 275; Brothers v. Porter, 6 B. Mon. 106; Purdy v. Purdy, 3 Md. Ch. 547; Botsford v. Burr, 2 Johns. Ch. 405; Bernard v. Bougard, Harr. (Mich.) 130; Chadwick v. Felt, 35 Pa. St. 305; Shoemaker v. Smith, 11 Humph. 81; Neill v. Keese, 13 Tex. 187; Pinney v. Fellows, 15 Vt. 525.

⁴ Case v. Coddington, 38 Cal. 191; Botsford v. Burr, 2 Johns. Ch. 405; Baker

have been made by the beneficiary, or that an absolute obligation for the payment shall have been incurred by him as a part of the original transaction of purchase, and at or before the time of the conveyance; no subsequent or independent payment will raise a resulting trust.¹ It must be clearly proved that the consideration of the purchase belonged to the *cestui que trust*,² and that the money of the *cestui que trust* was used in the purchase of the property in which the trust is claimed to exist. It cannot be created by agreement or contract.³ After the title has once passed without fraud, it is impossible to raise a

v. Vining, 30 Me. 121; 50 Am. Dec. 617; *Smith v. Patton*, 12 W. Va. 541; *Somers v. Overhulser*, 67 Cal. 237; *Smith v. Smith*, 85 Ill. 189; *McCully v. McCully*, 78 Va. 159.

¹ *Pomeroy's Eq. Jur.*, sec. 1037; *Case v. Coddington*, 38 Cal. 191; *Reeve v. Strawn*, 14 Ill. 94; *Morey v. Herrick*, 18 Pa. St. 123; *Kelley v. Johnson*, 28 Mo. 249; *Sullivan v. McLennans*, 2 Iowa, 442; 65 Am. Dec. 780; *Whaley v. Whaley*, 71 Ala. 159; *Gerry v. Stimson*, 60 Me. 189; *Roberts v. Ware*, 40 Cal. 637; *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256; *Pinnock v. Clough*, 16 Vt. 500; 42 Am. Dec. 521; *Buck v. Swazey*, 35 Me. 41; 56 Am. Dec. 681; *Miller v. Blose*, 30 Gratt. 744; *Sale v. McLean*, 29 Ark. 612; *Midner v. Midner*, 26 N. J. Eq. 299; *Cross's Appeal*, 97 Pa. St. 471; *Padgett v. Lawrence*, 10 Paige, 170; 40 Am. Dec. 232. But the payment is made "at the time of the purchase," if made after the agreement but before the execution of the conveyance: *Brown v. Cave*, 23 S. C. 251.

² *Dudley v. Bachelder*, 53 Me. 403; *Stephenson v. Thompson*, 13 Ill. 186; *Olive v. Dougherty*, 3 G. Greene, 371; *Getman v. Getman*, 1 Barb. Ch. 499; *Thompson v. Branch*, Meigs, 390; 33 Am. Dec. 153; *Shaw v. Shaw*, 86 Mo. 594; *Roberts v. Ware*, 40 Cal. 634. If the party who sets up a resulting trust in lands has made no payment, he cannot be permitted to show by parol evidence that the purchase was made for his benefit: *Irwin v. Ivers*, 7 Ind. 308; 63 Am. Dec. 421. But equity will

create an implied trust in favor of him who renders professional services wherewith to purchase property, as well as in favor of him who furnishes money for that purpose, where the legal title is taken in the name of another: *White v. Sheldon*, 4 Nev. 280. A resulting trust does not arise on a purchase of land for another's benefit, where the purchaser uses his own name and credit, and the undertaking to act for the other's benefit is by parol: *Fowke v. Slaughter*, 3 A. K. Marsh. 56; 13 Am. Dec. 133.

³ *Remington v. Campbell*, 60 Ill. 516; *Thalman v. Connor*, 24 N. J. Eq. 127; *Hunt v. Friedman*, 63 Cal. 510. A surety who pays the purchase-money, upon the default of his principal takes no interest in the land: *Gee v. Gee*, 32 Miss. 190. Money advanced by way of loan to a vendee, in whose name title is taken, will not raise a resulting trust: *Whaley v. Whaley*, 71 Ala. 159. Where the vendee of property assumes the payment of indebtedness due from the vendor to a third person, and the amount of such indebtedness is deducted from the purchase price, no trust is created in favor of such third person: *Nebraska City Bank v. Nebraska City Hydraulic Gas Light etc. Co.*, 14 Fed. Rep. 763. A resulting trust is not created in favor of a person who purchases property with his own money, but has the conveyance made directly to another person, the latter agreeing to pay the purchase-money: *McCue v. Gallagher*, 23 Cal. 51.

resulting trust, so as to divest the legal estate, by the subsequent application of the funds of a third person, in satisfaction of the unpaid purchase-money.¹ And if the payment of a definite portion of the purchase-money, or for some specific part or distinct interest in the estate, cannot be shown, no trust will result, as a general contribution toward the purchase is not sufficient.² Parol evidence is admissible to show who advanced the purchase-money, and to establish the trust.³ The fact of payment of the purchase-money, or of its ownership and payment in his behalf, may always be shown by parol, notwithstanding the recital in the deed of payment by the grantee. Such evidence does not contradict the statement in the deed that the grantee paid the money, but shows the further fact that the money did not belong to him, but to the person claiming the trust.⁴ On the other hand, the presumption may be rebutted by parol evidence

¹ *Coles v. Allen*, 64 Ala. 98; *Alexander v. Tams*, 13 Ill. 221; *Perry v. McHenry*, 13 Ill. 227; *Foster v. Trustees*, 3 Ala. 302; *Barnard v. Jewett*, 97 Mass. 87; *Mahorner v. Harrison*, 21 Miss. 53; *Cutler v. Tuttle*, 19 N. J. Eq. 549; *Botsford v. Burr*, 2 Johns. Ch. 405; *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256; *Wright v. King, Harr. (Mich.)* 12; *Bernard v. Bougard, Harr. (Mich.)* 130; *Freeman v. Kelley*, 1 Hoff. Ch. 90; *Rogers v. Murray*, 3 Paige, 390; *Barnet v. Dougherty*, 32 Pa. St. 371; *Gee v. Gee*, 2 Sneed, 395; *Pinnock v. Clough*, 16 Vt. 500; 42 Am. Dec. 521. Where the party who pays the consideration upon a purchase of land directs the deed to be made to one to whom he is indebted as a security for such debt, he thereby renounced the benefit of the consideration, and no trust arises in his favor: *Johnson v. Morse*, 16 Johns. 197; 8 Am. Dec. 306.

² *Olcott v. Bynum*, 17 Wall. 44; *Sayre v. Townsends*, 15 Wend. 647; *Reynolds v. Morris*, 17 Ohio St. 510; *McGowan v. McGowan*, 14 Gray, 119; 74 Am. Dec. 668; *Perry v. McHenry*, 13 Ill. 227; *White v. Carpenter*, 2

Paige, 217; *Baker v. Vining*, 30 Me. 121; 50 Am. Dec. 617; *Bible v. Hunter*, 79 Ala. 351.

³ *Ryall v. Ryall*, 1 Atk. 59; *Lench v. Lench*, 10 Ves. 511; *Boyd v. McLean*, 1 Johns. Ch. 582; *Brown v. Dwelley*, 45 Me. 52; *Kelley v. Johnson*, 22 Mo. 249; *Lindsey v. Plattner*, 23 Miss. 576; *Smith v. Strahan*, 16 Tex. 314; 67 Am. Dec. 622; *Lounsbury v. Purdy*, 18 N. Y. 515; *Perkins v. Nichols*, 11 Allen, 542; *Kelley v. Hill*, 50 Me. 470; *Lloyd v. Carter*, 17 Pa. St. 216; *Guthrie v. Gardner*, 19 Wend. 414; *Kane v. O'Connors*, 78 Va. 76; *Smitheal v. Gray*, 1 Humph. 491; 34 Am. Dec. 664; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; 47 Am. Dec. 527; *Baker v. Vining*, 30 Me. 121; 50 Am. Dec. 617; *Strimpfler v. Roberts*, 18 Pa. St. 283; 57 Am. Dec. 606; *Rhea v. Tucker*, 56 Ala. 450; *Sheerer v. Sheerer*, 109 Ill. 11; *Connor v. Follansbee*, 59 N. H. 124. But parties to a deed cannot by parol contradict the express consideration to defeat the conveyance: *Connor v. Follansbee*, 49 N. H. 124.

⁴ *Browne on Statute of Frauds*, sec. 93.

showing that it was the intention of the person advancing the purchase-money that the person to whom the property was transferred should take for his own benefit.¹

If land is conveyed without consideration of any kind, and no distinct trust is expressed, a trust results to the grantor.² But the smallest consideration is sufficient to prevent any resulting trust from arising;³ and parol proof that the conveyance was intended to be in trust for the grantor will not raise a trust.⁴ And the simple fact that the conveyance was a voluntary one will, not, if the instrument is well executed and intended to operate at once, create a trust, unless it is shown by other circumstances that the grantee was not intended to take beneficially.⁵ A resulting trust is subject to the rights of others, and will not be allowed to defeat prior and superior equities.⁶ The death of the nominal purchaser, and the descent of the mere naked title, does not destroy or impair the trust.⁷ When a tract of land bought by the husband, with money belonging to the wife, is sold and exchanged by him for another tract, the exchange does not affect her right to pursue her money, and fasten a trust on the lands received in the exchange.⁸ Resulting trusts of this kind have been abolished in several states by statute.⁹

¹ *Deacon v. Colquhoun*, 2 Drew. 21; *Jackson v. Feller*, 2 Wend. 465; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137; *Edwards v. Edwards*, 39 Pa. St. 378; *Bispham's Equity*, 83; *Hays v. Quay*, 68 Pa. St. 263; *Baker v. Vining*, 30 Me. 126; 50 Am. Dec. 617; *Warren v. Sheer*, 112 Pa. St. 634.

² 1 Greenl. Cruise, 375.

³ *Haythorp v. Hook*, 1 Gill & J. 297; *Farrington v. Barr*, 36 N. H. 86; *Graves v. Graves*, 29 N. H. 129.

⁴ *Hogan v. Jaques*, 19 N. J. Eq. 123; 97 Am. Dec. 644.

⁵ *Titcomb v. Morrill*, 10 Allen, 15; *Philbrook v. Delano*, 29 Me. 410; *Jackson v. Cleveland*, 15 Mich. 103; 90 Am. Dec. 266; *Carter v. Montgomery*,

2 Tenn. Ch. 216; *Orwig v. Merrill*, 69 Iowa, 733. A conveyance in fee with warranty estops the grantor from alleging an interest in the purchase-money which will raise a resulting trust to him: *Squire v. Harder*, 1 Paige, 494; 19 Am. Dec. 446.

⁶ *Sullivan v. McLanans*, 2 Iowa, 437; 65 Am. Dec. 780.

⁷ *Dudley v. Bosworth*, 10 Humph. 9; 51 Am. Dec. 690.

⁸ *Walker v. Elledge*, 65 Ala. 51.

⁹ Viz., Indiana, Kentucky, Michigan, Minnesota, Massachusetts, Maine, New York, and Wisconsin. The New York statute does not extend to trusts of personality: *Kane v. Gott*, 24 Wend. 641; 35 Am. Dec. 641.

ILLUSTRATIONS.—A, the purchaser, to raise the purchase-money, got B to become his surety on his note, and therewith obtained the money from a bank and paid it to the owner of the land, who, at the request of A, conveyed it to B as indemnity for his suretyship. *Held*, that a trust resulted in favor of A: *Bratton v. Rogers*, 62 Miss. 281. Land was purchased by W. with money belonging to his father and sister, but the deed, by mistake of the draughtsman, was taken in his name instead of theirs, as was intended. *Held*, that W. held the land for the use of his father and sister: *Oberthier v. Stroud*, 33 Tex. 522. A paid the consideration for premises for which a conveyance was taken in B's name. A continued to occupy them for many years, paying taxes and for improvements, and never being called on to account or to pay rent. *Held*, that there was a resulting trust in A's favor: *Mershon v. Duer*, 40 N. J. Eq. 333. A deed of mortgaged lands was executed by the mortgagor's, husband and wife, to the mortgagee upon the mortgagee's oral promise to the wife to sell the land, discharge the debt, and pay back the surplus, or reconvey any portion unsold. *Held*, a valid and enforceable trust in equity: *Clark v. Haney*, 62 Tex. 511; 50 Am. Rep. 536. A bought lands, took the title, and became responsible for the price, verbally agreeing at the time that B should have them upon assuming payment. *Held*, that no resulting trust was created by law, as there was no payment by B: *Lear v. Chouteau*, 23 Ill. 39.

§ 2010. **Children and Relatives—Presumption of Advancement.**—Where the purchaser is under a legal, or in certain cases a merely moral, obligation to maintain or otherwise provide for the person in whose name the purchase is made, equity will raise a presumption that the purchase was intended as an advancement.¹ Thus it

¹ *Pomeroy's Eq. Jur.*, sec. 1039; *Dyer v. Dyer*, 1 Eq. Lead. Cas. 314; *Stevens v. Stevens*, 70 Me. 92; *Lochenour v. Lochenour*, 61 Ind. 595; *Gilbert v. Gilbert*, 2 Abb. App. 256; *Baker v. Baker*, 22 Minn. 262; *Lorentz v. Lorentz*, 14 W. Va. 809; *Russ v. Weburs*, 16 Cal. 350; *Smith v. Strahan*, 16 Tex. 314; 67 Am. Dec. 622; *You v. Flinn*, 34 Ala. 409; *Gee v. Gee*, 32 Miss. 190; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Mumma v. Mumma*, 2 Vern. 19; *Livingston v. Livingston*, 2 Johns. Ch. 540; *Partridge v. Havens*, 10 Paige, 618; *Thomas v. Chicago*, 55 Ill. 403;

Guthrie v. Gardner, 19 Wend. 414; *Fatheree v. Fletcher*, 31 Miss. 265; *Knouff v. Thompson*, 16 Pa. St. 357; *Tremper v. Burton*, 18 Ohio St. 418; *Hill v. Pine River Bank*, 45 N. H. 300; *Seibold v. Christman*, 75 Mo. 308; *Cormerias v. Wesselhoeft*, 114 Mass. 550; *Milner v. Freeman*, 40 Ark. 62; *Bennett v. Camp*, 54 Vt. 40; *Wheeler v. Kidder*, 105 Pa. St. 270; *Dudley v. Bosworth*, 10 Humph. 9; 51 Am. Dec. 690; *Mut. Fire Ins. Co. v. Deale*, 18 Md. 26; 79 Am. Dec. 673; *Miller v. Blose*, 30 Gratt. 744. If a husband would claim a resulting trust

has been held that there will be no resulting trust, but that a presumption of advancement will arise in favor of a legitimate child;¹ a child as to property purchased in its name by the mother;² a wife;³ a sister;⁴ or one to whom the person advancing the money stands *in loco parentis*.⁵ But the presumption will not arise in favor of a woman with whom the purchaser has contracted an illegal marriage;⁶ or in favor of a mistress or concubine;⁷ or a brother.⁸ Parol evidence is admissible to show the intention of the purchaser to make the purchase an advancement.⁹ The presumption of advancement may be

in land conveyed to his wife by a third person, he must overcome by proof the presumption of an intended gift, and the proof must relate to the time of the transaction: *Read v. Huff*, 40 N. J. Eq. 229; *Stevens v. Stevens*, 70 Me. 92.

¹ *Sidmouth v. Sidmouth*, 2 Beav. 447; *Lorentz v. Lorentz*, 14 W. Va. 809; *Page v. Page*, 8 N. H. 187; *Lisloff v. Hart*, 25 Miss. 245; 57 Am. Dec. 203; *Wheeler v. Kidder*, 105 Pa. St. 270; *James v. James*, 41 Ark. 301; *Gee v. Gee*, 32 Miss. 190; *Hatton v. Landman*, 28 Ala. 127; *Partridge v. Havens*, 10 Paige, 618; *Shaw v. Read*, 47 Pa. St. 96; *Douglass v. Brice*, 4 Rich. Eq. 322; *Shepherd v. White*, 10 Tex. 72.

² *Pomeroy's Eq. Jur.*, sec. 1039. But see *Flynt v. Hubbard*, 57 Miss. 471.

³ *Seibold v. Christman*, 7 Mo. App. 254; *Drew v. Martin*, 2 Hem. & M. 130; *Whitten v. Whitten*, 3 Cusb. 194; *Dickenson v. Davis*, 43 N. H. 647; 80 Am. Dec. 202; *Smith v. Strahan*, 16 Tex. 314; 67 Am. Dec. 622; *Seibold v. Christman*, 75 Mo. 308; *Gray v. Gray*, 13 Neb. 453; *Maxwell v. Maxwell*, 109 Ill. 588. But subject to the claims of creditors: *Belford v. Crane*, 16 N. J. Eq. 265; 86 Am. Dec. 155. A conveyance of land to a husband for money furnished by the wife creates a trust in her favor: *Goldsberry v. Gentry*, 92 Ind. 193. Equity will fasten a trust on land purchased in his own name by a husband with the separate money of his wife: *Sasser v. Sasser*, 63 Ga. 275. A wife cannot base a resulting trust on her

husband's verbal promise to take in her name a deed of land for which, as well as for the improvements, he paid: *Lawrence v. Lawrence*, 14 Or. 77.

⁴ *Higdon v. Higdon*, 57 Miss. 264.

⁵ *Beckford v. Beckford*, Lofft. 490; *Currant v. Jago*, 1 Coll. C. C. 261; *Ebrand v. Dancer*, 2 Oh. Cas. 26; *Robert's Appeal*, 85 Pa. St. 84. It was held in a recent English case, that the mere fact that a person has placed himself *in loco parentis* towards the illegitimate child of his daughter did not alone raise a presumption of advancement in his favor. *Wood, V. C.*, said: "The court has never yet held that any presumption of advancement arose merely from the fact of so distant a relationship (if it be a relationship) as this, nor yet merely from the fact that one of the parties was *in loco parentis* to the other. Here I am asked to conjoin both the doctrines, and out of the weak parts of both to make one strong chain, and hold that the testator was under the obligation of making provision for an illegitimate grandchild, whom he was not under any liability, moral or legal, to support, and whose father was alive, merely on the ground that he had voluntarily brought up and educated him": *Tucker v. Burrow*, 2 Hem. & M. 515.

⁶ *Soar v. Foster*, 4 Kay & J. 152.

⁷ *Rider v. Kidder*, 10 Vesey, 360.

⁸ *Smithael v. Gray*, 1 Humph. 491; 34 Am. Dec. 664.

⁹ *Lamplugh v. Lamplugh*, 1 P. Wms. 113.

rebutted by parol evidence. "The advancement of a son is a mere question of intention, and therefore facts antecedent or contemporaneous with the purchase, or so immediately after it as to constitute a part of the same transaction, may properly be put in evidence for the purpose of rebutting the presumption."¹ The purchase of land by a parent in the name of a minor child is not to be deemed an advancement where it expressly appears that such was not the parent's intention; as, for instance, where the object was to protect the title against creditors.²

§ 2011. Resulting Trust—Where Trust Fails or does not Exhaust Property Conveyed.—Where a settlor conveys property or devises property on trusts which do not exhaust the whole property,—in that case, as to so much of the property respecting which no trust is declared, there will be a resulting trust in favor of the settlor, his heirs, residuary legatees, or devisees, or representatives,³ for where property is given simply upon trust, the trustee is excluded by that fact from taking beneficially, in case of failure, of the whole or part of the purpose for which the trust was directed.⁴ The rule is the same where the con-

¹ Lewin on Trusts, 136; Jackson v. Martin, 11 Johns. 91; Proseus v. McIntyre, 5 Barb. 424; Buren v. Buren, 79 Mo. 538; Seibold v. Christman, 75 Mo. 308; Hardin v. Darwin, 66 Ala. 55; Bent v. Bent, 44 Vt. 555; Milner v. Freeman, 40 Ark. 62; Wormmouth v. Johnson, 58 Cal. 621; Mut. Fire Ins. Co. v. Deale, 18 Md. 26; 79 Am. Dec. 673; Smith v. Strahan, 16 Tex. 314; 67 Am. Dec. 622; Robinson v. Robinson, 45 Ark. 481.

² Jackson v. Matsdorf, 11 Johns. 91; 6 Am. Dec. 355.

³ Pomeroy's Eq. Jur., sec. 1032; Corp. of Gloucester v. Wood, 3 Hare, 131; Schmucker's Estate v. Reel, 61 Mo. 592; 1 Perry on Trusts, 157, and note; Shaw v. Spencer, 100 Mass. 382; 1 Am. Rep. 115; Hill on Trustees, sec. 116; Steele v. Lowry, 4 Ohio, 72; 19 Am. Dec. 581. When a trust is ineffectually declared, or fails, the party

taking it becomes trustee for carrying out the purposes of other trusts in the will, or for those who are to take under the disposition of law: Drew v. Wakefield, 54 Me. 291; Lusk v. Lewis, 32 Miss. 297; Cushney v. Henry, 4 Paige, 345.

⁴ Snell's Equity, 122. "If I give to A and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose alone. If the devise is on trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of these two modes admits just this difference: the former is a devise of an estate for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest; where, therefore, the whole

veyance is stated to be on trust; but no trust is declared, or the trusts which are declared are inoperative;¹ or where the trust is too vague or uncertain to execute;² or cannot be executed because it is illegal;³ or where the trust fails by lapse.⁴ An exception to the general doctrine of resulting trusts of this class occurs in case of a charity; and if no particular purpose is declared, but the gift is for charitable purposes generally, or if the entire interest is not exhausted, no trust will result.⁵ Where real estate is directed to be sold and the proceeds to be applied to certain purposes, and there is a partial failure, "if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold the quality of personalty, not only to observe the particular purposes of the will, but to all intents, the claim of the heir at law is defeated, and the estate is considered to be personal."⁶

§ 2012. **Arising out of Joint Tenancies.**—Though equity follows the rules of law as to estates in joint tenancy, and where two or more persons purchase lands, and advance the money in equal shares, and take a con-

legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intention to give to the donee of the legal estate the beneficial interest, if the whole is not exhausted by the particular purpose, the surplus goes to the devisee, as it is intended to be given to him": *King v. Denison*, 1 Ves. & B. 272.

¹ *Aston v. Wood*, L. R. 6 Eq. 419; *Symes v. Hughes*, L. R. 9 Eq. 475; *Attorney-General v. Windsor*, 8 H. L. Cas. 369; *Coard v. Holderness*, 20 Beav. 147; *Bennett v. Hutson*, 33 Ark. 762; *Saylor v. Plaine*, 31 Md. 158; 1 Am. Rep. 34.

² *Nichols v. Allen*, 130 Mass. 211; 39 Am. Rep. 445; *Olliffe v. Wells*, 130 Mass. 221.

³ *Meth. Church v. Remington*, 1

Watts, 218; 26 Am. Dec. 61; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Arnold v. Chapman*, 1 Ves. Sr. 108; *Stevens v. Ely*, 1 Dev. Eq. 497; *Lemmond v. Peoples*, 6 Ired. Eq. 137.

⁴ *Pomeroy's Eq. Jur.*, sec. 1032; *Ackroyd v. Smithson*, 1 Brown Ch. 503.

⁵ *Jackson v. Phillips*, 14 Allen, 539.

⁶ *Craig v. Leslie*, 3 Wheat. 563.

Where the object for which a conversion of real estate into personalty fails, either wholly or in part, so that the proceeds thereof are not legally and effectually disposed of by the testator, there is a resulting trust in favor of the heirs at law *pro tanto*: *Hawley v. James*, 7 Paige, 213; 32 Am. Dec. 623. Where there is a qualified conversion by will, that portion of the fund which fails of its object does not pass with the residue, but results to the party who would have been entitled to the real estate if unsold: *Harker v. Reilly*, 4 Del. Ch. 72.

veyance to themselves and their heirs, they will be joint tenants in equity as at law, and upon the death of one of them the estate will go to the survivor, yet (in accordance with the maxim that equality is equity) equity leans against the doctrine of survivorship, and will therefore lay hold of almost any circumstances from which it can reasonably be implied that a tenancy in common was intended, and will treat the surviving joint purchaser as a trustee for the legal representatives of the deceased purchaser.¹ Therefore where two or more persons purchase lands and advance the purchase-money in unequal proportions, and this appears on the deed itself, this makes them in the nature of partners; the survivor will be deemed in equity a trustee for the other, in proportion to the sum advanced by him; and even where the purchase-moneys are advanced in equal proportions, it is only because, and only when, equity can find no sufficient circumstance of difference that the survivorship incident of joint tenancy is permitted to have its way. Where money is advanced either in equal or in unequal shares, by persons who take a mortgage to themselves jointly, in equity there will be a tenancy in common. The same rule is uniformly applied to joint purchases in the way of trade, and for purposes of partnership, and for other commercial transactions.²

§ 2013. Constructive Trusts — In General. — A constructive trust, as distinguished from both express and implied trusts, is defined to be a trust which is raised by construction of equity without reference to any intention of the parties, either expressed or presumed.³ Such a trust may be proved by parol,⁴ provided the evidence is clear and specific.⁵ One who, acting as the agent of

¹ Snell's Equity, 125.

² Snell's Equity, 125.

³ Snell's Equity, 127.

⁴ Hoge v. Hoge, 1 Watts, 163; 26

Am. Dec. 52; Leshey v. Gardner, 3 Watts & S. 314; 38 Am. Dec. 764.

⁵ Brickell v. Earley, 115 Pa. St.

another to buy property, purchases the property for himself will be held a trustee of it for his principal;¹ as where one purchased land in his own name, under an agreement to purchase for the joint benefit of himself and others;² where a railroad director bought lands for the use and benefit of the company, and paid for them with its funds, taking the title in his own name or jointly with others;³ where a person agreed to bid in land for another at a sheriff's sale, but he took the conveyance in his own name;⁴ where one undertook to act as guardian for an infant, and to bid in for her certain personal property from her father's estate, and obtained the same at a very low price, professedly for her benefit, but before he was actually appointed her guardian;⁵ where an agent, appointed to pay the taxes on lands of non-residents, suffered the lands to be sold for a trifling tax, and became the purchaser at the sale.⁶ So one who fraudulently procures a devise to himself under a parol promise to hold in trust for another will be adjudged a trustee for that other.⁷ So one who has obtained another's property by fraud is a trustee for him *ex maleficio* of the thing in his manual possession.⁸ So if A, with knowledge of the rights of B, acquires from the owner the title to land which should

¹ Sweet v. Jacocks, 6 Paige, 355; 31 Am. Dec. 252; Pinnock v. Clough, 16 Vt. 500; 42 Am. Dec. 521; Switzer v. Skiles, 8 Ill. 529; 44 Am. Dec. 723; Moffatt v. Shepard, 2 Pinn. 66; 52 Am. Dec. 141; Follansbe v. Kilbreth, 17 Ill. 522; 65 Am. Dec. 691; Miles v. Thorne, 38 Cal. 335; 99 Am. Dec. 385; Miller v. Antle, 2 Bush, 407; 92 Am. Dec. 495; Ryan v. Dox, 34 N. Y. 307; 90 Am. Dec. 697. See *ante*, Principal and Agent; Gilbert v. Carter, 10 Ind. 16; 68 Am. Dec. 655; Minot v. Mitchell, 30 Ind. 228; 95 Am. Dec. 685; Newton v. Taylor, 32 Ohio St. 339; Manning v. Hayden, 5 Saw. 360; Cape v. McCollum, 27 Ala. 461; Rose v. Hayden, 35 Kan. 106; 57 Am. Rep. 145. Even though the deed is made to the agent, the principal acquires, from the time of the purchase, the equitable

title, and the agent holds as trustee: Follansbe v. Kilbreth, 17 Ill. 522; 65 Am. Dec. 691; Chastain v. Smith, 30 Ga. 96; Brown v. Dwelley, 45 Me. 52; Safford v. Hynds, 39 Barb. 625; Smith v. Boquet, 27 Tex. 507.

² Ferguson v. Williamson, 20 Ark. 272; Hidden v. Jordan, 21 Cal. 92.

³ Michigan Air Line R. R. Co. v. Mellen, 44 Mich. 321.

⁴ Denton v. McKenzie, 1 Desaus. Eq. 289; 1 Am. Dec. 664; Moffatt v. Buchanan, 11 Humph. 369; 54 Am. Dec. 41.

⁵ Belcher v. Sanders, 34 Ala. 9.

⁶ Oldhams v. Jones, 5 B. Mon. 458.

⁷ Bedilian v. Seaton, 3 Wall. C. C. 284; McKee v. Jones, 6 Pa. St. 425; Hoge v. Hoge, 1 Watts, 163; 26 Am. Dec. 52.

⁸ Christy v. Sill, 95 Pa. St. 380.

have been conveyed to B, A will be charged as trustee for B.¹ So a purchaser who has obtained more land than he is entitled to, through the mistake or fraud of an executor, and without paying for it, holds such land as trustee for those beneficially interested.² So one may be constituted a trustee *ex malificio* in favor of a person not *in esse*, by fraudulent representations, if the latter merely seeks to obtain property which the former holds by virtue of his fraud, and which the latter would be entitled to hold if the representations had been true.³ A trust arising from an illegal transaction may be enforced in favor of an innocent party.⁴

But courts of equity will not assume jurisdiction to establish trusts in every case where a mere confidence has been reposed or a credit given.⁵ A trust does not result from a mere breach of contract.⁶ Money delivered to a person to pay debts and converted by him is not a trust fund authorizing the one who reposed the confidence or his representatives to recover it as such.⁷ And the acquisition of property by larceny or trespass does not create the relation of trustee and *cestui que trust*.⁸

ILLUSTRATIONS.—At an auction sale of a farm under a mortgage, C did not contradict an announcement that he was bidding for the mortgagor, and bidders, therefore, declining to bid against him, the farm was struck off to him at the amount of the encumbrances, being much less than its value. C then refused to convey to the mortgagor. *Held*, that he was the trustee of the mortgagor: *Jenckes v. Cook*, 9 R. I. 520; *Regan v. Campbell*, 2 Mackey, 28. Certain parties, by fraudulently representing that the entire stock and assets of a corporation belonged to them, procured a decree dissolving the corporation, and acquired possession of its assets. *Held*, liable in equity to

¹ Wells v. Francis, 7 Col. 396.

⁶ Cowan v. Wheeler, 25 Me. 267;

² Anderson v. Nesbit, 2 Rawle, 114.

43 Am. Dec. 283.

³ Piper v. Hoard, 107 N. Y. 73; 1 Am. St. Rep. 789.

⁷ Doyle v. Murphy, 22 Ill. 502; 74 Am. Dec. 165.

⁴ Miller v. Davidson, 8 Ill. 518; 44 Am. Dec. 715.

⁵ Doyle v. Murphy, 22 Ill. 502; 74 Am. Dec. 165.

⁸ Doyle v. Murphy, 22 Ill. 502; 74 Am. Dec. 165; Campbell v. Drake, 4 Ired. 70. *Contra*, Riehl v. Evansville Ass'n, 104 Ind. 79; New York etc. R. R. Co. v. Moore, 18 Abb. N. C. 106.

be decreed trustees *ex maleficio*, as respected *bona fide* stockholders: *Bailey's Appeal*, 96 Pa. St. 253. A testator, by the promise of C, a residuary legatee, to pay certain sums to certain persons as legacies, was induced to omit to provide therefor in the will or by codicil. *Held*, that this fact established a trust for such amounts in favor of such persons against C, and that such trust might be declared upon a promise implied by C's silent assent: *Brook v. Chappell*, 34 Wis. 405. A agreed with B to invest certain money, to be advanced by the latter, in lands, and in a specified time to repay the sum with interest, and divide with B whatever profits he should realize. *Held*, that no trust in the lands resulted to B: *Smith v. Garth*, 32 Ala. 368. M. held a judgment against plaintiff for two thousand dollars, and offered to discharge it for five hundred dollars, but plaintiff did not accept the offer. R., a stranger to plaintiff, applied to M., and by falsely representing that he was acting for plaintiff, induced M. to assign the judgment to him (R.) for five hundred dollars. *Held*, that plaintiff had no interest in the transaction, and that he was not entitled to the benefit of the purchase of the judgment: *Garvey v. Jarvis*, 46 N. Y. 310; 7 Am. Rep. 335.

§ 2014. Money Equitably Belonging to Another.—

Where one person has obtained money of another which he has not a right equitably to retain or withhold, as where money has been paid by accident, mistake of fact, or fraud, he will be treated in equity as a trustee, and equity will compel him to pay it over to the true owner.¹ Every person is a trustee who receives money to be paid to another or to be applied to a particular purpose to which he does not apply it.² The proceeds of a draft delivered to a banker for collection are a trust fund in his hands, and in case of his insolvency the drawer may enforce payment in full from his assignee, to the exclusion of other creditors, although the proceeds cannot be traced to any specific property.³

ILLUSTRATIONS.—The managing officer of a bank became indebted to it in a large sum, which he used in the purchase of

¹ Pomeroy's Eq. Jur., sec. 1047.

² *Finney v. Cochran*, 1 Watts & S. 112; 37 Am. Dec. 450; *Stockard v.*

Stockard, 7 Humph. 303; 46 Am. Dec. 79.

³ *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 287.

land, and died leaving a will devising it to his wife. *Held*, that the land would be charged with the payment of such sum, *Statesville Bank v. Simonton*, 86 N. C. 187. A, supposing that a bank held his notes which it had discounted, and wishing to anticipate payment, gave to the bank his check for the amount. The bank had sold the notes, and before they came due it failed. *Held*, a trust, and that the receiver of the bank should be ordered to pay the notes from the funds of the bank in his hands: *People v. City Bank*, 96 N. Y. 32.

§ 2015. Trust Property in Hands of Third Person.—

Where trust property — either real or personal — is transferred by the trustee to a third person, not in accordance or for the purposes of the trust, and such third person is either a volunteer or has notice of the trust, the latter will hold the property subject to the original trust, and will become himself a trustee for the original beneficiary.¹ If the alienee be a volunteer, then the property may be followed into his hands, whether he had notice of the trust or not; and if the alienee be a purchaser of the estate, even for valuable consideration, but with notice, the same rule applies.² But if the alienee be a purchaser for valuable consideration, having the legal estate, and with-

¹ Pomeroy's Eq. Jur., sec. 1048; *Cavagnaro v. Don*, 63 Cal. 227; *Bunting v. Ricks*, 2 Dev. & B. Eq. 130; 32 Am. Dec. 699; *Kinlock v. O'On*, 1 Hill, Ch. 190; 26 Am. Dec. 196; *Taylor v. King*, 6 Munf. 358; 8 Am. Dec. 746. The assignee will be compelled to execute the original trust at the instance of the *cestui que trust*: *Pierce v. McKeehan*, 3 Pa. St. 136; 45 Am. Dec. 635. But the rule has no application to a case where the trustee, with the consent of the creator of the trust and owner of whatever equitable interest there was after the trust, conveys to the *cestuis* themselves: *Storrs v. Flint*, 46 N. Y. Sup. Ct. 598. Nor to sales of trust estates at public vendue in accordance with the deed: *Wood v. Augustine*, 61 Mo. 46.

² *Shepherd v. McEvers*, 4 Johns. Ch. 136; 8 Am. Dec. 561; *Smith v. Daniel*, 2 McCord Ch. 143; 16 Am. Dec. 641; *Graff v. Castleman*, 5 Rand. 195;

16 Am. Dec. 741; *Smithael v. Gray*, 1 Humph. 491; 34 Am. Dec. 664; *Heth v. R. R. Co.*, 4 Gratt. 482; 50 Am. Dec. 88; *Huckabee v. Billingsly*, 16 Ala. 414; 50 Am. Dec. 183; *Bush v. Bush*, 3 Strob. Eq. 131; 51 Am. Dec. 675; *Moffatt v. Shepard*, 2 Pinn. 66; 52 Am. Dec. 141; *Carpenter v. McBride*, 3 Fla. 292; 52 Am. Dec. 379; *Bates v. Kelly*, 80 Ala. 142; *Everett v. R. R. Co.*, 67 Tex. 430; *Covington v. Anderson*, 16 Lea, 310; *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 392; *Stewart v. Chadwick*, 8 Iowa, 463; *Jones v. Shaddock*, 41 Ala. 262; *Webster v. French*, 11 Ill. 254; *Hagthorp v. Hook*, 1 Gill & J. 270; *Murray v. Ballou*, 1 Johns. Ch. 566; *Pinson v. Ivey*, 1 Yerg. 296; *Heth v. R. R. Co.*, 4 Gratt. 482; 50 Am. Dec. 88; *Gale v. Harby*, 20 Fla. 171; *Warmouth v. Johnson*, 58 Cal. 621; *Sadler's Appeal*, 87 Pa. St. 154.

out notice, his title, even in equity, cannot be impeached, and he takes the land freed from the trust.¹ Notice of a secret trust must be made out by clear proof of actual notice, or of facts which put the party upon such inquiry as, if pursued with ordinary diligence, would have led him to the knowledge of such trust.² But it is not necessary that he should have notice as to the particular *cestui que trust*: it is sufficient if he have notice that the person from whom he buys is but a naked trustee; he is then bound to inquire and find out the *cestui que trust*.³

There must be conclusive proof of gross inadequacy of consideration to warrant holding a purchaser of trust property, from a trustee authorized to sell, liable in equity to account for and pay the proceeds thereof to the *cestui qui trust*, on the ground of fraudulent collusion with the trustee in the purchase, where this is claimed upon inference of fraud from inadequacy of consideration only, and without direct evidence of actual fraud.⁴ To charge a stranger to a trust fund as a trustee, by reason of participation in the misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was aware that the debt was, at the time of payment, a debt of such character that the fund could not lawfully be used to pay it.⁵ Whoever buys land while there is a *cestui qui trust* in possession will be presumed to have had notice of the

¹ Beck v. Uhrich, 13 Pa. St. 636; 53 Am. Dec. 507; Wyse v. Dandridge, 35 Miss. 672; 72 Am. Dec. 149; Stewart v. Greenfield, 16 Lea, 13; Cheever v. Converse, 35 Minn. 199; Carey v. Brown, 62 Cal. 373; McCashel v. Lathrop, 63 Ga. 96; Flynt v. Hubbard, 57 Miss. 471; Oliver v. Pratt, 3 How. 333; Prevo v. Walters, 5 Ill. 35; Christmas v. Mitchell, 3 Ired. Eq. 535; Bracken v. Miller, 4 Watts & S. 102;

Hudnal v. Wilder, 4 McCord, 294; 17 Am. Dec. 744; Henderson v. Dodd, 1 Bail. Eq. 138.

² Wilson v. McCullough, 23 Pa. St. 440; 62 Am. Dec. 347.

³ Maples v. Medlin, 1 Murph. 219; 3 Am. Dec. 687.

⁴ Carpenter v. Robinson, 1 Holmes, 67.

⁵ Chicago Bank v. Hyde Park, 101 Ill. 595; 40 Am. Rep. 218.

trust.¹ Where one known to be a trustee pledges that which is known to be trust property, to secure his own debt, the act is *prima facie* unauthorized, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it.² The word "trustee" in a stock certificate issued to the holder in his name "as trustee" is sufficient to put persons on inquiry as to the holder's right to pledge it for his own debt, and a pledgee taking it without inquiry does so at his peril.³ A purchaser of land from a trustee with power to convey only on the happening of an event, which is a condition precedent, must ascertain at his peril whether the condition has been fulfilled. And this is so, although the deed recites performance of the condition.⁴ Although a trust deed empowers the trustee to raise money on mortgage of the trust property, one lending money with knowledge of the intention of the trustee to apply it to his own use takes but a voidable title.⁵ As between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust.⁶ Where a trustee disposes of the trust

¹ Pritchard v. Brown, 4 N. H. 397; 17 Am. Dec. 431.

² Shaw v. Spencer, 100 Mass. 382; 1 Am. Rep. 115.

³ Shaw v. Spencer, 100 Mass. 382; 1 Am. Rep. 115.

⁴ Griswold v. Perry, 7 Lans. 98.

⁵ Union Mut. Life Ins. Co. v. Spaulds, 99 Ill. 249.

⁶ Pennell v. Deffell, 4 De Gex, M. & G. 372; Perry on Trusts, secs. 828, 463; Story on Agency, sec. 229; Hargroves v. Batten, 19 Ga. 130; Lathrop v. Bampton, 31 Cal. 17; 89 Am. Dec. 141, the court saying: "Before a *cestui que trust* can claim specific real or personal property, he must show that it

is the identical property originally covered by the trust, or that it is the fruit or product thereof in a new form, The rule upon this subject is well and concisely stated by Mr. Justice Lewis in Thompson's Appeal, 22 Pa. St. 17: "Whenever a trust fund has been wrongfully converted into other species of property, if its identity can be traced, it will be held in its new form liable to the rights of the *cestui que trust*. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the *cestui que trust* or as the product of it, equity will follow it; and the right of reclama-

property, the *cestui que trust* may claim the thing received in exchange, if it can be identified.¹ But only when the trust fund can be traced and identified can the *cestui* follow it into the hands of third persons, and recover it therefrom in equity.² A *bona fide* purchaser from a trustee is not responsible for the misapplication of the purchase-money by the trustee.³ The officers of a bank are not chargeable with knowledge that a depositor is committing a fraud

tion attaches to it until detached by the superior equity of a *bona fide* purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself, so long as it can be ascertained to be such. But the right of pursuing fails when the means of ascertainment fail. This is always the case where the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description'; 2 Story's Eq. Jur., secs. 1257, 1259; Tiffany and Bullard on Trusts and Trustees, 33, 34. Where a trustee, in violation of his trust, invests the trust property or its proceeds in any other property, the *cestui que trust* may elect to hold the substituted property subject to the trust, or to hold the trustee personally liable to him for the breach of the trust. The former he can do, however, only when he can follow and identify the property either in its original or substituted form, as we have already seen. If this cannot be done, the right of the *cestui que trust* to elect is gone, because its exercise has become impossible, and he is therefore forced to rely upon the personal liability of the trustee; and such seems to be the condition of the *cestui qui trust* in the present case. When thus forced to rely upon the personal liability of the trustee, a *cestui que trust* occupies a position towards the estate of the trustee which is no better, but is identical with that of a simple contract creditor. He has no special lien upon the general estate of the trustee which is superior to that of any other creditor; for the specific property covered by the trust is gone, and nothing is left to the *cestui que*

trust except a naked claim for damages generally on account of the breach to be obtained through an action at law, attended by all the incidents of a like action on behalf of one who is not the beneficiary of a trust." If a trustee commits a breach of trust by loaning the assets of the trust to a third person, the latter is bound to indemnify the trustee; and if he has the trust property in specie, a court of equity will compel him to restore it to the trustee from whom he borrowed it: *Abbott v. Reeves*, 49 Pa. St. 494; 88 Am. Dec. 510. One who gives to the cashier of a bank a sum of money to pay his note made to the bank, the cashier saying that he will send for the note and return it to the maker, and who notwithstanding is sued by one holding the note, and judgment recovered, may follow the amount given to the cashier as a trust fund into the hands of an assignee for creditors of the bank: *Ellicott v. Barnes*, 31 Kan. 170.

¹ *Piatt v. Oliver*, 3 McLean, 27; *MacGregor v. MacGregor*, 9 Iowa, 65; *Moffitt v. McDonald*, 11 Humph. 457; *McLeod v. Bank*, 42 Miss. 99.

² *Parker v. Jones*, 67 Ala. 234; *Portland v. Steamboat Co.*, 73 Me. 370. A *cestui* cannot follow his fund into the hands of a receiver, but must occupy the position of a general creditor of the estate, unless he can identify his fund: *Illinois Trust and Savings Bank v. Buffalo Bank*, 15 Fed. Rep. 858.

³ *Hunt v. State Bank*, 2 Dev. Eq. 60; *Redheimer v. Pyron*, Spear Eq. 134. See *Rutledge v. Smith*, 1 Busb. Eq. 283; *Davis v. Christian*, 15 Gratt. 11; *Dawson v. Ramser*, 58 Ala. 573; *Hauser v. Shore*, 5 Ired. 357.

upon a trust estate, nor is the duty of inquiry imposed upon them simply because the depositor draws upon a trust account payable to himself, and transfers funds from a trust account to his private account. Nor is the bank chargeable with seeing to the application of a loan properly made to such depositor upon the security of a trust estate, there being nothing which should excite the suspicion of the bank officers in the matter, and the declared purpose of the borrower being a legal and proper one.¹

ILLUSTRATIONS.—A son was intrusted with money to buy land for his father, but took the title in his own name without his father's knowledge. The father occupied the land as his residence. *Held*, that his resulting trust should prevail over a mortgage made by the son, while his father was in actual possession: *Taylor v. Mosely*, 57 Miss. 544. W. lent S., a squatter on land, forty dollars to enter the land. S., not finding the land-agent, handed the money back, telling W. to enter the land for him, and hold the deed as security for its payment. W., without S.'s knowledge, entered the land in his own name, and after S. had improved it to the value of two thousand five hundred dollars, conveyed to D., who was cognizant of the facts. *Held*, that S. was entitled in equity to redeem the land on payment of forty dollars with interest: *Ward v. Spivey*, 18 Fla. 847. The owner of mortgaged cattle sold them, and with the proceeds paid his debt to a bank in another county, where the mortgage was not filed, the cashier having no knowledge of the circumstances except that the money arose from a sale of cattle. *Held*, that the bank was not liable to the holder of the mortgage for the proceeds: *Burnett v. Gustafson*, 54 Iowa, 86; 37 Am. Rep. 190. An intestate had received certain trust moneys which he deposited in his own name as trustee, and afterwards took all of the money, except \$159, and invested in his own business. *Held*, that no particular money could be impressed with the trust, as the original could in no way be identified: *Mills v. Post*, 76 Mo. 426. Money belonging to the school fund was deposited by the town treasurer in his own name with the banker. The depositor was a man of limited means, and not likely to be the owner of sums of money so large as those deposited. *Held*, that the banker took the money with notice of the trust, but that the money having become so mixed with other moneys of the bank that it could not be identified, the *cestuis que trust* had thereby lost their right to recover it: *School Trustees v. Kirwin*, 25 Ill. 73.

¹ *Goodwin v. American Bank*, 48 Conn. 550; *Loring v. Brodie*, 134 Mass. 453.

§ 2016. **Fiduciary Person Purchasing Property with Trust Funds.**—Where a person standing in a fiduciary position purchases property with the trust funds, and takes the title thereto in his own name, without any declaration of trust, a trust arises in favor of the *cestui que trust* or other beneficiary.¹ Thus if a partner purchase realty with the partnership funds, and take the title in his name, his copartner will be allowed to claim a trust.² And the rule applies to purchases by the trustee of a corporation;³ or by the committee, trustee, or guardian of an insane person;⁴ or by an executor.⁵ So where an agent purchases property with the funds of his principal, he holds it in trust for him.⁶ So a trust results to a fraudulent debtor for creditors on the purchase of land in another's name by such debtor to defraud his creditors.⁷ If a trustee purchase partly with his own funds and partly with those of a *cestui*, the *cestui* has a resulting trust in the purchase, and the burden rests on the trustee to show the amount of his own funds.⁸ And though, as shown in a former section, to constitute a simple resulting trust, where one person's money is used in paying for lands conveyed to another, the money must be paid at the time of the purchase, yet when a trustee thus uses trust funds, it is not essential to the *cestui's* equity to charge the lands that the money be paid at the time of the purchase. The right may be enforced, whether the

¹ Pomeroy's Eq. Jur., sec. 1049; Foote v. Colvin, 3 Johns. 216; 3 Am. Dec. 478; Wallace v. Duffield, 2 Serg. & R. 521; 7 Am. Dec. 660; Beck v. Uhrich, 13 Pa. St. 636; 53 Am. Dec. 507; Brett v. Yeaton, 101 Ill. 242; Thompson's Appeal, 22 Pa. St. 16; Pugh v. Pugh, 9 Ind. 132; Day v. Roth, 18 N. Y. 448; Valle v. Bryan, 19 Mo. 423.

² Kayser v. Maugham, 8 Col. 232; King v. Hamilton, 16 Ill. 190; Coder v. Haling, 27 Pa. St. 84; Ebbert's Appeal, 70 Pa. St. 79; Trephagen v. Burt, 67 N. Y. 30; McCully v. McCully, 78 Va. 159; Sheerer v. Sheerer, 109 Ill. 11.

³ Methodist E. Church v. Wood, 5 Ohio, 283.

⁴ Hamnett's Appeal, 72 Pa. St. 337; Reid v. Fitch, 11 Barb. 399.

⁵ Harper v. Archer, 28 Miss. 212; Seamen v. Cook, 14 Ill. 501; Dodge v. Cole, 97 Ill. 338; 37 Am. Rep. 111; White v. Drew, 42 Mo. 561.

⁶ Hall v. Sprigg, 7 Mart. 243; 12 Am. Dec. 507; Depeyster v. Gould, 3 N. J. Eq. 474; 29 Am. Dec. 723; Crocker v. Crocker, 31 N. Y. 507; 88 Am. Dec. 291.

⁷ Dunnica v. Coy, 24 Mo. 167; 69 Am. Dec. 420.

⁸ Watson v. Thompson, 12 R. I. 466.

payment be made before or after the purchase, so long as the trust funds can be traced into specific property, and against all persons except *bona fide* purchasers.¹

§ 2017. Renewal of Leases by Partners or Fiduciary Persons.—A lease renewed by a partner, a trustee, executor, or other fiduciary person in his own name and for his own benefit, even in the absence of fraud, and even upon the refusal of the lessor to grant a new lease to the *cestui que trust*, will in equity be considered as held in trust for the benefit of the persons entitled to the old lease.²

§ 2018. Money Expended in Improvements on Estate.—A constructive trust may also arise where a person who is only part owner, acting *bona fide*, permanently benefits an estate by repairs or improvements.³ Although a person expending money by mistake upon the property of another has no equity against the owner, who was ignorant of and did not encourage him in his expenditure,⁴ yet if it were necessary for the true owner to proceed in equity, he would only be entitled to its assistance according to the ordinary rule, by doing equity and making compensation for the expenditure, so far, of course, and only so far, as the expenditure was necessary, and had proved permanently beneficial.⁵ But a person will have no equity who lays out money on the property of another with full knowledge of the state of the title,⁶ or who lays out money unnecessarily and fancifully, extravagantly or improperly.⁷

¹ Lehman v. Lewis, 62 Ala. 129.

² Phyfe v. Wardell, 5 Paige, 268; 28 Am. Dec. 430; Mitchell v. Reed, 61 N. Y. 123; 19 Am. Rep. 252; Keech v. Sandford, 1 Eq. Lead. Cas. 46; Davon v. Fleming, 2 Johns. Ch. 282; Anderson v. Lemon, 8 N. Y. 236; Grumley v. Webb, 44 Mo. 444; 100 Am. Dec. 304. See *ante*, Agency—Partnership.

³ Snell's Equity, 134; McClanahan v. Henderson, 2 A. K. Marsh, 388; 12 Am. Dec. 412.

⁴ Bodwell v. Nutter, 63 N. H. 446; Findley v. Wilson, 3 Litt. 390; 14 Am. Dec. 72.

⁵ Nesson v. Clarkson, 4 Hare, 97; Dilworth v. Sinderling, 1 Binn. 488; 2 Am. Dec. 469; Pratt v. Thornton, 28 Me. 355; 48 Am. Dec. 492; Felch v. Hooper, 119 Mass. 52.

⁶ Rennie v. Young, 2 De G. & J. 136; Ramsden v. Dyson, L. R. 1 H. L. 129.

⁷ Snell's Equity, 134.

§ 2019. Who may be Trustee — Trustee de Son Tort.

—Any person may be a trustee who is capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and is domiciled within the jurisdiction of the court.¹ A voluntary association may be a trustee;² or a corporation;³ or the holders of certain offices, and their successors;⁴ or a city or town;⁵ or a female;⁶ or an irresponsible person.⁷ A husband may be trustee for his wife.⁸ An individual may be a trustee for a corporation.⁹ Persons acquiring title by fraud are trustees for the injured party.¹⁰ A legatee who takes an estate subject to a trust takes it as a trustee.¹¹ The tenant for life is a trustee for those in remainder.¹² Although generally a person cannot be trustee and *cestui*, a trust is not rendered void by the court's appointment of the *cestui* to be the trustee.¹³ But a person under disability or a non-resident will not be appointed, nor one whose interest

¹ Gibson's Case, 1 Bland Ch. 138; 17 Am. Dec. 257; Commissioners v. Walker, 6 How. (Miss.) 143; 38 Am. Dec. 433. The fact that the will speaks of the executors as trustees does not make them technically such: Bacon v. Bacon, 4 Dem. 5. If a testator devises property to A in trust, and also appoints A his executor, the two offices are distinct; and if A refuses or neglects to qualify as trustee and give bond, another person may be appointed trustee: Daggett v. White, 128 Mass. 398; Earle v. Earle, 48 N. Y. Sup. Ct. 18. Property may be so devised to an executor that he will be held to be also a trustee, although not so named in the will: Anck's Estate, 11 Phila. 118. Thus where a will directs acts to be done which necessarily require the intervention of a trustee to hold the property, the executor is trustee by necessary implication: Nash v. Cutler, 19 Pick. 67; Hall v. Cushing, 9 Pick. 395; Saunderson v. Stearns, 6 Mass. 37; Dorr v. Wainwright, 13 Pick. 328; Stone v. Hobart, 8 Mass. 464; Smithwick v. Jordan, 15 Mass. 113; Wheeler v. Perry, 18 N. H. 307.

² Pickering v. Shotwell, 10 Pa. St. 27.

³ Commissioners v. Walker, 6 How. (Miss.) 143; 38 Am. Dec. 433; Phillips Academy v. King, 13 Miss. 546, 557; Sutton v. Cole, 3 Pick. 232, 240; Amherst Academy v. Cows, 6 Pick. 427; 17 Am. Dec. 387; Ex parte Greenville Academies, 7 Rich. Eq. 471.

⁴ Commissioners v. Walker, 6 How. (Miss.) 143; 38 Am. Dec. 433.

⁵ Webb v. Neal, 5 Allen, 575; Piper v. Moulton, 72 Me. 155.

⁶ Gibson's Case, 1 Bland Ch. 138; 17 Am. Dec. 257.

⁷ Berry v. Williamson, 11 B. Mon. 245. That the testator selects for his trustee an irresponsible person is no ground for the court to require security: Holcomb v. Coryell, 12 N. J. Eq. 289.

⁸ Conway v. Hale, 4 Hayw. 1; 9 Am. Dec. 748; Porter v. Bank, 19 Vt. 410.

⁹ McCartee v. Orphan Asylum Soc., 9 Cow. 437; 18 Am. Dec. 516.

¹⁰ Coleman v. Cocke, 6 Rand. 618; 18 Am. Dec. 757.

¹¹ McCants v. Bee, 1 McCord Eq. 383; 16 Am. Dec. 610.

¹² Smith v. Daniel, 2 McCord Eq. 143; 16 Am. Dec. 641.

¹³ Rogers v. Rogers, 18 Hun, 409.

or office is incompatible with the trust.¹ A trustee *de son tort* is one who of his own authority enters into the possession or assumes the management of property which belongs beneficially to another. He is subject to the same rules and remedies as other constructive trustees.²

§ 2020. **Who may be Cestui que Trust.**—Any person or corporation capable of taking a conveyance of land may become a *cestui que trust*.³ One named as *cestui* may take under the will, in trust for himself and others.⁴ The assent of parties beneficially entitled under a trust deed will be presumed in the absence of proof of repudiation.⁵ A person for whose benefit a trust is created without his knowledge may afterwards affirm it and enforce its execution.⁶ A trust may be created in favor of an alien enemy, which he may enforce after the cessation of hostilities.⁷ The person for whose benefit the trust is created may compel its performance, although he may not be a party to the contract or agreement which raises it.⁸

ILLUSTRATIONS. — A bequest was “to A, in trust nevertheless as hereinafter provided,” with a subsequent provision that B should take care of all the property, and pay certain profits to A. *Held*, to mean that A was *cestui*, rather than trustee: *Wells v. Williams*, 136 Mass. 333.

§ 2021. **Estate of Trustee and of Cestui que Trust.**—Every trustee is presumed to take as large an estate as is necessary for the purpose of the trust.⁹ The estate in the

¹ Gibson's Case, 1 Bland Ch. 138; 17 Am. Dec. 257.

² Morris v. Joseph, 1 W. Va. 256; 91 Am. Dec. 386.

³ Phillips Academy v. King, 12 Mass. 546; Amherst Academy v. Cows, 6 Pick. 427; 17 Am. Dec. 387; Trotter v. Blacker, 6 Port. 269; Ashhurst v. Given, 5 Watts & S. 329.

⁴ Cocks v. Barlow, 5 Redf. 406.

⁵ Cloud v. Calhoun, 10 Rich. Eq. 358; Saunders v. Harris, 1 Head, 185; Furman v. Fisher, 4 Cold. 626; 94 Am. Dec. 210.

⁶ Pleasants v. Glasscock, 1 Smedes

& M. Ch. 17; Moses v. Murgatroyd, 1 Johns. Ch. 119; 7 Am. Dec. 478; Shepherd v. McEvers, 4 Johns. Ch. 136; Berly v. Taylor, 5 Hill, 577.

⁷ Buford v. Speed, 11 Bush, 338.

⁸ Rodney v. Shankland, 1 Del. Ch. 35; 12 Am. Dec. 70.

⁹ Morton v. Barrett, 22 Me. 257; 39 Am. Dec. 375; Norton v. Norton, 2 Sand. 296; Ellis v. Fisher, 3 Sneed, 231; 65 Am. Dec. 52; McCosker v. Brady, 1 Barb. Ch. 329; Coulter v. Robertson, 34 Miss. 278; 57 Am. Dec. 168; Doe v. Ladd, 77 Ala. 223; Ryan v. McGehee, 83 N. C. 500; Devin v.

trustee may be enlarged by implication, if the purposes of the trust demand it; thus on a conveyance to trustees without words of inheritance, a fee will be implied if necessary to effect the purposes of the trust.¹ If the trust is to mortgage lands, or to convey them in fee, the trustee will be understood to take a fee, since this quantity of estate will be required to perform the trusts;² but if a lesser estate be expressly limited, although it be entirely inadequate to carry the trusts into effect, a greater estate cannot be taken by implication.³ An estate in fee, conferred upon the trustee by the terms of the deed, will not be cut down, by implication merely, to an estate for life, upon the ground that the purposes of the trust do not require an estate in fee.⁴ A gift to a trustee of personal property, without words of limitation, vests in him the whole estate subject to the trust.⁵ Where the *cestui que trust* dies intestate without heirs, the trustee takes the estate freed of the trust.⁶

The possession of a trustee is in equity the possession of the *cestui que trust*,⁷ who is deemed absolutely seised of the freehold.⁸ After the purposes of a trust have ceased,

Henderthort, 32 Iowa, 192. Where a trustee cannot perform the duties imposed upon him by the will, without having the legal title to the property which he holds in trust, he will be considered as taking the legal title: *Morton v. Barrett*, 22 Me. 257; 39 Am. Dec. 575; *Cleveland v. Hallett*, 6 Cush. 403; *Welch v. Allen*, 21 Wend. 147; *Williams v. Presbyterian Society*, 1 Ohio St. 478. A trust to sell or improve lands, to invest and reinvest the proceeds, to collect rents and income, to pay taxes, assessments, commissions, and other annual expenses and charges, to pay over the net income, and to divide the estate, vests a fee-simple in the designated trustees: *Zabriskie v. R. R. Co.*, 33 N. J. Eq. 22; *Ames v. Ames*, 15 R. I. 13. A devise to trustees in trust for the use and benefit of the testator's son, to be applied at the discretion of the trustees, confers on them

an estate in fee: *Packard v. Marshall*, 138 Mass. 301.

¹ *Gould v. Lamb*, 11 Met. 84; 45 Am. Dec. 187; *Fisher v. Fields*, 10 Johns. 506; *Zabriskie v. R. R. Co.*, 33 N. J. Eq. 22; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390; *North v. Philbrook*, 34 Me. 537; *Neilson v. Lagow*, 12 How. 110; *West v. Fitz*, 109 Ill. 425; *Latshaw's Appeal*, 122 Pa. St. 142; 9 Am. St. Rep. 76.

² *Bagshaw v. Spencer*, 1 Ves. Sr. 142; *Preachers' Aid Soc. v. England*, 106 Ill. 125.

³ *Warter v. Hutchinson*, 1 Barn. & C. 747.

⁴ *Watkins v. Specht*, 7 Cold. 585.

⁵ *Hanson v. Worthington*, 12 Md. 418.

⁶ *Boone on Real Property*, sec. 167.

⁷ *Murphy v. Grice*, 2 Dev. & B. Eq. 199; *Green v. Otter*, 3 B. Mon. 102.

⁸ *Badgett v. Keating*, 31 Ark. 400.

the legal title vests in the beneficiary without a conveyance from the trustee.¹ Where the purpose for which land was conveyed in trust has ceased, and the trustee repudiates the trust, he may be required to reconvey.² Where a devise is made of lands to a trustee to pay debts, etc., and he refuses the devise, the title descends to the heirs, subject to the trust.³ A trust to a man for the sole use of his wife determines at the death of the husband. The wife then becomes *ipso facto* the legal owner of the estate.⁴ To create an equitable estate of inheritance, under a deed conveying land to a trustee, words are necessary implying an inheritable quality in the estate of the *cestui que trust*. Where such a deed contemplates no estate beyond the life of the *cestui que trust*, the beneficial estate terminates at his death, and the land reverts to the grantor and his heirs, although the deed in trust vested the fee-simple title in the trustee and his heirs.⁵ A father in conveying property to his son-in-law, in trust for his daughter, may impose such limitations and restrictions as he may think proper.⁶ *Cestuis* for life are entitled to the whole income, unless needed for the payment of debts. The executors may properly retain the accruing income until the estate is settled, and when they pay over to the trustees, their account should distinguish between capital and income. The income is properly chargeable with taxes, and with interest on debts remaining unpaid after a year from the grant of letters testamentary.⁷ Trust estates are liable to pay out of their income for goods or services furnished or rendered, and such as are necessary and proper.⁸ So a trustee must pay taxes, assessments, interest on encum-

¹ Mitchell v. Mitchell, 35 Miss. 108.

² Schlessinger v. Mallard, 70 Cal. 326. A decree that a trustee shall convey to the *cestui* by good and sufficient deed does not require a deed with full covenants of warranty, but a deed of release with covenants against acts done or suffered by the trustee: Kirten v. Spears, 44 Ark. 166.

³ Owens v. Cowan, 7 B. Mon. 152.

⁴ Coughlin v. Seago, 53 Ga. 250.

⁵ Starr v. Kealhofer, Tenn., 1879, 10 Cent. L. J. 8.

⁶ Waring v. Waring, 10 B. Mon. 331.

⁷ Ex parte Bailey, 13 R. I. 543.

⁸ Wyly v. Collins, 9 Ga. 223.

brances, and for repairs, out of the income.¹ No expenses incurred by a *cestui* of a fund for life, nor debts contracted for or by him, nor penalties resulting from his acts, can be paid out of income after his death, even though the persons upon whom the trust estate devolved were his own children, claiming, not through him, but under the provisions of the trust.² The estate and interest of a *cestui* may be taken by attachment, by writ of entry, by the levy of an execution, or any other appropriate proceeding at law, without resort to remedies afforded by a court of equity.³

A trust is not revocable except with the consent of the beneficiary.⁴ A trust created upon the vesting of the legal title in the trustee cannot be destroyed otherwise than by the renunciation of the *cestui que trust*.⁵ The beneficiary is entitled to a decree terminating the trust, where he has the entire beneficial interest both in the income of the property and in the property itself, held in trust for his benefit, and there is no limitation over of the estate in any contingency to any other person, nor any discretion given to the trustees, nor any provision that the income or estate shall not be alienable by the beneficiary, or attachable by his creditors.⁶ But the *cestui que trust* cannot call for the legal title when, from the nature of the trust, his ownership is not immediate and absolute, and when it would defeat or endanger a legitimate ulterior limitation of the trust.⁷ The court will not decree the abrogation of a trust for a widow and daughter at their instance, although they are the only parties interested and are *sui generis*.⁸

ILLUSTRATIONS.—A trust was for E. during her natural life, and at her death to descend to her children. *Held*, that only the life estate was vested in the trustee, and the remainder

¹ *Hepburn v. Hepburn*, 2 Bradf. 74.

² *Buckingham's Estate*, 12 Phila. 105.

³ *Hutchins v. Heywood*, 50 N. H. 491.

⁴ *Stockard v. Stockard*, 7 Humph. 303; 46 Am. Dec. 79; *Wright v. Miller*, 8 N. Y. 9; 59 Am. Dec. 438.

⁵ *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 643.

⁶ *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320.

⁷ *Battle v. Petway*, 5 Ired. 576; 44 Am. Dec. 59.

⁸ *Lent v. Howard*, 89 N. Y. 169.

directly in the children: *Greenwood v. Coleman*, 34 Ala. 150. Lands were conveyed to trustees, their heirs and assigns, to sell sufficient to pay certain debts, and then to lease and support a certain beneficiary for life, the residuum to be held for the benefit of the grantor's heirs at the expiration of the life estate; reserving to the grantors power by appointment or will to direct where the residue should go; the trustees in their discretion, upon request of the grantors, to sell and convey any portion. *Held*, that the trustees took the whole estate, and the beneficiaries only an equitable interest; and that if, by the acts or negligence of the trustees, the estate of the trustees had been defeated by adverse possession, the interests of the remaindermen were also defeated: *Bennett v. Garlock*, 79 N. Y. 302; 35 Am. Rep. 517. A by deed conveyed all her property, both "real and personal," to a trustee in trust to pay the income to her during her life, and at her death to transfer the property as she should by will appoint, and in default of such will to convey the property to her "heirs at law." The trust property was all personal. A died intestate. *Held*, that the trust property being personalty, the word "heirs" meant the persons entitled to take under the statute of distributions, and that therefore the property went to A's husband, and not to her child: *Sweet v. Dutton*, 109 Mass. 589; 12 Am. Rep. 744. A testator, by a codicil, revoked a provision made in his will for his son A, giving the property to B in trust to keep until A should prove himself worthy of receiving it; and if B should not judge it best to deliver the property to A, it should remain the property of B and his heirs. *Held*, that B's discretion in the matter could not be controlled, unless improper motives or a want of good faith were shown: *Bacon v. Bacon*, 55 Vt. 243. A testator bequeathed the "income, profit, and products" of certain stock in a corporation to a person for life, remainder over. Afterwards the corporation increased its capital stock, allowing each stockholder the option to take at par as many new shares as he held of the old. The trustees, under the will, sold part of their "option" to take the new shares, and with the proceeds bought new shares. *Held*, that the new shares were capital, and went to the remainderman: *Moss's Appeal*, 83 Pa. St. 264; 24 Am. Rep. 164, and note 169. By a will a trust was created, the capital consisting of stock in two corporations. The corporations afterwards issued new stock to be taken by the stockholders, and the trustees, under the will, sold the right to subscribe for stock in one company, and bought stock with their own money in the other company, and sold it at an advance. *Held*, that the profits belonged to the income, and not the capital, of the trust: *Wiltbank's Appeal*, 64 Pa. St. 256; 3 Am. Rep. 585. Property was given to a daughter for life, remainder to her children, and the manage-

ment of it was given to A until the daughter should arrive at the age of twenty-one years. She died, leaving children, before reaching twenty-one. *Held*, that A's control ceased upon her death: *Newman v. Dotson*, 57 Tex. 117.

§ 2022. **Powers of Trustee.**—Equity does not favor a construction that confers upon the trustee absolute and uncontrollable powers.¹ But the trustee has an implied power to reduce the trust estate to possession, and to sue or defend a suit at law in regard to it.² He may recover the estate in ejectment from his *cestui que trust*,³ or may sue him for the profits;⁴ or may maintain trover against him for a conversion of the property.⁵ He may alien or encumber the estate.⁶ A conveyance by the trustee passes the legal title.⁷ And the legal title held by a person as trustee passes to a purchaser under an execution sale against him.⁸ He may pay off an encumbrance on the trust property.⁹ He may compromise a debt due the estate.¹⁰ The trustee may charge the estate or the antici-

¹ *Haydel v. Hurck*, 5 Mo. App. 267.

² *Huckabee v. Billingsly*, 16 Ala. 414; 50 Am. Dec. 183; *Comm'rs v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433; *Harney v. Dutcher*, 15 Mo. 89; 55 Am. Dec. 131. He may bring an action as trustee which he would be estopped to bring in his individual capacity: *Worthy v. Johnson*, 10 Ga. 358; 54 Am. Dec. 393. But cannot recover in that capacity where he does not seek to do so, and has repudiated the trust relation by bringing the action in his own right: *Portis v. Hill*, 14 Tex. 69; 65 Am. Dec. 99. To maintain an action in his own name without joining the *cestui que trust*, he must show that the beneficiaries are numerous, and that it is impracticable to bring them before the court within a reasonable time: *Bardstown etc. R. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199; 81 Am. Dec. 541.

³ *Beach v. Beach*, 14 Vt. 28; 39 Am. Dec. 204. But *aliter* as to a trustee who holds only the naked legal title, the trust being a passive one: *Ingham v. Burnell*, 31 Kan. 333.

⁴ *Dennison v. Goehring*, 7 Pa. St. 175; 47 Am. Dec. 505.

⁵ *Guphill v. Isbell*, 1 Bail. 230; 19 Am. Dec. 675. Where one of several *cestuis* converts to his own use money belonging to the others, the trustee may retain after-acquired income to make good the indebtedness thus created: *Crocker v. Dillon*, 133 Mass. 91.

⁶ *McBrayer v. Canker*, 64 Ala. 50. The trustee of a naked trust cannot bind the trust estate by mortgage: *Griffin v. Blanchard*, 17 Cal. 70.

⁷ *Gale v. Mensing*, 20 Mo. 461; 64 Am. Dec. 197, and see note in 64 Am. Dec. 199–203. He may convey in his own name without reciting the trusts: *Bradstreet v. Clarke*, 12 Wend. 602. Trustees are not liable for the title or soundness of property sold by them at public sale except upon their own express warranty or where fraud exists: *Worthy v. Johnson*, 8 Ga. 236; 52 Am. Dec. 399.

⁸ *Giles v. Palmer*, 4 Jones, 386; 69 Am. Dec. 757. But see *Freeman on Executions*, sec. 173, 181.

⁹ *Pratt v. Thornton*, 28 Me. 355; 48 Am. Dec. 492.

¹⁰ *Maynard v. Cleveland*, 76 Ga. 52; *Pool v. Deal*, 10 S. C. 440; *Bacot v. Heyward*, 5 S. C. 441.

pated profits with the expenses necessary for its protection, when there are no funds in his hands, although such a power is not specified in the instrument creating the trust.¹ He may sell the property to pay expenses of litigation sustained for its protection.² Where he has authority to sell the trust property, when, in his opinion, the purchase-money may be invested more advantageously, he must exercise that opinion fairly and honestly.³ He may make necessary improvements on the trust estate which permanently benefit it.⁴ He may plead the statute of limitations or not; and if he fails to do so, those for whom he holds the property have no right to do so.⁵ But his powers in the management and disposition of the trust property must be regulated and controlled by the provisions and conditions of the deed of trust, and he has no power to alter, change, or dispense with those terms and conditions.⁶

¹ *Randall v. Dusenbury*, 39 N. Y. Sup. Ct. 174; *Mayfield v. Kilgour*, 31 Md. 241; *Downey v. Bullock*, 7 Ired. Eq. 112; *New v. Nicoll*, 73 N. Y. 127; *Noyes v. Blakeman*, 6 N. Y. 567, the court saying: "If he [the trustee] had advanced his own means or given his personal liability, he would clearly have had a lien upon the incoming rents and profits for the purpose of reimbursing or indemnifying himself; . . . and there is no rule of law or equity within my knowledge which would prevent his assigning that lien, if necessary, for the protection of his *cestui que trust*. The deed, it is true, does not in terms contemplate any other appropriation of the rents and profits than for the objects specified. But what then? Shall the trustee stand quietly by and see the objects of the trust utterly frustrated? It would be a reproach with which the law is not to be made chargeable. Rather than suffer it, the law will infuse into the trust deed a provision to enable the trustee to exercise the necessary power, if possible, to prevent it. It is undoubtedly true, as a general rule, that where a trustee employs agents in the execution of his trust, they are to look to him individ-

ually, and have no lien upon the trust fund for their compensation. If he is in funds, he is bound to protect the estate, in which case he has no lien, and consequently cannot assign any, having none to assign. But being without funds, and a necessity arising for expenditures in order to protect the estate from spoliation, he may either make them himself and be allowed for them in the passing of his accounts, or may engage others to do it upon the credit of the fund, reserving to himself the same management and direction as in any other case, and thus avoid the objection that he had delegated his trust." But chancery rarely permits trustees of their own authority to break in upon the capital of the trust fund, except under pressing necessity: *Hester v. Wilkinson*, 6 Humph. 215; 44 Am. Dec. 303; *Carter v. Rolland*, 11 Humph. 333.

² *White v. Dinkins*, 19 Ga. 285.

³ *Wormley v. Wormley*, 8 Wheat. 421.

⁴ *Myers v. Myers*, 2 McCord, 214; 16 Am. Dec. 648.

⁵ *Leigh v. Smith*, 2 Ired. Eq. 442; 42 Am. Dec. 182.

⁶ *Huntt v. Townshend*, 31 Md. 336; 100 Am. Dec. 63. Where the trust

A trustee authorized to sell real estate and invest the proceeds in stock is not empowered to exchange the trust property for other real estate.¹ Under a power to sell lands, with directions to reinvest the money arising from the sale, he cannot mortgage them.² Under a deed of trust to A, reserving to B the right to sell and exchange the property, and to superintend, possess, manage, and control the same, A has no power to charge the estate.³ A trustee cannot create a charge against the trust estate, except as specially authorized by statute or the provisions of the instrument creating the trust.⁴ He may not submit a claim to arbitration without the consent of the *cestui*;⁵ nor make any admission to the prejudice of the trust fund, and against the *cestui*;⁶ nor settle a debt due to the trust estate by receiving a credit on his individual debt to the debtor;⁷ nor pledge the property to secure his own debt;⁸ nor mortgage the estate for a debt not reduced to a judgment, and the validity of which is denied by the beneficiaries;⁹ nor delegate his authority to another;¹⁰ nor release a mortgage before it becomes due.¹¹ Notice to a trustee is not notice to the *cestui*, where the trustee has no

deed prescribes the circumstances under which and the manner in which the trustees may dispose of the trust property, they cannot dispose of it in any other manner. If they voluntarily confess judgment contrary to the provisions of the trust deed, such judgment is not a lien upon the trust property, and can only bind the individual property of the parties confessing it: *Huntt v. Townshend*, 31 Md. 336; 100 Am. Dec. 63. So where a trustee conveys his legal title to his *cestui que trust* in violation of the will creating the trust, the conveyance is absolutely void: *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 352. But the regularity and validity of a trustee's sale, and of the purchase under it, cannot be questioned by a stranger to the deed: *Herbert v. Hanrick*, 16 Ala. 581; *Gary v. Colgin*, 11 Ala. 514.

¹ *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 251.

² *Bloomer v. Waldron*, 3 Hill, 361.

³ *Hewitt v. Phelps*, 105 U. S. 393.

⁴ *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 32; *Tift v. Mayo*, 61 Ga. 246; *Weaver v. Van Ankin*, Mich., 1888.

⁵ *Crum v. Moore*, 14 N. J. L. 436; 82 Am. Dec. 262.

⁶ *Thomas v. Bowman*, 29 Ill. 426; 30 Ill. 84; *McKissick v. Pickle*, 16 Pa. St. 140; *Mayrant v. Guiquard*, 3 Strob. Eq. 112; *Bragg v. Geddes*, 93 Ill. 39.

⁷ *Maynard v. Cleveland*, 76 Ga. 52.

⁸ *Shaw v. Spencer*, 100 Mass. 382; 97 Am. Dec. 107.

⁹ *Reilly's Estate*, 13 Phila. 201.

¹⁰ *Fuller v. O'Neal*, 69 Tex. 349; 5 Am. St. Rep. 59.

¹¹ *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826.

official relation to the subject.¹ A trustee, whether he be the sole surviving trustee of an estate or not, cannot continue the trust after his own death, by will.² But a payment to a trustee after his resignation will absolve the debtor under a contract to pay to such trustee or such as may be appointed.³

§ 2023. **Powers of Cestui que Trust.**—In the absence of any statutory prohibition, where the equitable title of property conveyed in trust vests in the *cestui que trust*, he may encumber or charge such equitable interest in any manner not inconsistent with the trust, and which is authorized by the instrument or conveyance creating the trust.⁴ Where the *cestui que trust* of real estate has an absolute interest without any control in the trustee, the former may, as a general rule, alien his estate.⁵ But where—as in some states by statute—the whole estate, legal and equitable, vests in the trustee, the *cestui que trust* can create no charge against the trust property.⁶ Where an estate is conveyed in trust, to pay the income thereof to a certain person, he can create no charge against the income, or any part thereof, in advance of its becoming due.⁷ Where the legal title is in a trustee, though only

¹ Chew v. Henrietta Mining and Smelting Co., 1 McCrary, 222.

² Fonda v. Penfield, 56 Barb. 503. But trustees may be clothed by a testator with power to appoint their successors: Whelan v. Reilly, 3 W. Va. 597.

³ Lahy v. Holland, 8 Gill, 445; 50 Am. Dec. 705.

⁴ L'Amoureux v. Van Rensselaer, 1 Barb. Ch. 32; Lincoln etc. Association v. Hass, 10 Neb. 581; Laughlin v. Bradley, 25 Kan. 147; Tift v. Mayo, 61 Ga. 246; Dibrell v. Carlisle, 51 Miss. 785; Elliott v. Armstrong, 2 Blackf. 198; Martin v. Davis, 82 Ind. 38; Farmers' etc. Bank v. Brewer, 27 Conn. 600; Averett v. Lipscombe, 76 Va. 405.

⁵ Read v. Power, 12 R. I. 16.

⁶ L'Amoureux v. Van Rensselaer, 1

Barb. Ch. 32; Noyes v. Blakeman, 6 N. Y. 567; Weaver v. Van Akin, Mich., 1888.

⁷ Clute v. Bool, 8 Paige, 83; Van Epps v. Van Epps, 9 Paige, 237; Graff v. Bonnett, 31 N. Y. 9; 88 Am. Dec. 236; Campbell v. Foster, 35 N. Y. 361. *Contra*, Farmers' etc. Bank v. Brewer, 27 Conn. 600; Martin v. Davis, 82 Ind. 38. A beneficiary who is entitled to a life support out of an estate held by a trustee has no power to mortgage the estate; and a mortgage executed by him and the remainder-man is valid only as against the latter, except so far as it secured money used in paying debts resting on the estate: Barnes v. Dow, 59 Vt. 530. A *cestui* cannot create a trust in his own favor, to the prejudice of his creditors by investing his individual property in a building

for a naked trust to convey, a purchaser from the *cestui que trust* will not, in the absence of an express agreement to accept the equitable title only, be compelled, on a bill for specific performance, to accept the title from the *cestui* unless it is perfected by a conveyance of the legal estate from the trustee.¹ A *cestui* who becomes the purchaser at a public sale of the trust estate acquires the same title that a stranger would.²

The *cestui* for whose benefit a trust is created, and who is to be the ultimate receiver of the money, may sustain a bill in equity to have it paid directly to himself.³ He may maintain ejectment upon a demise in his own name, though the legal estate be still in the trustee, in a case where the purposes of the deed have been satisfied, and also in the case of a resulting trust.⁴ The *cestui* for whose benefit many trust deeds to several trustees have been given may maintain one suit for the foreclosure of all of them, especially when some are defective, so that the trustees could not sell under them without the aid of a court of equity. Nor does the fact that other persons claim liens on the land affect the right of the plaintiff to have the rights of all concerned settled in one proceeding.⁵ A *cestui* arrived of age may sue for his share of the estate, without joining minors entitled to similar shares.⁶ It is not necessary, in order to enable a *cestui que trust* to carry on a suit in the name of the trustee, that the trustee should expressly authorize the suit.⁷ Where, in case of the failure of a trustee in a deed to act, the *cestui* is authorized to appoint another, the power of appointment is not exhausted by the appointment of one, but on his failure

on the land held in trust, and the rents and profits of such building will be applied in satisfaction of the creditor's judgment: *Woodruff v. Johnson*, 5 N. J. Eq. 729; 55 Am. Dec. 247.

¹ *Read v. Power*, 12 R. I. 16.

² *State Bank v. Macy*, 4 Ind. 362.

³ *Russell v. Clark*, 7 Cranch, 69; *Fausler v. Jones*, 7 Ind. 277.

⁴ *Doggett v. Hart*, 5 Fla. 215; 58 Am. Dec. 465.

⁵ *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105.

⁶ *Hitchcock v. Linsly*, 17 Hun, 556.

⁷ *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120.

to act; another may be appointed.¹ A *cestui* cannot maintain an action at law against the trustee while the trust is still open.² But he may sue the trustee for money had and received where the trust has been closed and settled and the amount due the *cestui que trust* has been established and made certain.³ So an action may be maintained by a *cestui* against his trustee where the money should be paid over on demand.⁴ Where a *cestui* prosecutes a suit in equity to compel his trustee to convey the legal title to him, he may in said suit recover of the trustee the rents and profits which the trustee has received to the use of the *cestui* while the trustee was in possession of the land.⁵

Cestuis que trustent need not be joined in an action by creditors to reach trust property in the hands of administrators or trustees who have the control of and whose duty it is to protect the property. In such case the defense of the trustees is the defense of the *cestuis*, and their presence in court is not necessary to the protection of their interests.⁶ But the *cestui* is a necessary party to a suit for foreclosure of a mortgage executed by a trustee upon the trust estate; and if such *cestui que trust* be a married woman, her husband is also a necessary party.⁷

ILLUSTRATIONS.—A parent by will set apart a fund in trust, directing that the income be paid to a son semi-annually. *Held*, that the son could assign to the trustee the future income to secure advancements made in good faith by the trustee: *Caldwell v. Boyd*, 109 Ind. 447. A testator devised real estate to L., to be held by a trustee until she became of age or married, and upon her marriage to be settled to her separate use, so that neither the land, its proceeds, nor profits should be liable for her husband's debts or contracts. L. married. *Held*, that she, her husband, and the trustee could convey the property and give a

¹ *Foster v. Goree*, 4 Ala. 440.

² *Davis v. Coburn*, 128 Mass. 377.

³ *Gould v. Emerson*, 99 Mass. 154; 96 Am. Dec. 721; *Howard v. Patterson*, 72 Me. 57.

⁴ *Derome v. Vose*, 140 Mass. 575.

⁵ *Hill v. Cooper*, 8 Or. 254.

⁶ *Winslow v. R. R. Co.*, 4 Minn. 313; 77 Am. Dec. 519.

⁷ *Mavrich v. Grier*, 3 Nev. 52; 93 Am. Dec. 373.

good title in fee: *Averett v. Lipscombe*, 76 Va. 404. A testator directed that a sum be invested in good securities for R., "not to be used — the principal — until she shall arrive at twenty-six years of age, except the income or interest." Certain land of the estate was conveyed to R.'s father, as her guardian, for her use. *Held*, that R., on arriving at the age of twenty-one years, might sell and convey her interest in the land: *Buford v. Guthrie*, 14 Bush, 677.

§ 2024. Acceptance of Trust — Equity never Wants a Trustee. — The duties and liabilities of a trustee cannot be imposed upon a man without his assent.¹ To become a trustee, acceptance of the trust is essential,² but it is presumed unless the contrary is shown.³ No formal acceptance is necessary, but acts implying a consent are sufficient; such as taking possession of the property assigned;⁴ or doing any act under the deed;⁵ or bringing a suit as trustee;⁶ or setting up a claim for the *cestui que trust* in proceedings to try the right to property;⁷ or where (having a copy of the deed in his possession) he has stood on the record as trustee for six years without having done any act to disclaim the acceptance of the trust.⁸ Where a person is appointed a trustee, and with a knowledge of such appointment interferes with the trust property in such a manner and to such an extent as can be accounted for on no other ground than an acceptance of the trust, such interference will be sufficient proof of an acceptance, and will subject him to all the responsibilities of a trustee, in the same manner as if the office had been expressly accepted.⁹ Where the powers of a testamentary trustee, not

¹ *McCubbin v. Cromwell*, 7 Gill & J. 157; *Chaplin v. Givens*, Rice Eq. 132; *Goss v. Singleton*, 2 Head, 67; *Mahoney v. Hunter*, 30 Ind. 246.

² *Trask v. Donoghue*, 1 Atk. 370; *Cooper v. McClure*, 16 Ill. 436; *Goss v. Singleton*, 2 Head, 67; *Baldwin v. Porter*, 12 Conn. 473.

³ *Goss v. Singleton*, 2 Head, 67; *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 642; *Burritt v. Sullivan*, 13 N. Y. 93; *Wiswell v. Ross*, 4 Port. 321.

⁴ *Scull v. Reeves*, 3 N. J. Eq. 84; 29 Am. Dec. 694.

⁵ *Lewis v. Baird*, 3 McLean, 56; *Crocker v. Lowenthal*, 83 Ill. 579.

⁶ *Taylor v. Atwood*, 47 Conn. 498.

⁷ *Shirley v. Fearn*, 33 Miss. 653; 69 Am. Dec. 375.

⁸ *Roberts v. Moseley*, 64 Mo. 507.

⁹ *McCubbin v. Cromwell*, 7 Gill & J. 157; *Chaplin v. Givens*, Rice Eq. 132.

incident to the office of an executor, are conferred on the person named as executor, his refusal to qualify as executor is not a refusal to act as trustee.¹ Where the trustee declines or refuses to act, the court will appoint a trustee or execute the trust itself, for it is a maxim of equity that a trust shall not fail for want of a trustee;² and the assent of one named as trustee in a deed of gift is immaterial to the validity of the instrument.³ For the same reason, wherever a trust exists, either by the declaration of the party or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested to execute it.⁴ So where a deed names no grantee, but is given "for use of a school-house," a court of equity will appoint a trustee, and compel a conveyance to him of the legal title by the heirs of the grantor.⁵ So although a deed or will vests in an individual the power, if occasion arises, to appoint new trustees, a court of chancery has jurisdiction to control his exercise of the power, so far as to prevent an abuse of discretion; and may require an appointee named, who is of doubtful pecuniary responsibility, to give security.⁶ If, by reason of the disclaimer of the trustees, the property descends to the heir at law, who is also a *cestui*, the legal estate is cast upon the *cestui*, but if a trustee is appointed, in whom the legal estate is vested, coupled with the trusts, the legal estate is by necessary implication divested out of the *cestui*

¹ Pomroy v. Lewis, 14 R. I. 349.

² Field v. Arrowsmith, 3 Humph. 442; 39 Am. Dec. 185; Weiland v. Townsend, 33 N. J. Eq. 393; White v. Hampton, 10 Iowa, 238; Ex parte Conrad, 2 Ashm. 527.

³ Adams v. Adams, 21 Wall. 185; Braswell v. Downs, 11 Fla. 62; Thatcher v. St. Andrews Church, 37 Mich. 264; Cloud v. Calhoun, 10 Rich. Eq. 358; Dawson v. Dawson, Rice Eq. 243; Field v. Arrowsmith, 3 Humph. 442; 39 Am. Dec. 185; Saunders v. Harris,

1 Head, 185; Furman v. Fisher, 4 Cold. 626; 94 Am. Dec. 210.

⁴ Snell's Equity, 138; Harris v. Rucker, 13 B. Mon. 564; Treat's Appeal, 30 Conn. 113; White v. Hampton, 13 Iowa, 259; De Peyster v. Clendinning, 8 Paige, 295; Bundy v. Bundy, 38 N. Y. 210; Goodrum v. Goodrum, 8 Ired. Eq. 313; Ledyard's Appeal, 51 Mich. 623.

⁵ Bailey v. Kilburn, 10 Met. 176; 43 Am. Dec. 423.

⁶ Bailey v. Bailey, 2 Del. Ch. 95.

que trust.¹ The jurisdiction to appoint a trustee becomes vested in the court, and does not depend upon acquiring jurisdiction of the heirs or personal representatives of the deceased trustee, where a trustee is appointed by a deed, which provides that in case of his decease or legal incapacity the trust estate shall vest in such court, which shall execute the trust declared.²

ILLUSTRATIONS.—Money was bequeathed in trust, and the trustee directed to pay over the interest semi-annually. The trustee was a member of a mercantile firm, with which the testator's administrator made an arrangement to let the *cestuis* have goods on credit, to be paid out of the semi-annual interest as it accrued. The administrator paid these bills every six months, taking receipts signed by the trustee as trustee. *Held*, an acceptance of the trust which the trustee could not repudiate by his assertions that he did not intend to act as trustee: *Kennedy v. Winn*, 80 Ala. 165. A city, to secure the payment of its bonds, conveyed certain mortgaged premises to R., governor of Wisconsin, and to his successors in office, in trust for the holders of the bonds. *Held*, that even if Governor R. accepted the trust, this would not devolve its liabilities on any one of his successors in office who did not expressly or by implication accept it: *Delaplaine v. Lewis*, 19 Wis. 476.

§ 2025. **Duties of Trustee—To Conform to Directions of Trust and to Execute It.**—A trustee is bound to conform strictly to the directions of the trust.³ He is bound to carry into effect the trusts of a will so far as they are valid and consistent with the rules of law, unless excused from literal performance by the consent of all persons interested, and by the sanction of the court of chancery where the rights of infants and married women are concerned.⁴ Where a deed of trust minutely and particularly prescribes the circumstances under which and the manner in which the trustees shall have authority to sell

¹ *Goss v. Singleton*, 2 Head, 67.

² *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169.

³ *Pomeroy's Eq. Jur.*, sec. 1062; *Sheldon v. Rice*, 30 Mich. 296; 18 Am. Rep. 136; *Murdock v. Johnson*, 7 Cold. 605; *Goddard v. Brown*, 12 R. I. 31. See *ante*, § 2221.

⁴ *Wood v. Wood*, 5 Paige, 596; 28 Am. Dec. 451. In a Pennsylvania case it was held that where it is impossible to comply with all the directions of a testator, equity will apply a *cy pres* interpretation to one part so that the whole may stand: *Matter of Philadelphia*, 2 Brewst. 462.

the trust property, they have no power or authority to dispose of such property under any other circumstances or in any other manner.¹ So if it authorized a sale only on the written consent of the *cestui*, this must be obtained before exercise of the power.² The *cestuis que trustent*, or any one or more of them, are entitled to file a bill against the trustee, to compel him to the execution of any particular act of duty.³ If any *cestui que trust* has reason to suppose, and can satisfy the court, that the trustee is about to proceed to an act not authorized by the true scope of the trust, he may obtain an injunction from the court to restrain the trustee from such a wanton exercise of his legal power.⁴ And equity will hold a trustee responsible for the highest value of property sold by him in violation of the terms of the trust.⁵ But a trustee acting in good faith, in pursuance of the will creating the trust, will be protected, though the trust be subsequently declared void.⁶

ILLUSTRATIONS. — A deed of trust recited that the beneficiary had paid certain debts as security for the grantor, the amounts of which were not given, and the trustee was authorized to sell to satisfy such as had been paid and should be presented to the grantor. The trustee sold, but no proof was made that any indebtedness existed, nor that any claim had ever been presented to the grantor, as having been paid. *Held*, that the trustee was unauthorized to sell, and that his deed could not operate to pass any title to the purchaser: *Mills v. Traylor*, 30 Tex. 7. Upon a bequest to trustees of testator's interest in manufacturing property, the trustees being directed to pay over the residue of income of the estate, including said property, for the support and education of the children, "in such proportions, in such sums, at such times, and in such manner as said trustees, in their discretion, may think best." *Held*, that they could not exercise the power of selling the manufacturing property specially bequeathed, without reasons of extraordinary urgency: *Goddard v. Brown*, 12 R. I. 31.

¹ *Huntt v. Townshend*, 31 Md. 336; 100 Am. Dec. 63.

² *Berrien v. Thomas*, 65 Ga. 61.

³ *Snell's Equity*, 140.

⁴ *Lewin on Trusts*, 613; *Balls v. Strutt*, 1 Hare, 146.

⁵ *Voorhees v. Melick*, 24 N. J. Eq. 305; 25 N. J. Eq. 523.

⁶ *Hawley v. James*, 16 Wend. 61.

§ 2026. **To Account and Keep Accounts—Liability of in General.**—The trustee must keep regular and accurate accounts of all the property vested in or passing through his hands during the existence of the trust.¹ A failure to do so will raise a presumption against the trustee;² and will furnish a good reason for charging against him all that can be charged.³ In case doubts or obscurities arise from his failure to do so, they will be resolved against the trustee. If his accounts become lost through his carelessness, he must bear any injurious consequences arising therefrom.⁴ Where a trustee, when called on to account, first sets up a loss by fire twelve years before, he must make out his defense with certainty.⁵ The discharge of a trustee, and the appointment of another in his place, under a power reserved in the deed of trust, do not *per se* operate as a release of such discharged trustee from liability to account.⁶ The executor of a deceased trustee may be required to account for the trust estate, though there be a surviving co-trustee.⁷ A trustee may be called into a court of equity by the *cestui* at any time for the purpose of having an accounting of the trust property.⁸ Where a multiplicity of suits will be avoided and the trustee will not be embarrassed, he may be compelled in one suit in equity to account to several *cestuis* in the fund, although their rights arise under different contracts.⁹ While ordinarily the costs of accounting are to be borne by the trust estate, the rule is otherwise where the trustee, to serve his own ends, or to suit his own convenience, refuses to go on with his trust.¹⁰ So his costs may

¹ Pomeroy's Eq. Jur., sec. 1063. Where the account of a trustee extends over a number of years, and the rate of interest has during that time been changed by law, that charged in the account should correspond: *Gilmore v. Tuttle*, 34 N. J. Eq. 45.

² Pomeroy's Eq. Jur., sec. 1063; *Landers v. Scott*, 32 Pa. St. 495.

³ *Myers v. Myers*, 2 McCord Eq. 214; 16 Am. Dec. 648.

⁴ *In re Gaston*, 35 N. J. Eq. 60; *Veghte v. Steele*, 35 N. J. Eq. 348.

⁵ *Montgomery v. Coldwell*, 14 Lea, 29.

⁶ *Clarke v. Deveau*, 1 S. C. 172.

⁷ *Shoch's Estate*, 15 Phila. 519.

⁸ *Smith v. Townshend*, 27 Md. 368; 92 Am. Dec. 637.

⁹ *Norris v. Hassler*, 22 Fed. Rep. 401.

¹⁰ *In re Edwards*, 10 Daly, 68.

be refused where he has sought to avoid admitting a liability to the trust estate, and has failed to give many credits which he could have stated, thus subjecting the other parties to expense in proving them.¹ So when he has rendered necessary a suit by the *cestui* to get possession of income which should have been paid to him by the trustee, he is properly charged with the costs of his unsuccessful appeals from the decision against him.² But a trustee who is compelled to account to his *cestui* is entitled to credit for the sums expended by him in the acquisition of the trust property;³ and for money spent in reasonably and properly taking the opinions of counsel, in the execution of his trust;⁴ and for expenses properly incurred by him in the execution of his duties as such;⁵ or for the protection of the trust estate.⁶ At the termination of his trust, the trustee must account for all the trust property;⁷ but a settlement between a trustee and the *cestui* will not estop the latter from impugning a prior sale of estate, in the purchase whereof the trustee had become interested, the *cestui* not being then aware of such interest.⁸ Trust funds must be kept separate from private funds of the trustee, or he will be liable in case of loss. They must be deposited and the trust loaned as trust funds, and kept separate from other funds.⁹ If the trustee so confounds the trust property with his own that it cannot be distinguished, he

¹ Chamberlin v. Estey, 55 Vt. 378.

² McCarter's Estate, 94 N. Y. 558.

³ Hanna v. Spotts, 5 B. Mon. 362; 43 Am. Dec. 132.

⁴ Jones v. Stockett, 2 Bland, 409; Green v. Putney, 1 Md. 262.

⁵ Jones v. Dawson, 19 Ala. 672; Murray v. De Rottenham, 6 Johns. Ch. 52; Noyes v. Blakeman, 6 N. Y. 567.

⁶ Miles v. Bacon, 4 J. J. Marsh. 457; Constant v. Matteson, 22 Ill. 546; Vezie v. Forsaith, 76 Me. 172; Cheatham v. Rowland, 92 N. C. 340. A trustee is not to be allowed credit for improvements on land whereof he has wrongfully retained possession;

but he is not to be charged an increased rent caused by them: Tatum v. McLellan, 56 Miss. 352. A trust fund is not chargeable with the trustee's expense of the defense of a suit which he should have avoided: Page v. Boynton, 63 N. H. 190.

⁷ Pomeroy's Eq. Jur., sec. 1014; Dole v. Olmstead, 36 Ill. 150; 85 Am. Dec. 397.

⁸ Pearson v. Taylor, 37 Iowa, 331.

⁹ Coffin v. Bramlitt, 42 Miss. 194; 97 Am. Dec. 449; Pomeroy's Eq. Jur., sec. 1063; McAllister v. Commonwealth, 30 Pa. St. 536; Matter of Stafford, 11 Barb. 353; Mason v. Whitthorne, 2 Cold. 242.

must bear all the inconvenience from the confusion; and if it is a case of damages, they will be given, to the utmost value of the property.¹ When the trustee mingles trust money with his own, and afterwards pays out to others, he is presumed to pay out his own money, so long as he retains sufficient to cover the trust fund.² A trustee is personally liable for funds of the estate deposited by him in a bank in his individual name, even though he had no other funds in the bank, and informed the receiving teller when he deposited the funds that the same were held by him in trust.³ A mere attempt by a trustee to ignore the trust, and deal with the property as his own, is not such a fraud as will charge him beyond actual receipts.⁴ A trustee *ex maleficio*, who has acted in good faith, will be held to account only for what he has received, not for what he might have received.⁵

Purchases by trustees, when made in obedience to the trust, impose upon them a personal liability; the seller must look to them for payment, and they must look to the trust estate for reimbursement.⁶ Trustees are liable for parting with the dominion of trust property, and permitting it to be squandered, though the deed to them did not specify the trust upon which it was made.⁷

ILLUSTRATIONS.—A person received money in trust to pay certain debts, and only paid a portion of them, and refused to pay the others, claiming the balance in his hands as compensation, which claim he failed to establish. *Held*, liable for the sum in his hands, with interest from the time he ought to have paid out the same: *Jenkins v. Doolittle*, 69 Ill. 415. A testator directed his son to keep certain money invested for testator's daughter, and pay her the interest and so much of the principal

¹ *Brackenridge v. Holland*, 2 Blackf. 377; 20 Am. Dec. 123; *Houghton v. Davenport*, 74 Me. 590; *Morton's Estate*, 7 Phila. 484; *McComas v. Long*, 85 Ind. 549.

² *Continental Nat. Bank v. Weems*, 69 Tex. 489; 5 Am. St. Rep. 85.

³ *Williams v. Williams*, 55 Wis. 300; 42 Am. Rep. 708.

⁴ *Hoile v. Bailey*, 58 Wis. 434.

⁵ *Greenwood's Appeal*, 92 Pa. St. 181.

⁶ *Sanford v. Howard*, 29 Ala. 684; 68 Am. Dec. 101; *New v. Nicoll*, 73 N. Y. 127; 29 Am. Rep. 111.

⁷ *Kinloch v. F'On*, 1 Hill Ch. 190; 26 Am. Dec. 196.

as might be needed for her support, and the trustee bought a house, and accounted only for the rents, which were less than the legal rate of interest. *Held*, that he must account for the difference between the rents and the legal interest: *Williams v. Williams*, 35 N. J. Eq. 100.

§ 2027. Not to Delegate his Authority.—The office of trustee, being one of personal confidence, cannot be delegated; and if the trustee does so, he will be absolutely liable for all losses caused by the acts of his delegate.¹ A trustee under a deed cannot delegate the trust or power of sale to a third person, unless expressly authorized, and a sale made by such delegated agent when unauthorized by the deed is void.² The particular medium of advertisement, the manner of conducting the sale, the best method of offering the property, and the question of postponement of the sale, are matters regarding which special trust and confidence are reposed in the trustee, and they cannot be delegated to an agent.³ The duty of the trustee for the mortgage bond-holders of a railroad is a personal one where he has accepted the trust, and he is liable for damage sustained by reason of having permitted a majority of the bond-holders to institute and carry on foreclosure proceedings without his personal supervision or control.⁴ But mere mechanical or ministerial duties, as,

¹ See *ante*, Title I., Agency—Delegation of Authority; *Berger v. Duff*, 4 Johns. Ch. 368; *Seely v. Hills*, 49 Wis. 473; *Newton v. Bronson*, 13 N. Y. 587; 67 Am. Dec. 89; *Vose v. Trustees*, 2 Wood, 647; *Heyer v. Deaves*, 2 Johns. Ch. 154; *Tainter v. Clark*, 13 Met. 220; *Belote v. White*, 2 Head, 710; *Saunders v. Weber*, 39 Cal. 290; *Greenough v. Welles*, 10 Cush. 571; *Pearson v. Jamison*, 1 McLean, 230. "A trustee who has only a delegated discretionary power cannot give a general authority to another to execute the same, unless he is specially authorized so to do by the deed or will creating such power. A general authority to an agent to sell and convey lands belonging to the estate,

or to contract absolutely for the sale of such lands, cannot therefore be given by the trustees. . . . The better course in a case of this kind is, therefore, to intrust the agent with a discretionary power to contract, subject to the ratification of the trustees, upon his report of the facts, and that they should themselves execute the conveyance, when the terms of sale have been complied with, and transmit it, properly acknowledged, to the agent to be delivered to the purchaser": *Hawley v. James*, 5 Paige, 318, 487; 6 Wend. 61.

² *St. Louis v. Priest*, 88 Mo. 612.

³ *Bales v. Perry*, 51 Mo. 449.

⁴ *Merrill v. Trust Co.*, 24 Hun, 297.

for example, causing advertisements of sale to be put up, proclaiming the sale at auction, and receiving bids, may be done by others.¹ A trustee may sell by an agent,² and may convey by an agent.³ And he may appoint agents in necessary cases, and may act through agents when such is the customary mode of transacting the business in hand.⁴

§ 2028. **As to Care and Diligence.**—Trustees are bound only to take the same care of trust property as a man of ordinary caution would take of his own.⁵ They are not insurers. Therefore if they have taken such care of the trust property as they would of their own, trustees will not be liable for any accidental loss, or one occurring without their fault.⁶ Thus a trustee is not liable for a robbery of the property while in his own possession,⁷ or by a robbery or loss while in the possession of others with whom it has necessarily, i. e., in the ordinary course of business, been intrusted.⁸ In determining the liability or non-liability of a trustee for any loss sustained by the trust estate, courts distinguish between the duties imposed upon and the discretions vested in him as such.

¹ Bales v. Perry, 51 Mo. 449.

² Connolly v. Belt, 5 Cranch C. C. 405; Gillespie v. Smith, 29 Ill. 473; 81 Am. Dec. 328.

³ Telford v. Barney, 1 G. Greene, 575.

⁴ Joy v. Campbell, 1 Schoales & L. 341; Leggett v. Hunter, 19 N. Y. 445; Telford v. Barney, 1 G. Greene, 575; Sinclair v. Jackson, 8 Cow. 543; Lewis v. Reed, 11 Ind. 239; Hawley v. James, 5 Paige, 318.

⁵ Campbell v. Miller, 38 Ga. 304; 95 Am. Dec. 389; Davis v. Harman, 21 Gratt. 200; Hun v. Cary, 82 N. Y. 65; 37 Am. Rep. 546; Hutchinson v. Lord, 1 Wis. 286; 60 Am. Dec. 381; Jones's Appeal, 8 Watts & S. 143; 42 Am. Dec. 282; King v. King, 37 Ga. 205; Lovett v. Thomas, 81 Va. 245; Finlay v. Merriman, 39 Tex. 56; Morrow v. Saline Co., 21 Kan. 484; Higgins v. Whitson, 20 Barb. 141; Litchfield

v. White, 7 N. Y. 438; 57 Am. Dec. 534; Neff's Appeal, 57 Pa. St. 91. As to receiving confederate money in payment, see Venable v. Cody, 68 Ga. 171; Patton v. Fenner, 87 N. C. 337. Where one has a demand due to him personally, and another due to him as trustee, from the same person, and has obtained satisfaction of the first demand, it is his duty to apply the satisfaction received to both demands *pro rata*, since he is bound to take as good care of the trust property as of his own: Scott v. Ray, 18 Pick. 360; Bryant v. Russell, 23 Pick. 508, 546.

⁶ Knowlton v. Bradley, 17 N. H. 458; 43 Am. Dec. 609.

⁷ Morley v. Morley, 2 Ch. Cas. 2.

⁸ Darke v. Martyn, 1 Beav. 525; Foster v. Davis, 46 Mo. 268; Carpenter v. Carpenter, 12 R. I. 544; 34 Am. Rep. 716. See note to Seawell v. Greenway, 22 Tex. 691; 75 Am. Dec. 799-805.

And as regards his duties, the utmost diligence in observing the same (i. e., *exacta diligentia*) is his only protection against liability for any loss; while as regards his discretions, or discretionary powers, an amount of diligence equal to what he bestows on his own property will protect him from liability.¹ Where a discretionary power is conferred on a trustee, his exercise of the discretion conferred will not be interfered with by the courts unless abused.² If he act negligently, or contrary to his trust, the advice of counsel is no protection.³ A trustee will be liable if he permit the trust fund to remain unnecessarily, or contrary to his duty, in the hands of third parties; as, for instance, if money be left in the hands of a banker more than a year after the testator's death, and after the debts, etc., have been paid;⁴ or if he mix trust property with his own,⁵ or part with his exclusive control of it by associating another person with him;⁶ or sell the trust property under disadvantageous circumstances which it was in his power to avoid;⁷ or receive without ordinary prudence improper securities from his predecessor;⁸ or investing moneys in a bond secured by a deed which he fails for a month to have recorded, another lien intervening meanwhile, whereby the security is lost.⁹ If the trust fund be a chose in action, as a debt which may be reduced into possession, it is the trustee's duty to be active in getting it in, and any unnecessary delay in this respect will be at his own personal risk.¹⁰ A trustee is not guilty of negligence in failing to sue his predecessor for loss resulting from non-payment of taxes, when, at the time he

¹ Snell's Equity, 142; Deaderick v. Cantrell, 10 Yerg. 263; 31 Am. Dec. 576. See Konigmacher v. Kimmel, 1 Pen. & W. 207; 21 Am. Dec. 374.

² Cromie v. Bull, 81 Ky. 646; Ames v. Scudder, 11 Mo. App. 168; Albright v. Albright, 91 N. C. 220; Banning v. Gunn, 4 Dem. 337; Veazie v. Forsaith, 76 Me. 172.

³ Cogbill v. Boyd, 77 Va. 450.

⁴ Darke v. Martyn, 1 Beav. 525; Cann v. Cann, 51 L. T., N. S., 770.

⁵ Lupton v. White, 15 Ves. 432.

⁶ Salway v. Salway, 2 Russ. & M. 215.

⁷ Hunt v. Bass, 2 Dev. Eq. 292; 24 Am. Dec. 274.

⁸ Mills v. Hoffman, 26 Hun. 594.

⁹ Cogbill v. Boyd, 77 Va. 450.

¹⁰ Grove v. Price, 26 Beav. 103; Elley v. Naglee, 9 Cal. 683.

first learned of such non-payment, both the trustee and his surety were insolvent.¹ He does not abuse his trust by paying over to the *cestui que trust* money in good faith, when charged by the will of the testator to do so, when, in his judgment, it seems necessary.² Where a deed gives the trustee full power to select the company or companies in which to insure the trust property, he must exercise due care in the selection of good and solvent companies, but is not a guarantor of their solvency.³ The remedy of the *cestui que trust* against the trustee for negligence must be in equity.⁴

ILLUSTRATIONS. — A trustee, having a large number of houses belonging to the trust estate, in good faith, and in pursuance of a definite policy, demanded such high rents that many of the houses remained empty. *Held*, that he was not chargeable with what he might have received had he let the houses on the best terms obtainable: *Pleasanton's Appeal*, 99 Pa. St. 362. Managers of a savings bank were ordered to invest in certain securities. This they did, and delivered the securities to A, a banker, who converted them into money, used it, and failed. The receiver of the bank got a sum of money out of A, and released him from further liability, and then brought a suit in equity against the managers. *Held*, that the managers were guilty of a breach of trust, and that A's release did not affect their liability, except as to the amount obtained from A: *Wilkinson v. Dodd*, 40 N. J. Eq. 123; *Dodd v. Wilkinson*, 41 N. J. Eq. 566. A savings bank was incorporated in 1867, and up to 1875, when a receiver was appointed, did business in leased premises. The deposits in the bank at no time exceeded about seventy thousand dollars, and during each year but one the expenses of the bank, including interest to depositors, exceeded its income. At a time when the bank was substantially insolvent the trustees purchased a lot costing twenty-nine thousand dollars, on which a building for the use of the bank, costing twenty-seven thousand dollars, was erected. In 1875 a receiver was appointed, and this building and lot, subject to a mortgage, and other assets producing only about one thousand dollars, constituted the whole property of the bank, and the lot and building were afterwards swept away by the mortgage. In an action by the receiver against the trustees for the loss, *held*,

¹ *Peake v. Jamison*, 82 Mo. 552.

³ *Gettins v. Scudder*, 71 Ill. 86.

² *Kimball v. Reding*, 31 N. H. 352;

⁴ *Hukill v. Page*, 6 Biss. 183.

64 Am. Dec. 333.

that the trustees failed in exercising the prudence which the law requires, and were liable for the loss sustained: *Hun v. Cary*, 82 N. Y. 65; 37 Am. Rep. 546. A testator gave a portion of his estate to A in trust to pay the income, at his discretion, to the testator's son B for his life, and on his death to pay over the same in equal portions to his children. B had previously compromised with his creditors, who accepted a percentage, and discharged him from the balance, A being among them, and doing the same. Afterwards B made his note for the balance to A, who, with B's consent, took payment therefor out of the income which he was to pay to B. *Held*, that this was an abuse of his discretion as trustee: *Clement's Appeal*, 49 Conn. 519. Upon the occasion of the investment of a trust fund on mortgage, the trustee employed the same solicitor as the mortgagor. Subsequently he had reason to suspect the sufficiency of the security, but took no steps to inquire into the matter. It afterwards turned out that the solicitor had practiced a fraud on the trustee, and that the security was insufficient. *Held*, that the trustee was liable for the loss occasioned to the trust estate: *Sutton v. Wilders*, L. R. 12 Eq. 373.

§ 2029. **As to Investments.**—It is the duty of the trustee to invest the trust property so as to produce an income, and if he suffer the trust money to lie idle when by a proper investment an income might be obtained, he will be liable for interest or for what would have been earned by the proper handling and investment of the estate.¹ A trustee being required by law to use his "best skill and judgment" in investing trust funds, his powers and discretion are not enlarged by the use in the deed of the words "best skill and judgment."² If a trustee keep the funds uninvested beyond a reasonable time, six months being usually allowed, he is *prima facie* liable for interest, and the burden is upon him to explain or justify the delay.³ A trustee empowered to invest the trust moneys "in any property, real or per-

¹ Pomeroy's Eq. Jur., secs. 1071, 1072; *Knowlton v. Bradley*, 17 N. H. 458; 43 Am. Dec. 609; *Minuse v. Cox*, 5 Johns. Ch. 441; 9 Am. Dec. 313; *Com'rs v. Walker*, 6 How. (Miss.) 143; 38 Am. Dec. 433; *Barney v. Saunders*,

16 How. 535; *Andrew v. Schmitt*, 64 Wis. 664.

² *Kimball v. Reding*, 31 N. H. 352; 64 Am. Dec. 333.

³ *Lent v. Howard*, 89 N. Y. 169.

sonal, that he may see fit," must invest the same in such manner as not only to secure the principal, but to obtain an immediate income from the investment.¹ But a refusal to loan a trust fund at a usurious rate of interest is not a breach of trust, nor will the fund be withdrawn from the trustee to enable the *cestui que trust* to loan it at more than legal interest.² Where the trust instrument expressly directs the securities in which the estate is to be invested, such directions must be exactly followed, and a departure from the directions will make him liable for any loss occasioned thereby, while if a loss occurs as a result of his obedience he will not be charged.³ So one who lends the trust money contrary to the requirements of the statute does so at his own risk, and in case of loss is liable to make it good.⁴ Where the funds are directed to be invested in certain securities, and such securities cannot be purchased, the trustee may invest in such manner as shall seem to him safe and productive.⁵ Where the trust instrument gives a general direction to the trustee in the choice of securities, he must nevertheless exercise that discretion with reasonable care and business prudence.⁶ A trustee who is exempted, by the terms of

¹ Pray's Appeals, 34 Pa. St. 100.

² Montjoy v. Lashbrook, 2 B. Mon. 261.

³ Pomeroy's Eq. Jur., sec. 1073; McGregor v. McGregor, 9 Iowa, 65; Clemens v. Caldwell, 7 B. Mon. 171; Trustees v. Clay, 2 B. Mon. 385.

⁴ Wadsworth v. Connell, 104 Ill. 369.

⁵ McIntire v. Zanesville, 17 Ohio St. 352.

⁶ Pomeroy's Eq. Jur., sec. 1073; Gilmore v. Tuttle, 32 N. J. Eq. 611; Nancrede v. Voorhis, 32 N. J. Eq. 524; Bowman v. Pinkham, 71 Me. 295; Cromie v. Bell, 81 Ky. 646. In Mayer v. Mordecai, 1 S. C. 383, 7 Am. Rep. 26, the court say: "When a trustee is not limited or directed by the instrument under which he acts, and is left to the discretion of his own judgment, our cases hold that his discretion, must be exercised with the

same diligence and care that a prudent man would bestow on his own concerns. It is not to be understood by this that wherever loss ensues from the investment of the trustee he will be excused by showing that persons of care and prudence in the management of their own affairs made investments of the same character, and were disappointed in the result. A prudent man dealing with his own means might employ them in speculations promising large gains, or loan them on personal security, or invest in the stocks of railroad companies or other private corporations. If a trustee should, however, so loan or engage in such enterprises at the expense of the interests committed to his charge, he could not claim excuse by pointing to the course of individuals noted for their prudence

the deed of trust, from liability for anything except willful and intentional breaches of trust, is nevertheless responsible for loss caused by making investments without making proper inquiries and exercising reasonable judgment concerning the value of securities taken.¹ Investments of trust funds must be made with a view to the good of the beneficiary, and for no other purpose. They must not be made to favor friends, nor to promote individual interests; but they must be made so that the full benefit shall go where the creator of the trust directed.²

Where the trust instrument is silent as to the mode of investment, the trustee has no authority to invest the trust funds in personal security, however good;³ nor in trade, or speculation, or in manufacturing;⁴ nor in second or subsequent mortgages;⁵ nor in Confederate States bonds;⁶ nor in stock of a bank which has suspended specie payments;⁷ nor in stock of a contemplated railroad or other corporation;⁸ nor in a patent right and manufacturing patented articles.⁹ In England a trustee

by whose example he had been misled. The principle which is to be extracted from the cases in this state consists with what is said in Hovenden on Frauds, 486: 'He is bound to manage the property for the benefit of the *cestui que trust* with the care and diligence of a prudent man.' What will constitute the care and diligence thus exacted will depend on the attendant circumstances. If the act in itself was an incautious and imprudent one, it will not be sustained; and no aid derived from the fact that the trustee was countenanced in it by the participation of prudent men will give it sanction or support."

¹ Tuttle v. Gilmore, 36 N. J. Eq. 617.

² Shuey v. Latta, 90 Ind. 136.

³ Clark v. Garfield, 8 Allen, 427; Harding v. Larned, 4 Allen, 426; Will's Appeal, 22 Pa. St. 330; Smith v. Smith, 4 Johns. Ch. 281; Nyce's Estate, 5 Watts & S. 254; 40 Am. Dec. 498; Swoyer's Appeal, 5 Pa. St. 377; Gray v. Fox, 1 N. J. Eq. 259; 22 Am. Dec. 509. *Aliter* in New Hampshire: Knowl-

ton v. Bradley, 17 N. H. 458; 43 Am. Dec. 609.

⁴ Munch v. Cockerell, 5 Mylne & C. 178; Docker v. Somes, 2 Mylne & K. 655; French v. Hobson, 9 Ves. 103; Hemphill's Appeal, 18 Pa. St. 303; Morris v. Wallace, 3 Pa. St. 311; Ackerman v. Emmott, 4 Barb. 626; Kyle v. Barnett, 17 Ala. 306.

⁵ Shuey v. Latta, 90 Ind. 136; Whitney v. Martin, 88 N. Y. 535; Gilmore v. Tuttle, 32 N. J. Eq. 611; Norris v. Wright, 14 Beav. 27; Tuttle v. Gilmore, 36 N. J. Eq. 617. But *contra*, Nance v. Nance, 1 S. C. 209. And where no loss occurs, a trustee will not be held liable for investing trust funds in a second mortgage: Sherman v. Lanier, 39 N. J. Eq. 249.

⁶ Mayer v. Mordecai, 1 S. C. 383; 7 Am. Rep. 26.

⁷ Morris v. Wallace, 3 Pa. St. 319; 45 Am. Dec. 642.

⁸ Kimball v. Keding, 31 N. H. 352; 64 Am. Dec. 333; Adair v. Brimmer, 74 N. Y. 539.

⁹ Trull v. Trull, 13 Allen, 407.

must not invest in bank stock or shares of manufacturing, railroad, or other public companies, and the rule is the same in New York and Pennsylvania and other states.¹ But in Massachusetts the rule is different.² Investments in first mortgages of improved lands are proper, and the trustee will not be liable for a subsequent depreciation if the original security were sufficient.³ Trustees may rightfully invest in their own state securities, or in those of the United States, and perhaps in those of other states of the Union. But *aliter* as to other foreign securities.⁴ The trustee may change the investment of the trust property, where it is manifestly for the benefit of the *cestui que trust*; but if he do so without an order of court, he does it at his own peril.⁵

In case of a trustee's improper investment, the *cestui* may elect to take the fund and the profits during the whole period, subject to all the losses of the business, or to take the fund and legal interest thereon.⁶ The trustee cannot convert money into land or land into money at his pleasure, unless specially authorized; and if he invests money in land, the *cestui* may take the land or demand the money at his option.⁷ But if a trustee makes investments at the instance and upon the importunity of the *cestui*,

¹ Bispham's Equity, sec. 141; Worrell's Appeal, 9 Pa. St. 508; Pray's Appeal, 34 Pa. St. 100; Ackerman v. Emmott, 4 Barb. 626; Adair v. Brimmer, 74 N. Y. 537; King v. Talbot, 40 N. Y. 76; 50 Barb. 453; Tucker v. State, 72 Ind. 422; Gilbert v. Welsch, 75 Ind. 557.

² Bispham's Equity, sec. 141; Harvard College v. Amory, 9 Pick. 446; Hunt's Appeal, 141 Mass. 515; Brown v. French, 125 Mass. 410; 28 Am. Rep. 254. So in Rhode Island: Peckham v. Newton, 15 R. I. 321. And the trustees are justified in taking new stock, *pro rata*: Daland v. Williams, 101 Mass. 571. A trustee, who, in the exercise of sound discretion, retains an investment made by the testator in stock of a railroad when it is gradually falling in value, is not responsible for the depreciation, al-

though the stock becomes worthless: Bowker v. Pierce, 130 Mass. 262.

³ Pomeroy's Eq. Jur., sec. 1074; Rawlings's Estate, 13 Phila. 337; Clark v. Anderson, 13 Bush, 111.

⁴ Pomeroy's Eq. Jur., sec. 648; Mills v. Hoffman, 26 Hun, 594, the court saying: "From our examination of the authorities and the cases referred to, we have come to the conclusion that, as a general rule, it is the duty of trustees to invest funds held by them in government or state securities, or in bonds and mortgages on unincumbered real estate." But see Ormiston v. Oleott, 22 Hun, 270.

⁵ Cornwise v. Bourguin, 2 Ga. Dec. 15; Quick v. Fisher, 9 N. J. Eq. 802; Washington v. Emery, 4 Jones Eq. 32.

⁶ Baker v. Disbrow, 18 Hun, 29.

⁷ Kaufman v. Crawford, 9 Watts & S. 131; 42 Am. Dec. 323.

the latter is estopped from seeking to charge him with a loss resulting.¹ So a trustee who changes an investment of trust funds with the consent of the *cestui*, who is of legal age, is not liable for any loss growing out of such new investment.²

ILLUSTRATIONS. — A trustee invested trust funds in a second mortgage on an estate upon which, in his individual capacity, he held a first mortgage. A building upon the estate burned, leaving the security insufficient to pay both mortgages. *Held*, that the trust mortgage should be treated as the first and not as the second mortgage, even as against the assignee of the first mortgage, who took it after maturity, with notice: *Shuey v. Latta*, 90 Ind. 139. A devise was to township's trustees and their successors perpetually, for the exclusive benefit of the poor, with authority to the trustees to manage the trust "as they think best for the benefit of said poor." *Held*, that the trustees might invest in notes or other securities, and were not limited to real estate security: *Scott v. Marion*, 39 Ohio St. 153. A trustee succeeding another trustee found the fund invested in a mortgage for \$2,416.66, on property for which the mortgagor had paid \$4,000. The land subsequently depreciated; but the trustee, on repeated inquiries, was informed by those residing in the neighborhood that it was worth \$3,000, until, on foreclosure of the mortgage, it was sold for only \$2,000. *Held*, that the trustee was not guilty of any negligence: *Fahnestock's Appeal*, 104 Pa. St. 46. The money was bequeathed to executors, under a direction "to invest it in any loans of the United States, or of the state of Pennsylvania, or of the city of Philadelphia, or in any of the incorporated districts in the county of Philadelphia, or in any public stocks or securities bearing an interest." *Held*, that the bonds of the Lehigh Coal and Navigation Company were public securities, and the executors were not liable for a loss incurred in such investment: *Rush's Estate*, 12 Pa. St. 375. A statute authorized certain *quasi* public agents, trustees of a firemen's fund, to invest permanently from time to time in public securities certain surplus income. *Held*, that having invested accordingly, the trustees had power to sell those securities: *Baltimore etc. Department v. Creamer*, 17 Md. 243. A will empowered trustees to "sell," "vest, and reinvest" any part of the principal of the trust fund, and directed them to invest the surplus income in certain specified ways. *Held*, that the specified investments of the income did not control the trustees in their reinvestments of the principal: *Goddard v. Brown*, 12 R. I. 31.

¹ *Clermontel's Estate*, 12 Phila. 139.

² *Campbell v. Miller*, 38 Ga. 304; 95 Am. Dec. 339.

§ 2030. **Not to Deal with Trust Property to their Own Advantage—Or Take Advantage of their Fiduciary Position.**—The trustee in dealing with the trust property must not use it in his own private business, or make any pecuniary gains or incidental profit from his fiduciary position.¹ If a trustee receives a bonus for lending the trust funds, he must charge himself with the bonus.² So where trustees lend money on usurious interest, the profits will inure to the *cestui*.³ Thus if a trustee or executor use the fund committed to his care in buying and selling land, or in stock speculations, or lay out the trust money in a commercial adventure, as in fitting out a vessel for a voyage, or if he employ it in business,—in all these cases, while the executor or trustee is liable for all losses, the *cestui que trust* may at his election insist on having the trust fund replaced, with interest, or on having the profits made by the trust funds turned over to him.⁴ A director in a company cannot become a contractor with the company, nor have any personal or pecuniary interest in such contract.⁵ If trustees or executors buy up any debt or encumbrance to which the trust estate is liable for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the creditors or legatees, or other *cestuis que trust*, shall have the

¹ Pomeroy's Eq. Jur., sec. 1075-1077; *Miller v. Davidson*, 3 Gilm. 518; 44 Am. Dec. 715. A trustee who receives gifts from tenants of his estate should be punished more severely than simply by being compelled to give up the sums so received, though possibly the deprivation of all his commission might be too severe: *Jacobus v. Munn*, 37 N. J. Eq. 48; 38 N. J. Eq. 622.

² *Sherman v. Lanier*, 39 N. J. Eq. 249.

³ *Barney v. Saunders*, 16 How. 535.

⁴ *Docker v. Somes*, 2 Mylne & K. 655; *Willett v. Blanfood*, 1 Hare, 253; *Townsend v. Townsend*, 1 Giff. 201; Pomeroy's Eq. Jur., sec. 1075; *Myers v. Myers*, 2 McCord Ch. 214; 16 Am. Dec. 648; *Hanna v. Spott*, 5 B. Mon. 362;

43 Am. Dec. 132; *Chorpenning's Appeal*, 32 Pa. St. 315; 72 Am. Dec. 789; *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304; *Norris's Appeal*, 71 Pa. St. 106. But the *cestui*, in electing whether to take the profits or insist on the corpus and interest, cannot, in general, take the profits for one part of the time and interest for the other: *Malone v. Kelley*, 54 Ala. 532. And a trustee, though chargeable with all profits which he himself may have secretly made out of his trust relation, is not chargeable with what some one else has been enabled to make through an accidental connection with him: *Bent v. Priest*, 10 Mo. App. 562.

⁵ *Port v. Russell*, 36 Ind. 60; 10 Am. Rep. 5.

advantage of it.¹ A trustee cannot buy in an outstanding title, or any adverse claim, or purchase the land at a sheriff's sale for taxes, and set up the title thus acquired to defeat the title of the *cestui que trust* in equity.² The *cestui* has the option to take the benefit of any purchase which the trustee may make of claims or titles adverse to the estate upon reimbursing the trustee to the extent of his outlay; but he must signify his election to do so within a reasonable time.³ If he purchases, either directly or indirectly, at his own or any other sale of the trust property, the sale may be set aside at the election of the *cestui que trust*;⁴ but only at his instance, and not at the suit of a stranger.⁵ So a trustee cannot take a renewal of a lease in his own name for his own benefit.⁶

¹ Pooley v. Quilter, 2 De Gex & J. 327; Fosbrooke v. Balguy, 1 Mylne & K. 226; Green v. Winter, 1 Johns. Ch. 27; 7 Am. Dec. 475; Wiswall v. Stewart, 32 Ala. 433; 70 Am. Dec. 549; Browne v. Alston, 8 Fla. 397. The trustee, however, may demand to be reimbursed the amount expended in making the purchase, with interest: Baugh v. Walker, 77 Va. 99.

² Moore v. Titman, 44 Ill. 367; Rand v. Scofield, 43 Ill. 167; Dennis v. McCagg, 32 Ill. 429; O'Holloran v. Fitzgerald, 71 Ill. 58; McClanahan v. Henderson, 2 A. K. Marsh. 388; 12 Am. Dec. 412; Morgan v. Boone, 4 T. B. Mon. 291; 16 Am. Dec. 153; Keaton v. Cobb, 1 Dev. Eq. 439; 18 Am. Dec. 595; Norris v. Taylor, 49 Ill. 17; 95 Am. Dec. 569.

³ Wiswall v. Stewart, 32 Ala. 433; 70 Am. Dec. 549.

⁴ Dorsey v. Dorsey, 3 Har. & J. 410; 6 Am. Dec. 506; Price v. Morris, 5 McLean, 4; Jackson v. Van Dalfsen, 5 Johns. 43; Singstack v. Harding, 4 Har. & J. 186; 7 Am. Dec. 669; Davis v. Simpson, 5 Har. & J. 147; 9 Am. Dec. 500; Brackenridge v. Holland, 2 Blackf. 377; 20 Am. Dec. 123; Richardson v. Jones, 3 Gill & J. 163; 22 Am. Dec. 293; Hunt v. Bass, 2 Dev. Eq. 292; 24 Am. Dec. 294; Armstrong v. Campbell, 3 Yerg. 201; 24 Am. Dec. 556; Saltmarsh v. Beene, 4 Port. 283;

30 Am. Dec. 525; Buckles v. Lafferty, 2 Rob. (Va.) 292; 40 Am. Dec. 752; Scott v. Freeland, 7 Smedes & M. 409; 45 Am. Dec. 310; Pearson v. Moreland, 7 Smedes & M. 609; 45 Am. Dec. 319; Pratt v. Thornton, 28 Me. 355; 48 Am. Dec. 492; Spindler v. Atkinson, 3 Md. 409; 56 Am. Dec. 755; Chorpennin's Appeal, 32 Pa. St. 315; 72 Am. Dec. 789; Hoffman Coal Co. v. Coal and Iron Co., 16 Md. 456; 77 Am. Dec. 311; Jewett v. Miller, 10 N. Y. 402; 61 Am. Dec. 751; Mulford v. Murch, 11 N. J. L. 16; 64 Am. Dec. 475; North Balt. Bldg. Ass. v. Caldwell, 25 Md. 420; 90 Am. Dec. 67; Grumley v. Webb, 44 Mo. 444; 100 Am. Dec. 304; Toote v. McKiernan, 48 N. Y. Sup. Ct. 163; Hallman's Estate, 13 Phila. 562; Freeman v. Howard, 49 Me. 195; Union State Co. v. Tilton, 69 Me. 244; Carson v. Marshall, 37 N. J. Eq. 213.

⁵ Wilson v. Troup, 2 Cow. 195; 14 Am. Dec. 458; Richardson v. Jones, 3 Gill & J. 163; 22 Am. Dec. 293; Harrison v. McHenry, 9 Ga. 164; 52 Am. Dec. 435; Baldwin v. Allison, 4 Minn. 25; McKinley v. Irvine, 13 Ala. 681; Woelper's Appeal, 2 Pa. St. 71; Paniter v. Henderson, 7 Pa. St. 48; McNish v. Pope, 8 Rich. Eq. 112; Coxe v. Blanden, 1 Watts, 533; 26 Am. Dec. 83; Jackson v. Van Dalfsen, 5 Johns. 43.

⁶ See *ante*, Resulting Trusts.

The *cestui que trust* is entitled in a court of equity to set aside the purchase and have the property re-exposed to sale. And whether the sale was private or public, the *cestui que trust* may insist on having the experiment of another sale, without proving that the trustee made a bargain advantageous to himself, and without showing actual injury.¹ These rules include an attorney;² a general agent and confidential adviser;³ an agent for the collection of successive mortgages;⁴ a mortgagee with power to sell;⁵ an agent orally employed to purchase land;⁶ one of several joint purchasers of real estate in whose name the title is taken for their joint benefit, with authority to sell and divide the proceeds.⁷ A trustee, incompetent to purchase on his own account, cannot purchase as agent for a third person;⁸ nor can he sell to another as agent for himself.⁹ But the trustee is only prohibited from dealing with the trust property for his own benefit so long as the trust continues. After the trust ceases, he occupies the same relation to the trust property that a stranger to the trust does, and acting in good faith, may become the owner of the property, by purchase or otherwise.¹⁰ So after he has made an actual sale, in good faith, of the trust property, to a third person, he may afterwards purchase it of such person and acquire a good title to it.¹¹ Where a trustee who has an interest to protect by bidding at a sale of the trust property makes a special application to the

¹ *Bank of Old Dominion v. R. R. Co.*, 8 Iowa, 277; 74 Am. Dec. 302.

² *Byington v. Moore*, 62 Iowa, 470.

³ *Stewart v. Duffy*, 116 Ill. 47; *Wakeman v. Dodd*, 27 N. J. Eq. 564.

⁴ *Reese v. Wallace*, 113 Ill. 589.

⁵ *Imboden v. Hunter*, 23 Ark. 622; 79 Am. Dec. 117.

⁶ *Rose v. Hayden*, 35 Kan. 106; 57 Am. Rep. 145.

⁷ *Cook v. Sherman*, 20 Fed. Rep. 167; 4 McCrary, 20.

⁸ *Hawley v. Cramer*, 4 Cow. 717; *Gould v. Gould*, 36 Barb. 270.

⁹ *Murray v. Vanderbilt*, 39 Barb. 140. A sale by a trustee, directly or

indirectly, to a corporation in which he is a large owner, is as fraudulent as an outright transfer to himself: *Robbins v. Butler*, 24 Ill. 387. But it does not follow from the fact that a bank cashier was A's agent in such a sense that his purchase of A's land at a tax sale would inure to A's benefit, and the bank's purchase would so inure to A's benefit: *Storm Lake Bank v. Missouri Valley Ins. Co.*, 66 Iowa, 617.

¹⁰ *Munn v. Burges*, 70 Ill. 604; *Bush v. Sherman*, 80 Ill. 160.

¹¹ *Creveling v. Fritts*, 34 N. J. Eq. 134.

court for permission to bid, which upon a hearing of all the parties interested is granted, he can make a purchase.¹ A trustee may purchase the trust property, a railroad, for instance, at a judicial sale not controlled by himself if he acts in good faith, and to protect the interests of himself and others.²

Nor, as a general rule, will a trustee be permitted to contract with or purchase the trust estate from his *cestui que trust*.³ To sustain such a purchase, it must clearly appear that there has been no fraud or concealment in the matter, and that no advantage in any way has been taken by the trustee.⁴ All presumptions are against its validity.⁵ So a trustee is bound to put his *cestui que trust* in possession of the full and true state of his affairs before any settlement will be binding.⁶

ILLUSTRATIONS.—A, B's creditor, bid in B's farm at a foreclosure sale. Against B's protest as to price, A sold the farm for a fair price, B not offering to redeem or to produce any one who would give more. *Held*, that A was chargeable only with the price received: *Childs v. Jones*, 41 N. J. Eq. 74. A trustee sold trust property under a power for an adequate price, afterwards purchased other property with his own funds, made improvements upon it, and finally exchanged it for the trust property so sold by him. *Held*, that the trustee was only liable for the price for which he sold the property: *De Bevoise v. Sanford*, 1 Hoff. Ch. 192.

¹ *Scholle v. Scholle*, 101 N. Y. 167.

² *Lusk's Appeal*, 108 Pa. St. 152.

³ *Fox v. Mackreth*, 1 Lead. Cas. 123; *Jamison v. Glascock*, 29 Mo. 191; *Munro v. Allaire*, 2 Caines Cas. 183; 2 Am. Dec. 330; *McCants v. Bee*, 1 McCord Ch. 383; 16 Am. Dec. 610; *Everett v. Henry*, 67 Tex. 402. As to when the power of disposal of it is in the beneficiary, see *Marshall v. Stephens*, 8 Humph. 159; 47 Am. Dec. 601. The relation between a man and the woman whom he is engaged to marry is not confidential and fiduciary in the sense that a presumption of fraud is raised in business dealings between them: *Atkins v. Withers*, 94 N. C. 581.

⁴ *McCants v. Bee*, 1 McCord Ch. 383;

16 Am. Dec. 610; *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 251; *Bruch v. Lantz*, 2 Rawle, 392; 21 Am. Dec. 458; *Field v. Arrowsmith*, 3 Humph. 442; 39 Am. Dec. 185; *Juzan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Migett's Appeal*, 109 Pa. St. 520; *Smith v. Townshend*, 27 Md. 368; 92 Am. Dec. 637; *Bryan v. Duncan*, 11 Ga. 67. But a trustee seeking to purchase from his *cestui* is not bound to disclose that he has already sold half the property, if the deed is duly recorded: *Whitesides v. Taylor*, 105 Ill. 496.

⁵ *Lathrop v. Pollard*, 6 Col. 424; *Beckett v. Tyler*, 3 McAr. 319.

⁶ *Diller v. Brubaker*, 52 Pa. St. 498; 91 Am. Dec. 177.

§ 2031. **Duties and Liabilities of Co-trustees.**—Where the trust is vested in several trustees, they all form but one collective trustee, and therefore must execute the duties of the office in their joint capacity. Sometimes one of several trustees is called the acting trustee; but the courts know no such distinction; all who accept the trust are acting trustees.¹ But in public trusts a majority of the trustees may act and bind all.² And by the testator's express authorization a majority of the trustees may act.³ In a Pennsylvania case it is said that acts depending on the discretion and judgment of the trustees require the concurrence of all, while acts of a mere ministerial nature may be performed by one.⁴ But in Maryland it was held that all the trustees must join in a receipt for money, and a receipt by one was not a discharge of the debt.⁵ One of two joint trustees cannot, without the assent of his co-trustee, convey or pledge the trust property.⁶ The trustees must all unite in bringing an action on behalf of the estate.⁷ At law, where trustees join in a receipt, *prima facie* all are to be considered as having received the money. But it is competent to a trustee to show that the

¹ Lewin on Trusts, 298; Hill on Trustees, 305; Nicholson v. Wordsworth, 2 Lev. 370; Holcomb v. Holcomb, 11 N. J. Eq. 285; Vandever's Appeal, 8 Watts & S. 405; 42 Am. Dec. 305; Sloo v. Law, 3 Blatchf. 471; Latrobe v. Tiernan, 2 Md. Ch. 474; Hayden v. Marmaduke, 19 Mo. 403. "It is a settled rule that when a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is necessary to its due execution. . . . They have no separate interests of their own on which the separate deed can operate; . . . and unless specially authorized to act separately by the instrument creating the trust, they can make no disposition of the trust estate vested in them otherwise than by their joint deed." Sinclair v. Jackson, 8 Cow. 583. Upon the death of one of several joint trustees, the whole estate

devolves on the survivors: Golder v. Bressler, 105 Ill. 419. So where one refuses to act: In re Bernstein, 3 Redf. 20; Scull v. Reeves, 17 N. J. Eq. 84; 29 Am. Dec. 694.

² Low v. Perkins, 10 Vt. 535; 33 Am. Dec. 217; see *ante*, Title I., Principal and Agent; Sloo v. Law, 3 Blatchf. 459; Chambers v. Perry, 17 Ala. 726; Hill v. Josselyn, 13 Smedes & M. 597; First Nat. Bank v. Mt. Tabor, 52 Vt. 87; 36 Am. Dec. 734; McCready v. Guardians, 9 Serg. & R. 94; 11 Am. Dec. 667.

³ Crane v. Decker, 22 Hun, 452.

⁴ Vandever's Appeal, 8 Watts & S. 409; 42 Am. Dec. 305.

⁵ Latrobe v. Tiernan, 2 Md. Ch. 474. But see People v. Sigel, 46 How. Pr. 151.

⁶ Ham v. Ham, 58 N. H. 70.

⁷ Thatcher v. Candee, 4 Abb. App. 387.

money acknowledged to have been received by all was in fact received by one, and he himself joined only for conformity.¹

One trustee is not liable for the acts or defaults of his co-trustee in which he has not joined or concurred, to which he has not consented, or which he has not aided or made possible by his own negligence.² But co-trustees are bound to watch over the conduct of each other, and to know of the collection of funds belonging to the trust estate, and see that they are properly applied.³ Where one trustee voluntarily permits his co-trustee to take the trust fund into his exclusive possession and control, both are answerable for it.⁴ So a trustee who negligently permits his co-trustee to misapply the property will be held liable for such misapplication.⁵ It is the duty of a trustee to protect the trust estate from any misfeasance by his co-trustee, upon being made aware of the intended act, by obtaining an injunction against him; and if the wrongful act has been already committed, to take measures, by suit or otherwise, to compel the restitution of the property, and its application in the manner required by the trust. Without such action he will himself be liable.⁶ A sale of trust property by one trustee to his co-trustee renders them jointly responsible.⁷ Where two trustees have been guilty of a breach of trust, the court may determine the order in which they shall stand answerable for the loss by making one primarily liable and the other secondarily.⁸ The distinction, as a question of due diligence in a trustee in any case, between a discretionary trust and a

¹ *Brice v. Stokes*, 11 Ves. 319; 2 Lead. Cas. Eq. 877; *Monell v. Monell*, 5 Johns. Ch. 283; 9 Am. Dec. 298; *Griffin v. Macaulay*, 7 Gratt. 476.

² *Pomeroy's Eq. Jur.*, sec. 1082.

³ *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 250; *Graham v. Austin*, 2 Gratt. 273; *Bates v. Underhill*, 3 Redf. 365.

⁴ *Monell v. Monell*, 5 Johns. Ch. 283; 9 Am. Dec. 298; *Rayall v. McKenzie*,

25 Ala. 363; *Deaderick v. Cantrell*, 10 Yerg. 263; 31 Am. Dec. 576.

⁵ *Hilles's Estate*, 13 Phila. 402; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Laroe v. Douglass*, 13 N. J. Eq. 308.

⁶ *Crane v. Hearn*, 26 N. J. Eq. 378.

⁷ *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 250.

⁸ *McCartin v. Traphagen*, 43 N. J. Eq. 323.

directory trust is of great importance in considering the liability of one trustee for the act of his co-trustee.¹

§ 2032. **Compensation of Trustees.**—It is an established rule of the English courts that trustees, executors, or administrators, or others standing in a similar situation, shall have no allowance for their care and trouble.² But in the United States this rule is not in force, and trustees, executors, etc., are entitled to a reasonable compensation for their services, which, if not fixed by the trust deed or

¹ In *Deaderick v. Cantrell*, 10 Yerg. 263, 31 Am. Dec. 576, the court say: "Trusts of the character now under consideration are of two kinds, distinguishable by the law as discretionary and directory trusts, the rules for regulating the responsibilities of co-trustees being different when applied to these different trusts. We will proceed to examine: 1. When and under what circumstances a trustee is liable for an abuse of trust by his co-trustee when the trust is discretionary; and 2. When and under what circumstances he is liable where the trust is directory. A discretionary trust is when, by the terms of the trust, no direction is given as to the manner in which the trust fund shall be vested till the time arrives at which it is to be appropriated in satisfaction of the trust. In such cases, in order to charge a trustee for an abuse by his co-trustee, some act of commission must be shown on his part by which the trust fund was attained by his co-trustee, or some act of commission amounting to gross neglect in permitting the fund to be wasted. In the case of *Monell v. Monell*, 5 Johns. Ch. 287, 9 Am. Dec. 298, Chancellor Kent, after an elaborate examination of the authorities on that point, says: 'It may be laid down as a principle, that if two guardians or other trustees join in a receipt for money, it is *prima facie*, though not absolutely conclusive, evidence that the money came to the hands of both; that one trustee may show by satisfactory proof that the joining in the receipt was necessary or merely formal, and that the moneys in fact were paid to his companion; that without such satisfactory

proof he must be liable to the *cestui que trust*; and that if the moneys were in fact paid to his companion, yet if they were so paid by his act, direction, or agreement, and when he had it in his power to have controlled or received the money, he is and ought to be responsible.' From this opinion we understand the chancellor to have held that a trustee is liable for an abuse of trust by his co-trustee,—1. When the money has been received jointly; 2. When a joint receipt has been given, unless it be shown by satisfactory proof that the joining in the receipt was necessary or merely formal, and that the money was in fact paid to his companion; 3. When the moneys were in fact paid to his companion, yet so paid by his act, direction, or agreement. . . . But this is not a discretionary but a directory trust. A directory trust is when, by the terms of the trust, the fund is directed to be vested in a particular manner till the period arrives at which it is to be appropriated. In such cases, if the fund be not vested, or vested in a different manner from that pointed out, it is an abuse of trust for which both trustees are responsible, though but one received the money, because both are bound to attend to the directions of the trust, and must be careful to execute it faithfully, according to its terms and the intention of the person by whom it was created: *Bone v. Cooke*, McClell. 168; *Ringgold v. Ringgold*, 1 Har. & G. 12; 18 Am. Dec. 250; 3 Brown Ch. 90, 112; *Oliver v. Count*, 3 Ex. 312; 4 Cond. Ch. 93; *Brice v. Stokes*, 11 Ves. 326."

² *Pomeroy's Eq. Jur.*, sec. 1084; *Robinson v. Pelt*, 3 P. Wms. 132.

by statute, will be determined by the court.¹ The trustee is likewise entitled to be reimbursed for all outlays made in the carrying out of the trust, and to be indemnified for all losses arising therefrom.² The trustee is entitled to an allowance for reasonable counsel fees in settling or defending the estate.³ A trustee who is also a lawyer may be allowed compensation for necessary services of a professional character concerning the trust,⁴ but not in addition to his expenses and commissions.⁵

The trust estate must bear the necessary expenses of its administration.⁶ Where one of any parties having a common interest in a trust fund at his own expense takes proper proceedings to save it from destruction, and restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts.⁷ But no commission or compensation is allowed where the

¹ Note to *Robinson v. Pett*, 2 Lead. Cas. Eq., 4th Am. ed., 512; *Trustees v. Greenough*, 105 U. S. 527; *Muscagee Lumber Co. v. Hyer*, 18 Fla. 698; 43 Am. Rep. 332; *Ringgold v. Ringgold*, 1 Har. & G. 11; 18 Am. Dec. 250; see note to *Gibson's Case* (1 Bland, 138), in 17 Am. Dec. 266-274; *Barney v. Saunders*, 16 How. 535; *Wood's Appeal*, 86 Pa. St. 346; *In re Allen*, 96 N. Y. 327; *Hancock v. Meeker*, 95 N. Y. 528; *Clark v. Platt*, 30 Conn. 282; *Phillips v. Bustard*, 1 B. Mon. 348; *Schwarz v. Wendell*, Walk. 267; *Spangler's Estate*, 21 Pa. St. 335; *Heckert's Appeal*, 24 Pa. St. 482; *Lane's Appeal*, 24 Pa. St. 487; *Woodruff v. Snedecor*, 68 Ala. 437. The trustees of real estate who have had the care of it for years, and have received a commission upon the income, may be allowed a further compensation out of the corpus of the estate on the termination of their trust: *Biddle's Appeal*, 83 Pa. St. 340; 24 Am. Rep. 183. Commissions may be awarded to trustees, although they have received commissions as executors, where the duties are separate: *Laytin v. Davidson*, 95 N. Y. 263. A trustee may be entitled to commissions as upon six separate trusts, al-

though the property had not been divided, where six trusts were created by the will, and the trustee has managed the property and paid over the income to the six beneficiaries: *Clute v. Gould*, 28 Hun. 348. Where an instrument creating a trust provides that the trustee shall have a reasonable compensation for his services, he is not confined to the statutory allowance to executors, etc.: *In re Schell*, 53 N. Y. 263. Five per cent commission will not be allowed trustee for simply receiving and paying over dividends of stock to his *cestui*: *Turnage v. Greene*, 2 Jones Eq. 63; 62 Am. Dec. 208.

² *Pomeroy's Eq. Jur.*, sec. 1085. See *Principal and Agent*, Title I., *ante*; *Dilworth v. Sinderling*, 1 Binn. 488; 2 Am. Dec. 469.

³ *Grimball v. Cruse*, 70 Ala. 534; *Tryan v. Lindemann*, 37 Ohio St. 218; *In re Burbank*, 65 How. Pr. 129.

⁴ *Perkins's Appeal*, 108 Pa. St. 314; 56 Am. Rep. 208.

⁵ *Binasse v. Paige*, 1 Abb. App. 138.

⁶ *Trustees v. Greenough*, 105 U. S. 527.

⁷ *Trustees v. Greenough*, 105 U. S. 527.

trustee has been guilty of unfaithfulness or gross misconduct in the administration of the trust;¹ nor can a trustee claim compensation for services self-imposed, and resulting from his own wrong;² nor where a sale is in violation of his duty, and a constructive fraud on his *cestui*;³ nor where he assumes a position hostile to the trust;⁴ nor where the damage resulting to the beneficiaries from his breach of trust is greater than the benefit derived from his services.⁵ The compensation of a trustee should be put at the lowest estimate where the transactions of the trust are involved in obscurity which might have been removed by a proper attention to duty.⁶ Where a trustee resigns for his own convenience, he is not entitled to commissions upon the principal of the trust estate. He is, however, entitled to commissions upon the income.⁷ And the court will allow a reasonable commission to the estate of a deceased trustee who dies before completing his trust.⁸ Trustees appointed as successors cannot claim commissions on the trust fund received from their predecessors.⁹ A trustee who has waived all claim to commissions before his appointment, and whose appointment was procured under a family arrangement, in which he was himself concerned, on the express agreement and understanding, by parol, and proved by parol evidence, that no commissions were to be charged, is entitled to nothing but his actual expenses.¹⁰ Under an agreement that a trustee's expenses should be paid, he cannot claim compensation for his personal services.¹¹ There is nothing to prevent

¹ *Jenkins v. Eldredge*, 3 Story, 235; *Sherrill v. Shuford*, 6 Ired. Eq. 228; *Stehman's Appeal*, 5 Pa. St. 413; *Berryhill's Appeal*, 35 Pa. St. 245; *Robinett's Appeal*, 36 Pa. St. 174; *Cook v. Lowry*, 95 N. Y. 103; *Singleton v. Lowndes*, 9 S. C. 465. *Aliter*, when their irregularities have done no harm: *Morgan v. Morgan*, 4 Demarest, 353.

² *Stearly's Appeal*, 38 Pa. St. 525; *Tracy v. R. R. Co.*, 84 Mo. 210.

³ *Flagg v. Mann*, 3 Sum. 84.

⁴ *Greenfield's Estate*, 24 Pa. St. 232; *Carrier's Appeal*, 79 Pa. St. 230.

⁵ *Probate Judge v. Jackson*, 58 N. H. 458.

⁶ *McDowell v. Caldwell*, 2 McCord Ch. 43; 16 Am. Dec. 635.

⁷ *In re Allen*, 29 Hun, 7.

⁸ *Bentley v. Shreve*, 2 Md. Ch. 215.

⁹ *Jenkins v. Whyte*, 62 Md. 427.

¹⁰ *Ridgely v. Gittings*, 2 Har. & G. 58.

¹¹ *McMillen v. Scott*, 1 T. B. Mon. 150.

trustees from contracting with their *cestuis que trustent* to receive a certain compensation for the performance of the duties of the trust. But such a contract would be very jealously scrutinized by a court of equity; and if there be any appearance of unfairness or unconscionable advantage on the part of the trustee, the agreement will not be enforced.¹

§ 2033. **Renunciation of Trust.**—A trustee who has accepted the trust cannot afterwards renounce it. The only mode in which he can obtain a release is either under the sanction of a court of equity, or by virtue of a special power in the instrument creating the trust, or with the consent of all parties interested in the estate, being *sui juris*.² The court does not accept the resignation of a trustee as a matter of course. No attention is paid to the consent of parties, except so far as their views have a bearing on the propriety of the resignation.³ The trustee in a deed of trust cannot divest himself of the trust by simply withdrawing from it with the assent of the grantor, even though the latter is a beneficiary, if there are other beneficiaries who do not consent, or, being infants, cannot.⁴ An abandonment of a trust by the trustee, and a surrender of the fund to the grantor, constitute a breach of the trust, and involve both in liability.⁵ A quitclaim deed from the trustee to the grantor reinvests the grantor with the legal estate, and divests the trustee of it.⁶

¹ Snell's Equity, 144; Ayliffe v. Murray, 2 Atk. 58; Bowker v. Pierce, 130 Mass. 262.

² Shepherd v. McEvers, 4 Johns. Ch. 136; 8 Am. Dec. 561; Creger v. Holliday, 11 Paige, 314; Gilchrist v. Stevenson, 9 Barb. 9; Brennan v. Wilson, 71 N. Y. 506; Ross v. Barclay, 18 Pa. St. 179; 55 Am. Dec. 616; Drane v. Gunter, 19 Ala. 731; Jones v. Stockett, 2 Bland, 409; Thatcher v. Candee, 4 Abb. App. 387; Craig v. Craig, 3

Barb. Ch. 76; Tilden v. Fiske, 4 Demarest, 357. A trustee is not removed by his bankruptcy: Rankin v. Barcroft, 114 Ill. 441.

³ Matter of Miller, 15 Abb. Pr. 277.

⁴ Henderson v. Sherman, 47 Mich. 267.

⁵ Henderson v. Sherman, 47 Mich. 267.

⁶ Huckabee v. Billingsly, 16 Ala. 414; 50 Am. Dec. 183.

§ 2034. **Removal of Trustees.**—Equity, independent of statutory authority, has power to remove the trustees of express trusts, either on their own application or on the application of any one interested in the trust. It is in every case a matter of discretion in the court.¹ Thus the court may and will remove a trustee for a breach of trust or violation of his duty; or where he is insolvent, or has become incapable, through age or infirmity, of managing the trust property, or has removed from the jurisdiction, or has absconded;² or where his acts are such as to endanger the property, or to show want of capacity or reasonable fidelity, equity may remove him, or require security;³ or where he, from long-continued intemperance, has become unfit to have the charge of the trust property.⁴ And a trustee has been removed on the ground that he was the confidential clerk of one of two claimants;⁵ that his domestic relations were such as to make it probable that his feelings might conflict with his duty;⁶ that he has denied his relation;⁷ that he has refused to obey, or threatens to disobey, the order of the court;⁸ that he (a co-trustee) has refused to join in a conveyance of land, on the ground that its sale would interfere with his personal interest or convenience;⁹ that he has neglected to invest trust funds, where the will creating the trust required an investment;¹⁰ for setting a grossly unreasonable claim to the trust property, adverse to the *cestui*;¹¹ where he neglected and refused to take possession of the mort-

¹ Pomeroy's Eq. Jur., sec. 1086; In re Mayfield, 17 Mo. App. 684; Ward v. Dortch, 69 N. C. 279.

² Pomeroy's Eq. Jur., sec. 1086; Gibson's Case, 1 Bland, 138; 17 Am. Dec. 257; Read v. Patterson, 44 N. J. Eq. 211; 6 Am. St. Rep. 877; In re Wiggins, 29 Hun, 271; Cavender v. Cavender, 3 McCrary, 158; 114 U. S. 464; In re Paddock, 6 How. Pr. 215; Farmers' Trust Co. v. Hughes, 11 Hun, 130; Kraft v. Lohman, 79 Ala. 323; Satterfield v. John, 53 Ala. 127.

³ Holcomb v. Coryell, 12 N. J. Eq. 289.

⁴ Bayles v. Staats, 5 N. J. Eq. 513.

⁵ In re Mayfield, 17 Mo. App. 684.

⁶ In re Schlang, 66 How. Pr. 199.

⁷ Irvine v. Dunham, 111 U. S. 327.

⁸ Ehlen v. Ehlen, 63 Md. 267; Attorney-Gen. v. Garrison, 101 Mass. 223.

⁹ Oliver v. Frisbie, 3 Demarest, 22.

¹⁰ Cavender v. Cavender, 114 U. S. 464. But see Corlies v. Corlies, 23 N. J. Eq. 192.

¹¹ Cooper v. Day, 1 Rich. Eq. 26.

gaged property after the bonds had matured, on the request of the bond-holders;¹ failing to invest the fund as directed by the devise creating it, and using it in his own business;² drawing money of the estate from a bank, and refusing to give to a creditor a satisfactory explanation of what was done with it, or to show his official check-book, the use of the money not being explained in court upon the hearing.³

So a trustee who is charged with an active trust which gives him a discretionary power over the *cestui que trust* may be removed where strong ill-feeling exists between the two.⁴ But the court will not remove a trustee on the ground of an honest mistake or misjudgment in the execution of his trust;⁵ nor because the trustee and *cestui que trust* disagree as to the management of the property;⁶ nor because certain transactions, while not endangering the security of the estate, were probably entered into with a view to his personal advantage;⁷ nor where the trust is passive.⁸ Where the title to property is vested in trustees for a particular purpose, and in special confidence, and with discretionary powers, a court of equity will not, at the instance of a subsequent encumbrancer, substitute other persons to sell the property or to execute the trust, there being neither fraud, incompetency, nor misconduct on the part of the trustees.⁹

To warrant the removal, the charges should be specific and certain, not vague and indefinite.¹⁰ To such a pro-

¹ *Matter of Mechanics' Bank*, 2 Barb. 446; *Stevens v. Eldridge*, 4 Cliff. 348.

² *Clemens v. Caldwell*, 7 B. Mon. 171; *Deen v. Cozzens*, 7 Robt. 178.

³ *In re Mayer*, 66 How. Pr. 106.

⁴ *McPherson v. Cox*, 96 U. S. 404; *Scott v. Rand*, 118 Mass. 404; *Wilson v. Wilson*, 145 Mass. 490; 1 Am. St. Rep. 477. But *aliter*, where no intercourse between the parties is required, and the duties are merely formal and ministerial, and no neglect of duty or

misconduct is established against him: *McPherson v. Cox*, 96 U. S. 404; *Nichols v. Phelps*, 18 Fla. 732.

⁵ *Matter of Durfee*, 4 R. I. 401; *Matthews v. Murchison*, 17 Fed. Rep. 760.

⁶ *Gibbes v. Smith*, 2 Rich. Eq. 131; *Preston v. Wilcox*, 38 Mich. 578.

⁷ *Morgan v. Morgan*, 3 Demarest, 612; *Massey v. Stout*, 4 Del. Ch. 274.

⁸ *Sloo v. Law*, 1 Blatchf. 512.

⁹ *Shea v. Dulin*, 3 McAr. 339.

¹⁰ *Ferris v. Ferris*, 2 Demarest, 336.

ceeding all the beneficiaries must be made parties; nor is it enough that one asserts that he moves in behalf of all.¹

§ 2035. **Acquiescence of Cestui que Trust—Release.**—The remedy of a *cestui que trust* against his trustee for breach of trust of any sort may be barred by the concurrence of the *cestui que trust*, or by his acquiescence after full knowledge of the facts and of his rights.² If the former discover facts justifying a repudiation of the latter's acts, he is bound, after investigation, or a reasonable time therefor, to declare whether he will avail himself of that right or not, and he cannot lie by indefinitely for the purpose of affirming the bargain if a profitable one, or by repudiating it if it is a losing one.³ A *cestui que trust* may, by a release or confirmation, prevent himself from taking proceedings against trustees for a breach of trust,⁴ but neither will be binding on him unless he had a full knowledge of the facts of the case.⁵

§ 2036. **Lapse of Time—Effect of on Trust.**—An express trust, as between trustee and *cestui que trust*, is not barred by lapse of time as long as the trust exists.⁶ But

¹ Bear v. American Rapid Tel. Co., 36 Hun, 400.

² Pomeroy's Eq. Jur., sec. 1083; Hoffman etc. Co. v. Cumberland etc. Co., 16 Md. 508; 77 Am. Dec. 311; Davis v. Simpson, 5 Har. & J. 147; 9 Am. Dec. 500; Van Dyke v. Johns, 1 Del. Ch. 93; 12 Am. Dec. 76; Jennison v. Hapgood, 7 Pick. 1; 19 Am. Dec. 258; Scott v. Freeland, 7 Smedes & M. 409; 45 Am. Dec. 310; Harrison v. McHenry, 9 Ga. 164; 52 Am. Dec. 435; Mulford v. Murch, 11 N. J. Eq. 16; 64 Am. Dec. 472; Ames Iron Works v. West, 24 Fed. Rep. 313; Kennedy v. Winn, 80 Ala. 165; Wiswall v. Stewart, 32 Ala. 433; 70 Am. Dec. 549.

³ Follansbe v. Kilbreth, 17 Ill. 522; 65 Am. Dec. 691; Hume v. Beale, 17 Wall, 336. A *cestui que trust* does not by delay in enforcing, as he might have done, a personal liability of the trustee preclude himself from assert-

ing his rights in the trust fund: Ames v. Brooks, 143 Mass. 344.

⁴ French v. Hobson, 9 Ves. 103; Cocks v. Barlow, 5 Redf. 406.

⁵ Lloyd v. Attwood, 3 De Gex & J. 650; Kay v. Smith, 21 Beav. 522; Burrows v. Walls, 5 De Gex M. & G. 254; Boyd v. Hawkins, 2 Dev. Eq. 195; Luers v. Bumges, 5 Redf. 32; Jones v. Lloyd, 117 Ill. 597.

⁶ Miles v. Thorne, 38 Cal. 335; 99 Am. Dec. 384; Boone v. Chiles, 10 Pet. 223; Foscue v. Foscue, 2 Ired. Eq. 321; Hayward v. Gunn, 82 Ill. 385; Kane v. Bloodgood, 7 Johns. Ch. 120; 11 Am. Dec. 417; Love v. Watkins, 40 Cal. 547; 6 Am. Rep. 624; Miller v. Bingham, 1 Ired. Eq. 423; 36 Am. Dec. 58; Pratt v. Thornton, 28 Me. 355; 48 Am. Dec. 493; Lexington Life Ins. Co. v. Page, 17 B. Mon. 412; 66 Am. Dec. 165; Reihl v. Likowski, 33 Kan. 515; Manning v. Hayden, 5 Saw. 360.

equity, acting on its own inherent doctrine of discouraging antiquated demands, refuses to interfere in attempts to establish a stale trust, except where the trust is clearly established, and the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*.¹ Where the trustee denies the right of his *cestui que trust*, and the possession of the property becomes adverse, lapse of time from that period may constitute a bar in equity. The statute begins to run from the time the trust is repudiated or disclaimed by the trustee.² In order to sustain a plea of limitation by a trustee founded upon his declarations and acts of ownership adverse to the claim of the *cestui que trust*, such acts and declarations must be continuous and constant, not now denying the trust and again admitting it; admitting it to some persons and denying it to others.³

In cases of constructive trusts, the statute will begin to run against the *cestui que trust* from the time he has acquired, or with reasonable diligence might have acquired, the knowledge of the fact upon which the trust is founded.⁴ To enable a trustee, without giving up the possession, to turn it into an adverse holding against the *cestui que trust*, the evidence must be clear and unmistakable, and such adverse claim must be brought home to the *cestui que trust* beyond question or doubt. The attitude of the trustee must be hostile, and continuously so, and there must be no mistake or misapprehension as to the character of his

¹ Reynolds v. Sumner, 126 Ill. 58; 9 Am. St. Rep. 523; Hightower v. Thornton, 8 Ga. 486; 52 Am. Dec. 413; Badger v. Badger, 2 Wall. 87.

² Kane v. Bloodgood, 7 Johns. Ch. 120; 11 Am. Dec. 417; Mason v. Mason, 33 Ga. 435; 83 Am. Dec. 172; Bigelow v. Catlin, 50 Vt. 408; Wilmerding v. Russ, 33 Conn. 67; Piatt v. Oliver, 2 McLean, 267; 3 How. 333; White v. Tucker, 52 Miss. 145; Hearst v. Pujol, 44 Cal. 230; Poe v. Domic, 54 Mo. 119; Nease v. Capeheart, 8 W. Va.

59; Merriam v. Hassam, 14 Allen, 516; 92 Am. Dec. 795; Tinnen v. Mebane, 10 Tex. 246; 60 Am. Dec. 205; Robertson v. Wood, 15 Tex. 1; 65 Am. Dec. 140.

³ Grumbles v. Grumbles, 17 Tex. 473.

⁴ Phalen v. Clark, 19 Conn. 421; 50 Am. Dec. 253; Strimpfner v. Roberts, 18 Pa. St. 283; 57 Am. Dec. 606; Starke v. Starke, 3 Rich. 447; Kane v. Bloodgood, 7 Johns. Ch. 120; 11 Am. Dec. 417.

holding by either party.¹ Where a trustee has possession of the trust estate for his *cestui que trust*, he cannot by any act of his own, without communication with the *cestui*, so change the nature of his possession as to make it adverse; and if he parts with the possession to a third person, in whose favor time would operate, and regain it by purchase or descent, he takes it charged with the trust.² But the trustee holds adverse to the *cestui* from the time when he manifests an intention to claim and enjoy as his own the land subject to the trust by failing to make a conveyance to the *cestui que trust* at the time agreed upon and by taking out a patent for the land in his own name.³ A trustee's delay until barred by statute will also bar the *cestui*.⁴ The statute of limitations runs in case of a trust estate in favor of a stranger in exclusive adverse possession against both the trustee and the *cestui*, whether for life or in remainder.⁵

¹ *Scott v. Haddock*, 11 Ga. 258; *Moffatt v. Bingham*, 11 Humph. 369; *Andrews v. Smithwick*, 20 Tex. 111; *Cunningham v. McKindley*, 22 Md. 149; *Merriam v. Hassam*, 14 Allen, 516; 92 Am. Dec. 795.

² *Armstrong v. Campbell*, 3 Yerg. 201; 24 Am. Dec. 556.

³ *De Cordova v. Smith*, 9 Tex. 129; 58 Am. Dec. 137.

⁴ *Bryan v. Weems*, 28 Ala. 423; 65 Am. Dec. 407.

⁵ *Smilie v. Biffle*, 2 Pa. St. 52; 44 Am. Dec. 157.

INDEX.

INDEX.

[This brief index will, it is hoped, be found sufficient for immediate use. A comprehensive index to the entire work will be made on its completion.]

Alterations.

of bills and notes.....p. 2798, § 1616

Assignment.

of copyright.....p. 2826, § 1632

of trade-marks.....pp. 2857-2860, § 1648

Assignments for Benefit of Creditors.

valid at common law.....p. 3383, § 1985

requisites of, in general.....p. 3383, § 1985

who may make.....p. 3384, § 1985

made to hinder, delay, or defraud creditors....p. 3384, § 1986

giving preference to certain creditors.....p. 3386, § 1987

illegal provisions in assignments—reserving benefits to

debtor.....p. 3387, § 1988

exactng release from creditor.....p. 3388, § 1989

other provisions held illegal.....p. 3389, § 1990

circumstances raising presumption of fraud.....p. 3392, § 1991

retention of possession by assignor.....p. 3393, § 1991

when assignment not void for fraud....p. 3393, § 1991

provisions in assignments held valid.....p. 3394, § 1992

secret agreement with creditor.....p. 3397, § 1993

who may avoid fraudulent assignment.....p. 3397, § 1994

assent of creditors not necessary.....p. 3398, § 1995

what property passes to assignee.....p. 3399, § 1996

what property does not pass to assignee.....p. 3401, § 1997

form of assignment.....p. 3403, § 1998

delivery of possession essential.....p. 3404, § 1999

powers, duties, and liabilities of assignee.....p. 3405, § 2000

bond required of assignee, effect of.....p. 3407, § 2001

assignment not revocable by debtor.....p. 3408, § 2002

effect of bankruptcy laws upon assignments.....p. 3409, § 2003

Bailments. See also COMMON CARRIERS; INNKEEPERS;

PLEDGES; TELEGRAPH COMPANIES.

bailment defined, illustrations of bailments..pp. 2899, 2902, §§ 1692, 1693

mutual assent and knowledge essential.....p. 2902, § 1694

may be created without express contract.....p. 2903, § 1695

Bailments (Continued).

bailments by public officers.....	p. 2910, § 1697
contract must be to return identical thing.....	p. 2905, § 1696
mutuum, what is.....	p. 2907, § 1696
different classes of bailments.....	p. 2910, § 1698
negligence as affecting bailments.....	p. 2911, § 1699
tortious bailee an insurer.....	p. 2913, § 1700
bailee cannot dispute owner's title.....	p. 2913, § 1701
liability may be limited by contract.....	p. 2914, § 1702
liability may be enlarged by contract.....	p. 2914, § 1703
contributory negligence of owner.....	p. 2915, § 1704
burden of proof.....	p. 2917, § 1705
bailments for sole benefit of bailor; gratuitous bailments..	p. 2920, § 1706
test of gratuitous bailment.....	p. 2922, § 1707
liability of gratuitous bailee.....	pp. 2924-2932, § 1708
not liable to undertake gratuitous bailment.....	p. 2932, § 1709
liability of bailee of closed receptacle.....	p. 2934, § 1710
bailee or bailor may sue for chattel.....	p. 2934, § 1711
bailment, how terminated — by act of parties.....	p. 2935, § 1712
by redelivery.....	p. 2936, § 1713
by death.....	p. 2938, § 1714
excuses for not redelivering.....	p. 2938, § 1715
at what place bailee bound to deliver.....	p. 2937, § 1716
after refusal to deliver, bailee an insurer.....	p. 2939, § 1717
not entitled to use article bailed.....	p. 2940, § 1718
bailee entitled to reimbursement.....	p. 2940, § 1719
joint bailors and joint bailees.....	p. 2942, § 1720
bailment for sole benefit of bailee; gratuitous loans.....	p. 2943, § 1721
borrower liable for slight neglect.....	p. 2944, § 1722
for what borrower not liable.....	p. 2945, § 1723
rights, duties, and liabilities of lender.....	p. 2945, § 1724
rights and duties of borrower.....	p. 2946, § 1725
termination of bailment.....	p. 2948, § 1726
mutual benefit bailment; hire of labor and services on	
property.....	p. 2950, § 1727
different classes of these bailments.....	p. 2950, § 1727
subject-matter must be a chattel.....	p. 2952, § 1728
property must be in existence.....	p. 2953, § 1728
there must be a reward.....	p. 2954, § 1728
there must be a mutual assent.....	p. 2955, § 1728
bailee liable for ordinary negligence.....	pp. 2955-2961, § 1729
for what bailees not responsible.....	p. 2961, § 1730
negligence contributing to accidental loss.....	p. 2962, § 1731
warehousemen and wharfingers, liability of.....	pp. 2962-2972, § 1732
bailee may bring action for chattel....	p. 2922, § 1733
bailee is entitled to compensation.....	p. 2973, § 1734
even when completion of bailment is interrupted.....	p. 2973, § 1735

Bailments (Continued).

other rights and duties of bailee.....	p. 2974, § 1736
duty of bailee to redeliver property.....	p. 2975, § 1737
mutual benefit bailments; hire of chattels.....	p. 2978, § 1738
how bailment created.....	p. 2978, § 1738
hirer liable for ordinary negligence.....	p. 2979, § 1739
may enlarge liability by contract.....	p. 2981, § 1740
using thing beyond terms of contract.....	p. 2982, § 1741
hirer cannot transfer chattel.....	p. 2983, § 1742
hirer liable for injury to it by servant.....	p. 2984, § 1743
bailor liable for letting defective thing.....	p. 2985, § 1745
hirer may sue for chattel.....	p. 2986, § 1746
other rights of hirer.....	p. 2986, § 1747
duty of hirer to restore chattel.....	p. 2987, § 1748
duty of hirer to pay compensation.....	p. 2987, § 1749
bailor must bear expenses, when.....	p. 2987, § 1750

Baggage. See COMMON CARRIERS.

Bankrupt Laws.

effect of on assignments for benefit of creditors.....	p. 3409, § 2003
--	-----------------

Bills and Notes. See NEGOTIABLE INSTRUMENTS.

Bills of Lading. See NEGOTIABLE INSTRUMENTS.

Bonds. See also NEGOTIABLE INSTRUMENTS.

of assignees for benefit of creditors.....	p. 3407, § 2001
--	-----------------

Certificates of Deposit. See NEGOTIABLE INSTRUMENTS.

Collateral Security. See PLEDGES AND PAWNS.

Common Carriers.

Carriers of goods.

common carriers defined.....	p. 3076, § 1789
who are private carriers.....	p. 3077, § 1789
are subject to public regulation and control.....	p. 3079, § 1790
carriage must be for hire.....	p. 3079, § 1791
who are common carriers.....	pp. 3080-3083, § 1792
who are not common carriers.....	p. 3083, § 1792
carriers of animals.....	p. 3083, § 1792; p. 3107, § 1812
action against carrier for refusing to carry.....	p. 3090, § 1797
mandamus against carrier for refusing to carry.....	p. 3090, § 1797
discrimination by carrier.....	p. 3090, § 1797
carriers of passengers.....	p. 3086, § 1794
sleeping-car companies.....	p. 3086, § 1795
carrier bound to carry for all.....	p. 3095, § 1797
payment in advance refused.....	p. 3096, § 1798
nature of goods and place of destination outside carrier's business or route.....	p. 3097, § 1799
goods tendered away from office or after business hours....	p. 3097, § 1800
goods exposed to violence.....	p. 3097, § 1801
suspicious packages.....	p. 3097, § 1802
property not properly packed.....	p. 3097, § 1803

Common Carriers (Continued).

goods beyond his facilities.....	p. 3098, § 1804
delivery to carrier — delivery to agent.....	p. 3098, § 1805
owner retaining control of goods.....	p. 3101, § 1806
delivery must be for immediate carriage.....	p. 3102, § 1807
place of delivery.....	p. 3102, § 1808
common carrier an insurer.....	p. 3103, § 1809
exceptions — act of God.....	p. 3104, § 1810
public enemies — mobs — strikes.....	p. 3107, § 1811
wear and tear and deterioration of goods.....	p. 3109, § 1812
act of the law.....	p. 3109, § 1813
stoppage in transitu.....	p. 3111, § 1814
act or neglect of owner.....	p. 3111, § 1815
fraud of owner.....	p. 3114, § 1816
effect of delay — loss by act of God after delay.....	p. 3116, § 1817
effect of delay on contracts limiting liability.....	p. 3120, § 1818
loss after deviation.....	p. 3122, § 1819
effect of deviation on contracts limiting liability.....	p. 3123, § 1820
duty of carrier as to stowage of goods.....	p. 3125, § 1821
duty of carrier to follow shipper's instructions.....	p. 3126, § 1822
agreements to deliver within specified time.....	p. 3127, § 1823
duty of carrier as to care of goods during transit.....	p. 3129, § 1824
presumption of negligence from failure to deliver safely . . .	p. 3130, § 1825
delivery by carrier — personal delivery, when required....	p. 3130, § 1826
delivery by carriers by water.....	p. 3132, § 1827
delivery by railroads.....	p. 3134, § 1828
delivery by express companies.....	p. 3138, § 1829
delivery to wrong person.....	p. 3141, § 1830
where consignee does not receive, carrier holds goods as warehouseman.....	p. 3146, § 1831
duty of carrier to notify consignor.....	p. 3149, § 1832
right of consignee to inspect goods before delivery.....	p. 3149, § 1833
carrier's right of action for injury or taking of goods by third person.....	p. 3149, § 1834
right of carrier to sell goods.....	p. 3150, § 1835
right of carrier to freight — goods must be delivered.....	p. 3151, § 1836
who liable for freight.....	p. 3155, § 1837
who may sue.....	p. 3156, § 1838
<i>Limitation of liability.</i>	
power of carrier to limit liability.....	p. 3157, §§ 1839, 1840
in Pennsylvania and South Carolina.....	p. 3159, § 1841
in New York.....	p. 3161, § 1842
special consideration necessary to support restrictive con- tract.....	p. 3163, § 1843
notices as to value and quality of goods.....	p. 3164, § 1844
notices by advertisement and placard.....	p. 3168, § 1845
conditions in notice do not bind shipper until assented to..	p. 3169, § 1846

Common Carriers (Continued).

presumption of assent to conditions in notice.....	p. 3169, § 1847
notices in bills of lading and receipts.....	p. 3170, § 1848
cases where assent of shipper was inferred.....	p. 3171, § 1849
cases where assent of shipper was not inferred.....	p. 3173, § 1850
bills of lading.....	p. 3174, § 1851
bill of lading cannot be explained or contradicted by parol.....	p. 3175, § 1852
exceptions to this rule.....	p. 3176, § 1853
delivery of bill of lading after receipt of goods.....	p. 3177, § 1854
conditions in contracts as to manner and time of making claim.....	p. 3178, § 1855
other conditions and regulations contained in carrier's con- tracts.....	p. 3180, § 1856
conditions in contracts as to carriage of live-stock.....	p. 3181, § 1857
construction of special contracts.....	p. 3182, § 1858
different words and phrases in carrier's contracts construed.....	p. 3183, § 1859
presumption of liability from happening of loss or damage — burden on carrier.....	p. 3193, § 1860
burden of proof of restrictive contract on carrier.....	p. 3193, § 1861
loss falling within exemption—burden of proof of negli- gence.....	p. 3194, § 1862
usage as to restrictive contracts.....	p. 3196, § 1863

Connecting carriers.

carriers may agree to carry beyond their own routes.....	p. 3198, § 1864
or may stipulate for non-liability beyond route.....	p. 3198, § 1865
presumption from receipt of goods marked beyond route....	p. 3201, § 1866
construction of contracts as to liability beyond own route.....	pp. 3202-3207, § 1867
rights and liabilities of connecting carrier.....	p. 3207, § 1868
when connecting carrier may and may not have benefit of exemptions in contract with first carrier.....	p. 3207, § 1868

Carriers of Passengers.

who are common carriers of passengers.....	p. 3212, § 1869
carrier bound to carry all.....	p. 3214, § 1870
exceptions — persons previously ejected for cause.....	p. 3215, § 1871
persons for whom he has no room.....	p. 3215, § 1872
thieves — drunken and disorderly persons.....	p. 3216, § 1873
objects not carriage — conflicting interests.....	p. 3216, § 1874
wrong vehicles or wrong time.....	p. 3217, § 1875
other cases.....	p. 3217, § 1876
waiver by receiving passenger.....	p. 3217, § 1877
who are passengers — persons on conveyance by fraud.....	p. 3217, § 1878
persons carrying on business on conveyances.....	p. 3219, § 1879
employees of carrier, when passengers.....	p. 3221, § 1880
persons temporarily absent from conveyance.....	p. 3222, § 1881
persons meeting or leaving passengers.....	p. 3223, § 1882
persons riding free.....	p. 3224, § 1883

Carriers of Passengers (Continued).

at what time relation commences and ends.....	p. 3224, § 1884
status of a ticket.....	p. 3226, § 1885
duty to run trains according to time-tables — delay.....	p. 3228, § 1886
special contracts with passengers — contract to carry to particular place	p. 3230, § 1887
limited tickets.....	p. 3233, § 1888
continuous passage.....	p. 3237, § 1889
passenger entitled to seat.....	p. 3240, § 1890
must give time for refreshment.....	p. 3241, § 1891
name of station must be announced.....	p. 3242, § 1892
invitation to alight, express or implied.....	p. 3242, § 1893
time must be given to alight or get aboard.....	p. 3243, § 1894
car overshooting or falling short of platform.....	p. 3245, § 1895
carrying passenger beyond destination.....	p. 3246, § 1896
carrier may establish reasonable regulations — right to eject passenger.....	p. 3246, § 1897
no right to imprison passenger	p. 3250, § 1898
at what time passenger may be ejected.....	p. 3251, § 1899
excessive force must not be used.....	p. 3252, § 1900
right of passenger to resist ejection.....	p. 3252, § 1901
discrimination by carrier — as to sex, color, etc.....	p. 3252, § 1902
passenger must have ticket, or pay fare.....	p. 3253, § 1903
must purchase ticket before entering car.....	p. 3255, § 1904
passenger must show ticket.....	p. 3257, § 1905
power to eject drunken, disorderly, and dangerous passen- gers	p. 3258, § 1906
carrier of passengers not an insurer.....	p. 3259, § 1907
presumption of negligence from accident.....	p. 3260, § 1908
duty as to vehicles and appliances.....	p. 3262, § 1909
duty as to roadway.....	p. 3263, § 1910
negligence of manufacturer or contractor	p. 3264, § 1911
duty of carrier as to platforms, stations, etc.....	p. 3265, § 1912
to what persons this duty due.....	p. 3268, § 1913
regulations as to admission to stations.....	p. 3269, § 1914
passengers upon freight trains.....	p. 3270, § 1915
injuries to passengers on tracks.....	p. 3273, § 1916
liability of carrier for assault on passenger by fellow-pas- senger.....	p. 3273, § 1917
carrier cannot release himself from liability for negligence...	p. 3275, § 1918
conflict as to free passengers.....	p. 3276, § 1919
who not gratuitous passengers.....	p. 3277, § 1920
conditions limiting liability in tickets.....	p. 3278, § 1921
contributory negligence of passenger.....	p. 3280, § 1922
arm or head out of window.....	p. 3280, § 1923
riding in dangerous place — on platform.....	p. 3281, § 1924
jumping from or upon train while in motion.....	p. 3285, § 1925

Carriers of Passengers (Continued).

- exception — escaping threatened danger.....p. 3287, § 1926
- other instances of negligence.....p. 3288, § 1927
- duty of carrier as to persons under physical or mental disability.....p. 3292, § 1928
- imputed negligence — negligence of person in charge of infant.....p. 3294, § 1929
- negligence of carrier..p. 3295, § 1930
- concurrent negligence of carrier and third person.....p. 3295, § 1931
- liability of carrier for acts of servant within scope of employment.....p. 3296, § 1932
- and for willful and malicious acts of servants.....p. 3297, § 1933
- liability of carrier using another's line or means of transportation'.....p. 3299, § 1934
- liability for acts of another carrier using his line or appliances.....p. 3301, § 1935
- connecting lines — liability of first carrier.....p. 3303, § 1936
- liability of carrier on whose line loss occurred.....p. 3304, § 1937
- right to restrict liability to his own line.....p. 3305, § 1938
- duties and liabilities of carriers by stage.....p. 3305, § 1939
- street-car companies, liabilities ofp. 3306, § 1940
- carriers by water, liabilities of.....p. 3309, § 1941
- receiving and landing passengers.....p. 3309, § 1942
- authority of master over passengersp. 3310, § 1943
- duty as to treatment of passengersp. 3310, § 1944
- duty as to accommodation of passengers.....p. 3311, § 1945
- United States statutes as to carriers by waterp. 3312, § 1946

Baggage.

- liability of carrier for baggagep. 3315, § 1947
- what is and is not baggagepp. 3317-3321, § 1948
- extra baggage.....p. 3321, § 1949
- delivery of baggage to carrier.....p. 3321, § 1950
- effect of "checking".....p. 3322, § 1951
- baggage taken by passenger into vehiclep. 3323, § 1952
- delivery by carrierp. 3325, § 1953
- passenger must remove baggage.....p. 3327, § 1954

Consideration.

- absence of, as a defense to liability on negotiable instrument.....p. 2767, § 1591
- consideration in case of negotiable instruments, generally..p. 2767, § 1592
- failure of consideration.....p. 2722, § 1596
- illegal consideration.....p. 2723, § 1597

Contributory Negligence. See NEGLIGENCE.**Copyrights.**

- copyright, at common law, lost by publication.....p. 2803, § 1618
- what is a publication.p. 2804, § 1619
- stage representation not a publication.....p. 2805, § 1620

Copyrights (Continued).

- property in private letters.....p. 2806, § 1621
- copyright by statute.....p. 2808, § 1622
 - mode of obtaining and requisites of statutory copyright..p. 2808, § 1623
 - who may take out copyright.....p. 2812, § 1624
 - what may and may not be copyrighted.....pp. 2813-2818, § 1625
- what is an infringement.....pp. 2818-2824, § 1627
 - abridgments and compilations.....p. 2818, § 1627
 - right to make extracts.....p. 2823, § 1628
 - translations into another language.....p. 2824, § 1629
- jurisdiction of court as to copyrights.....p. 2811, § 1622
 - rule as to granting injunctions.....p. 2824, § 1630
- statutory penalties for infringement.....p. 2825, § 1631
- contracts and licenses to print.....p. 2826, § 1632
- assignment of copyright.....p. 2826, § 1632

Damages.

- measure of, on refusal to accept bill.....p. 2647, § 1505
- measure of, on refusal to pay bill or note.....p. 2668, § 1520
- measure of, on dishonor, against drawer and indorser.....p. 2739, § 1576
- measure of, for infringement of copyright...pp. 2824, 2825, §§ 1630, 1631
- measure of, for infringement of trade-mark.....p. 2855, § 1646

Deeds of Trust. See also TRUSTEES.

- what are.....p. 3379, § 1983
- similarity to mortgages.....p. 3379, § 1983
- authority to give deed.....p. 3380, § 1983
 - sales by trustee under deed.....p. 3381, § 1984
 - power, rights, and liabilities of trustee under deed.pp. 3381-3383, § 1985

Delivery.

- of negotiable instruments.....pp. 2608-2611, § 1470

Dies non Juridicus.

- effect of on negotiable paper.....p. 2626, § 1485

Escrow.

- delivery of negotiable paper in.....p. 2612, § 1471

Evidence.

- parol evidence inadmissible to vary negotiable instrument..p. 2616, § 1475
 - exceptions.....pp. 2617-2619, § 1477
- burden of proof of negligence by bailee.....p. 2917, § 1705

Guaranty.

- guarantor of negotiable paper not entitled to notice of dis-
 - honor.....p. 2692, § 1542
- discharge of.....p. 2798, § 1617

Injunction.

- to restrain infringement of copyright.....p. 2824, § 1630
- to restrain infringement of trade-mark.....p. 2885, § 1646
- to restrain infringement of patent.....p. 2888, § 1691

Innkeepers.

- innkeepers defined.....p. 3045, § 1778

Innkeepers (Continued).

boarding and lodging house keepers.....	p. 3041, § 1779
who are "guests".....	p. 3048, § 1780
innkeeper bound to receive public.....	p. 3052, § 1781
innkeeper an insurer.....	p. 3056, § 1782
extent of liability as to time, place, and quantity.....	p. 3060, § 1783
who may bring action.....	p. 3066, § 1784
innkeeper not liable — contributory negligence of guest.....	p. 3067, § 1785
other cases where innkeeper not liable	p. 3069, § 1786
limitation of liability — by contract and notice.....	p. 3070, § 1787
by statute.....	p. 3071, § 1788

I O U's. See NEGOTIABLE INSTRUMENTS.**Jurisdiction.**

of courts in copyright cases.....	p. 2811, § 1622
of courts in patent cases.....	pp. 2881, 2882, §§ 1689, 1690
of equity over trusts.....	p. 3375, § 1979

Letters.

copyright in private letters.....	p. 2806, § 1621
-----------------------------------	-----------------

Letters of Credit. See NEGOTIABLE INSTRUMENTS.**Loan.** See BAILMENTS; PLEDGE.**Mistake.**

mistakes in drawing negotiable instruments.....	p. 2604, § 1466
---	-----------------

Negotiable Instruments.

defined—different classes of.....	p. 2579, § 1444
bill of exchange, what is	p. 2580, § 1445
foreign bills.....	p. 2580, § 1445
inland bills.....	p. 2580, § 1445
bills in a set.....	p. 2580, § 1446
effect of payment of one of set.....	p. 2581, § 1446
promissory note, what is.....	p. 2581, § 1447
check, what is.....	p. 2581, § 1448
bills of lading.....	p. 2581, § 1449
negotiability of.....	p. 2582, § 1449
letter of credit.....	p. 2582, § 1450
bonds, status of.....	p. 2582, § 1451
what bonds are and are not negotiable.....	p. 2582, § 1451
coupons, negotiability of.....	p. 2583, § 1452
certificates of deposit, negotiability of.....	p. 2584, § 1453
certificates of stock, negotiability of.....	p. 2584, § 1453
receiver's certificates, negotiability of.....	p. 2585, § 1453
treasury notes, negotiability of.....	p. 2585, § 1454
bank bills, negotiability of.....	p. 2585, § 1454
negotiability, requisites of, in general.....	p. 2586, § 1455
must be payable to order or bearer.....	p. 2586, § 1455
effect of sealing.....	p. 2587, § 1456
order or promise must be certain.....	p. 2588, § 1457
order or promise must be imperative.....	p. 2588, § 1457

Negotiable Instruments (Continued).

I O U's, status of.....	p. 2589, § 1458
due bills, status of.....	p. 2589, § 1458
payment must be unconditional.....	pp. 2590-2593, § 1459
payment must be certain.....	pp. 2590-2593, § 1459
payment out of particular fund.....	p. 2593, § 1460
amount must be certain.....	pp. 2594-2596, § 1461
must be payable in money.....	p. 2597, § 1462
must not include other matters.....	pp. 2598-2601, § 1463
bills and notes, requisites of, as to form.....	p. 2601, § 1464
signature to instrument, how made.....	p. 2603, § 1465
mistakes as to amount.....	p. 2604, § 1466
mistakes as to date.....	p. 2604, § 1466
mistakes as to time.....	p. 2604, § 1466
mistakes as to place.....	p. 2604, § 1466
mistakes as to other matters.....	p. 2604, § 1466
date not absolutely essential.....	p. 2605, § 1467
sum, instrument may be drawn for any.....	p. 2607, § 1468
place of making need not be stated.....	p. 2607, § 1469
delivery of instrument essential.....	pp. 2608-2611, § 1470
delivery in escrow.....	p. 2612, § 1471
parties to bill or note, in general.....	p. 2612, § 1472
the drawer.....	p. 2613, § 1473
the drawee.....	p. 2614, § 1474
the maker.....	p. 2614, § 1474
the payee.....	p. 2614, § 1475
parol evidence inadmissible to vary instrument.....	p. 2616, § 1475
exceptions.....	pp. 2617-2619, § 1477
contemporaneous written agreements.....	p. 2619, § 1478
time of payment—payment on demand.....	p. 2620, § 1479
payment at sight.....	p. 2621, § 1480
payment at future day.....	p. 2621, § 1481
days of grace.....	p. 2623, § 1482
usance.....	p. 2623, § 1483
time, how computed.....	p. 2624, § 1484
month means a calendar month.....	p. 2624, § 1484
dies non juridicus.....	p. 2626, § 1485
place of payment—in general.....	p. 2626, § 1486
instrument may be payable anywhere.....	p. 2626, § 1486
instrument not specially describing place is payable any- where.....	p. 2626, § 1486
presentment for acceptance, when necessary.....	p. 2629, § 1487
what is a presentment.....	p. 2629, § 1487
at what time must presentment be made.....	p. 2630, § 1488
at what place must presentment be made.....	p. 2631, § 1489
by whom.....	p. 2631, § 1490
to whom.....	p. 2631, § 1491

Negotiable Instruments (Continued).

right of drawee to retain bill	p. 2632, § 1492
presentment for acceptance, when excused	p. 2632, § 1493
when drawee is fictitious	p. 2632, § 1493
or has not capacity to contract	p. 2632, § 1493
where, after reasonable diligence, presentment cannot be effected	p. 2632, § 1493
where drawee is not in funds, and bill will not be ac- cepted	p. 2632, § 1493
acceptance defined—in general	p. 2633, § 1494
form of acceptance	pp. 2633-2636, § 1495
must be written on bill or on separate paper	p. 2633, § 1495
any form of words sufficient	p. 2633, § 1495
may be oral	p. 2634, § 1495
may be implied	p. 2634, § 1495
may be by promise before or after bill is drawn	p. 2635, § 1495
need not be dated	p. 2637, § 1496
general and absolute acceptance	p. 2637, § 1497
qualified acceptance	p. 2637, § 1498
conditional acceptance	p. 2637, § 1498
acceptance must be promise to pay money	p. 2641, § 1500
time of acceptance	p. 2641, § 1499
who may accept	p. 2641, § 1501
acceptance supra protest	pp. 2642-2644, § 1502
effect of non-acceptance	p. 2644, § 1503
duty of drawee to accept	p. 2644, § 1504
liability of drawee before acceptance	p. 2644, § 1504
measure of damages on refusal to accept	p. 2647, § 1505
no privity between holder and drawee—latter not liable to former for refusing to accept	p. 2648, § 1506
liability of acceptor after acceptance—what acceptor admits and warrants	p. 2649, §§ 1507-1508
existence of drawer	p. 2649, § 1508
capacity and authority of drawer to draw	p. 2650, § 1509
that bill is drawn upon funds of drawer in his hands	p. 2650, § 1509
genuineness of drawer's signature	p. 2650, § 1509
existence of payee, and his capacity to indorse	p. 2650, § 1509
but not genuineness of his indorsement	p. 2650, § 1509
presentment for payment—in general	p. 2650, § 1509
mode of presentment	p. 2651, § 1510
time of presentment	pp. 2651-2654, § 1511
place of presentment	pp. 2654-2658, § 1512
must be made by holder	p. 2658, § 1513
liability of agents for neglect	p. 2659, § 1514
must be made to acceptor	p. 2660, § 1515
presentment for payment, when excused	p. 2661, § 1516
what will not excuse presentment	p. 2663, § 1517

Negotiable Instruments (Continued).

what will excuse delay in presentment.....	p. 2664, § 1518
when presentment necessary to charge parties.....	p. 2667, § 1519
measure of damages on refusal to pay.....	p. 2668, § 1520
liability of drawer.....	p. 2668, § 1521
what drawer admits and warrants.....	p. 2668, § 1522
when is instrument dishonored for non-payment.....	p. 2669, § 1523
effect of dishonor.....	p. 2669, § 1524
"noting"—effect of noting.....	p. 2669, § 1525
protest—requisites of—what protest must contain.	p. 2669, § 1526
copy of bill, or bill itself, annexed, and statement that it is in notary's hands.....	p. 2669, § 1526
statement of parties for whom and against whom bill protested.....	p. 2669, § 1526
date of protesting, and place where protest is made.....	p. 2670, § 1526
statement that payment was demanded, and terms of answer.....	p. 2670, § 1526
reservation of rights against parties liable.....	p. 2670, § 1526
subscription and seal of notary.....	p. 2670, § 1526
protest only necessary in case of foreign bills.....	p. 2670, § 1526
protest of checks is not necessary.....	p. 2670, § 1526
nor of certificates of deposit.....	p. 2670, § 1526
nor of bank bills.....	p. 2670, § 1526
nor of inland bills of exchange.....	p. 2670, § 1526
nor of promissory notes.....	p. 2670, § 1526
nor of instruments not negotiable.....	p. 2671, § 1526
aliter by statute in many states.....	p. 2671, § 1526
protest necessary to charge drawer and indorsers.....	p. 2671, § 1527
who may make protest.....	p. 2672, § 1528
at what time must protest be made.....	p. 2672, § 1529
at what place must protest be made.....	p. 2673, § 1530
what will excuse making protest.....	p. 2673, § 1531
what will excuse delay in making protest.....	p. 2673, § 1532
protest for better security.....	p. 2673, § 1533
notice of dishonor essential.....	p. 2673, § 1534
proof of notice, how made.....	p. 2674, § 1534
effect of not giving notice.....	p. 2674, § 1535
must be given by whom.....	p. 2675, § 1536
modes of giving notice.....	pp. 2676-2679, § 1537
time of giving notice.....	p. 2679, § 1538
time of receiving notice.....	p. 2680, § 1539
notice by post.....	pp. 2681-2688, § 1540
party receiving notice has what time to send it to ante- cedent parties.....	p. 2688, § 1541
to whom must notice be given.....	p. 2689, § 1542
acceptor not entitled to.....	p. 2692, § 1542
nor guarantor.....	p. 2692, § 1542

Negotiable Instruments (Continued).

form and requisites of notice.....	pp. 2694-2697, § 1543
when notice of dishonor excused.....	pp. 2697-2700, § 1544
when notice of dishonor not excused.....	p. 2701, § 1545
waiver of notice — how and when notice may be waived	pp. 2703-2709, § 1546
delay in giving notice, when excused.....	p. 2709, § 1547
to whose benefit notice will inure.....	p. 2710, § 1548
usages as to demand and notice.....	p. 2711, § 1549
transfer of bills and notes — in general.....	p. 2714, § 1550
by assignment or sale.....	p. 2714, § 1550
of bill payable to order without indorsement.....	p. 2715, § 1551
by delivery.....	p. 2716, § 1552
transferrer by delivery warrants that bill is what it pur-	
ports to be.....	p. 2717, § 1553
that he has no knowledge of its invalidity.....	p. 2717, § 1553
that he has title to it.....	p. 2717, § 1553
that it is genuine, and not fictitious, forged, or altered.....	p. 2718, § 1553
that indorsements are genuine.....	p. 2718, § 1553
that maker is solvent.....	p. 2718, § 1553
but not that it is drawn against funds.....	p. 2719, § 1553
or that it is not accommodation paper.....	p. 2719, § 1553
transfer by death of holder.....	p. 2720, § 1554
transfer by negotiation.....	p. 2720, § 1555
who may negotiate.....	p. 2720, § 1556
payee wrongly described.....	p. 2721, § 1557
several payees or indorsers.....	p. 2721, § 1558
to whom may instrument be negotiated.....	p. 2722, § 1559
time of negotiation.....	p. 2722, § 1560
negotiation by delivery.....	p. 2723, § 1561
negotiation by indorsement — in general.....	p. 2724, § 1562
form of indorsement — requisites of as to.....	p. 2725, § 1563
indorsement in blank — general indorsement.....	p. 2727, § 1564
special indorsement.....	p. 2727, § 1565
striking out indorsements.....	p. 2728, § 1566
partial indorsement.....	p. 2729, § 1567
qualified indorsement.....	p. 2729, § 1568
indorsement "without recourse".....	p. 2729, § 1568
facultative indorsement.....	p. 2731, § 1569
conditional indorsement.....	p. 2731, § 1570
restrictive indorsement.....	p. 2732, § 1571
who is an indorser — liability in general.....	p. 2734, § 1572
what indorser admits and warrants.....	p. 2734, § 1573
indorser of non-negotiable instrument.....	p. 2735, § 1574
liability of indorser not a party to instrument....	pp. 2735-2739, § 1575
liability of drawer and indorser on dishonor — measure of	
damages.....	p. 2739, § 1576

Negotiable Instruments (Continued).

- re-exchange and redraft.....p. 2741, § 1577
- right of de facto holder to give good title.....p. 2741, § 1578
- bona fide holder, who is.....pp. 2743-2746, § 1579
- negligence in taking instrument.....pp. 2743-2746, § 1579
- "value," what is.....pp. 2746-2749, § 1580
- note taken for pre-existing debt.....p. 2750, § 1581
- "before maturity," what is.....p. 2752, § 1582
- overdue bill is taken subject to equities.....p. 2752, § 1583
- what are "equities".....p. 2753, § 1584
- at what time is instrument overdue.....p. 2755, § 1585
- at what time may suit be brought.....p. 2756, § 1585
- what is "in the usual course of business".....p. 2757, § 1586
- instrument taken with notice of defense or equities.....pp. 2759-2764, § 1587
- holder claiming under bona fide holder....p. 2764, § 1588
- holder presumed to be bona fide and for value.....p. 2764, § 1589
- exceptions.....p. 2765, § 1590
- absence of consideration as a defense....p. 2767, § 1591
- consideration, in general.....p. 2767, § 1592
- accommodation party, rights and liabilities of
pp. 2767-2771, §§ 1593, 1594
- partial failure of consideration—effect of.....p. 2772, § 1595
- total failure of consideration—effect of.....p. 2772, § 1596
- illegal consideration—effect of.....p. 2773, § 1597
- forged instrument—liability.....pp. 2773-2776, § 1598
- fraud or duress—effect of.....pp. 2776-2780, § 1599
- instrument void by statute.....p. 2780, § 1600
- defects patent on face of instrument.....p. 2780, § 1601
- fictitious payee or indorser.....p. 2781, § 1602
- right of de facto holder to bring action....p. 2783, § 1603
- defenses.....p. 2784, § 1604
- discharge of instrument—in general.....p. 2785, § 1605
- discharge by payment.....pp. 2785-2787, § 1606
- who must make payment.....p. 2787, § 1607
- to whom may payment be made.....p. 2788, § 1608
- payment supra protest.....p. 2789, § 1609
- payment by mistake.....pp. 2790-2793, § 1610
- at what time payment may be made.....p. 2793, § 1611
- duty of holder on payment.....p. 2793, § 1612
- discharge of instrument by acceptor becoming holder...p. 2793, § 1613
- discharge of instrument by waiver or cancellation.....p. 2795, § 1614
- discharge of instrument by renewal.....p. 2796, § 1615
- discharge of instrument by alterations.....p. 2798, § 1616
- discharge of sureties or indorsers.....p. 2798, § 1617
- Negligence.** See also COMMON CARRIERS; INNKEEPERS;
TELEGRAPH COMPANIES; TRUSTEES.
- in taking bills and notes.....pp. 2743-2746, § 1579

Negligence (Continued).

as effecting bailments

p. 2911, § 1699; p. 2944, § 1722; p. 2955, § 1727; p. 2979, § 1739

contributory negligence of owner.....p. 2915, § 1704

Notice. See NEGOTIABLE INSTRUMENTS; PLEDGES.**Officers.**

bailments by public officers.....p. 2910, § 1697

Parties.

to negotiable instruments.....pp. 2613, 2614, § 1473-1475

Patents.

origin and nature of patents.....p. 2863, § 1650

former statutory provisions as to.....p. 2863, § 1661

consolidation act of 1870.....p. 2865, § 1652

the patent-office and officers.....p. 2865, § 1653

printing of papers.....p. 2866, § 1654

copies as evidence.....p. 2866, § 1655

issuance of patents — duration — date.....p. 2867, § 1656

what inventions patentable.....p. 2867, § 1657

patents of foreign inventions.....p. 2867, § 1658

requisites of application.....p. 2868, § 1659

drawings, when requisite.....p. 2868, § 1660

specimens of ingredients — models.....p. 2869, § 1661

oath of applicant.....p. 2869, § 1662

examination and issuance of patent.....p. 2869, § 1663

time for completing application.....p. 2870, § 1664

patent to assignee of inventor — to executor.....p. 2870, § 1665

renewal of application.....p. 2870, § 1666

assignment of patent.....p. 2871, § 1667

rights of purchaser before application.....p. 2871, § 1668

patented articles to be marked — penalties.....p. 2871, § 1669

caveats — filing and effect of.....p. 2872, § 1670

rejection of claim — notice of.....p. 2873, § 1671

interferences.....p. 2873, § 1672

affidavits and depositions — subpoenas — witness fees.....p. 2873, § 1673

penalty for refusing to testify.....p. 2874, § 1674

appeals.....p. 2874, § 1675

proceedings on appeal from commissioner — determination

of.....p. 2874, § 1676

suits in equity for patent.....p. 2875, § 1677

reissue of defective patents.....p. 2875, § 1678

disclaimer.....p. 2876, § 1679

suits in interference.....p. 2877, § 1680

infringement suits.....p. 2878, § 1681

pleading in infringement suits.....p. 2878, § 1682

infringement, where specification too broad.....p. 2879, § 1683

previous use in foreign country.....p. 2880, § 1684

extension of patents granted prior to March 2, 1861.....p. 2881, § 1685

Patents (Continued).

proceedings — operation of extension.....	p. 2882, § 1686
patents for designs.....	p. 2881, § 1687
penalty for using patented design without authority.....	p. 2882, § 1688
jurisdiction of the federal courts.....	p. 2882, § 1689
of the state courts.....	p. 2885, § 1690
injunctions to restrain infringement.....	p. 2888, § 1691

Pawns. See PLEDGES AND PAWNS.**Payment. See NEGOTIABLE INSTRUMENTS.****Pledges and Pawns.**

what is a pawn.....	p. 2989, § 1751
what is a pledge.....	p. 2989, § 1751
what is collateral security.....	p. 2989, § 1751
title does not pass.....	p. 2992, § 1752
delivery of property essential.....	p. 2993, § 1753
actual manual possession not necessary.....	p. 2995, § 1754
who may make pledge or pawn.....	p. 2997, § 1755
what may be pledged.....	p. 2998, § 1756
property not in existence.....	p. 2999, § 1757
what debts or engagements covered by pledge.....	p. 3001, § 1758
extent of security.....	pp. 3003-3008, § 1759
right of pledgee to possession of pledge.....	p. 3008, § 1760
right of pledgee to use pledge.....	p. 3009, § 1761
right of pledgee to sell pledge.....	pp. 3010-3014, § 1762
demand and notice necessary.....	p. 3014, § 1763
sale must be public.....	p. 3017, § 1764
pledgee may not purchase.....	p. 3018, § 1765
pledge of several securities.....	p. 3019, § 1766
pledgor may ratify irregular sale.....	p. 3019, § 1767
pledgee not obliged to sell.....	p. 3020, § 1768
pledgee may sue pledgor personally.....	p. 3023, § 1769
right of pledgee to transfer pledge.....	p. 3023, § 1770
rights of purchasers....	p. 3023, § 1770
pledgee must use ordinary care.....	p. 3028, § 1771
special contract may enlarge or restrict liability.....	p. 3029, § 1772
duty of pledgee to collect negotiable paper.....	p. 3031, § 1773
right of pledgor to redeem.....	p. 3033, § 1774
duty of pledgee to return pledge.....	p. 3035, § 1775
other duties of pledgor and pledgee.....	p. 3038, § 1776
extinguishment of pledge.....	p. 3041, § 1777
by payment of debt or discharge of engagement.....	p. 3041, § 1777
by taking higher security.....	p. 3041, § 1777
by giving up possession.....	p. 3041, § 1777
by release or waiver of security.....	p. 3043, § 1777
by prescription or limitation.....	p. 3043, § 1777
by loss of pledge.....	p. 3043, § 1777

Post,

notice by.....pp. 2681-2688, § 1540

Principal and Agent.

liability of agent for neglect to present bill or note.....p. 2659, § 1514

Promissory Notes. See NEGOTIABLE INSTRUMENTS.**Protest.** See NEGOTIABLE INSTRUMENTS.**Sales.** See DEEDS OF TRUST; TRUSTEES.**Sleeping-car Companies.**

liability of.....p. 3086, § 1795

Street Cars. See BAILMENTS.**Telegraph Companies.** See also TELEPHONE COMPANIES.

are public agencies.....p. 3330, § 1955

but not insurers, like common carriers.....p. 3330, § 1955

must transmit for all who apply.....p. 3332, § 1956

exceptions—when message may be refused.....p. 3333, § 1957

care required in transmission of telegrams.....p. 3336, § 1959

presumption of negligence—burden of proof.....p. 3339, § 1960

power to limit liability.....p. 3340, § 1962

power to contract against negligence.....p. 3340, § 1962

conditions as to repeating messages.....p. 3341, § 1963

other conditions in telegraph blanks.....p. 3343, § 1964

knowledge by sender of conditions essential.....p. 3343, § 1965

contributory negligence of sender.....p. 3344, § 1966

measure of damages.....pp. 3345-3351, § 1967

what damages not recoverable.....pp. 3351-3354, § 1968

knowledge of importance of message essential.....p. 3355, § 1969

damages for injuries to feelings.....p. 3358, § 1970

connecting lines.....p. 3362, § 1971

who may bring action.....p. 3363, § 1972

Telephone Companies.

are public agencies.....p. 3334, § 1953

cannot refuse its instruments to persons applying.....p. 3334, § 1953

charges for use of instruments may be regulated by state..p. 3334, § 1953

may establish reasonable regulations.....p. 3335, § 1958

conversation by telephone admissible in evidence.....p. 3334, § 1958

acknowledgment of deed by telephone.....p. 3334, § 1958

Trade-marks.

what is a trade-mark.....p. 2830, § 1633

trade-mark, how acquired.....p. 2830, § 1633

trade-marks protected on ground of fraud.....p. 2832, § 1634

what may be a trade-mark—in general.....p. 2833, § 1635

words not original.....p. 2836, § 1636

words in common use.....p. 2836, § 1636

geographical names.....p. 2836, § 1637

names descriptive of article of trade.....p. 2838, § 1638

symbols and numbers.....p. 2841, § 1639

trade-mark in one's own name.....p. 2842, § 1640

Trade-marks (Continued).

names of corporations.....	p. 2843, § 1641
name of business or firm.....	p. 2843, § 1641
name of newspapers and books.....	p. 2846, § 1642
what is an infringement.....	pp. 2846-2851, § 1643
trade-mark intended to deceive not protected.....	pp. 2851-2854, § 1644
what persons entitled to protection.....	p. 2854, § 1645
damages, when given.....	p. 2855, § 1646
injunction, when issued.....	p. 2855, § 1646
account of profits, when ordered.....	p. 2855, § 1646
delay and acquiescence as a bar.....	p. 2857, § 1647
assignments and conveyances of trade-marks.....	pp. 2857-2860, § 1648
statutory provisions as to registration.....	p. 2860, § 1649

Trustees.

who may be a trustee.....	p. 3436, § 2019
trustee de son tort.....	p. 3437, § 2019
who may be cestui que trust.....	p. 3437, § 2020
extent of estate of trustee.....	p. 3437, § 2021
extent of estate of cestui que trust.....	p. 3437, § 2021
powers of trustees.....	p. 3442, § 2022
powers of cestui que trust.....	p. 3445, § 2023
trustee must accept trust.....	p. 3448, § 2024
effect of non-acceptance.....	p. 3448, § 2024
equity never wants a trustee.....	p. 3448, § 2024
duties of trustee to execute trust according to its terms.....	p. 3450, § 2025
duties of trustee to account and keep accounts.....	p. 3452, § 2026
duties of trustee not to delegate authority.....	p. 3455, § 2027
duties of trustee as to care and diligence.....	p. 3456, § 2028
duties of trustee as to investments.....	p. 3459, § 2029
duties of trustee not to take advantage of his position.....	p. 3464, § 2030
purchases by trustee.....	p. 3464, § 2030
duties and liabilities of co-trustees.....	p. 3468, § 2031
compensation of trustees.....	p. 3470, § 2032
renunciation by trustee.....	p. 3473, § 2033
removal of trustees.....	p. 3474, § 2034
acquiescence of cestui que trust — release.....	p. 3476, § 2035
effect of lapse of time on trust.....	p. 3476, § 2036

Trusts. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS;

DEEDS OF TRUST; TRUSTEES; USES.

trusts defined.....	p. 3373, § 1979
trust, how created.....	p. 3374, § 1979
assent of cestui.....	p. 3374, § 1979
illegal trusts.....	p. 3374, § 1979
not revocable.....	p. 3375, § 1979; p. 3379, § 1982; p. 3440, § 2021
jurisdiction of equity over.....	p. 3375, § 1979
declaration of, must be in writing — statute of frauds.....	p. 3376, § 1980
trusts of personalty may be created by parol.....	p. 3412, § 2007

Trusts (Continued).

- executed trusts — construction ofp. 3377, § 1981
- executory trusts — construction ofp. 3377, § 1981
- voluntary trusts, when enforceable.....p. 3378, § 1982
- powers in the nature of trusts.....p. 3409, § 2004
- what language will create a trust.....p. 3409, § 2005
- precatory wordsp. 3410, § 2006
- resulting trusts, in generalp. 3414, § 2008
 - to purchaser on conveyance to stranger.....p. 3416, § 2009
 - presumption of advancement in case of relatives.....p. 3421, § 2010
 - where trust fails, or does not exhaust propertyp. 3423, § 2011
 - when arising out of joint tenancies.....p. 3424, § 2012
- constructive trusts, in generalp. 3425, § 2013
 - money equitably belonging to another.....p. 3428, § 2014
 - property in hands of third person.....p. 3429, § 2015
- fiduciary persons purchasing with trust fundsp. 3434, § 2016
- fiduciary persons renewing leasesp. 3435, § 2017
- money expended on improvements.....p. 3435, § 2018

Uses. See also TRUSTS.

- uses at common law.....p. 3368, § 1973
- shifting uses.....p. 3369, § 1973
- springing uses.....p. 3369, § 1973
- statute of uses in the United States.....p. 3369, § 1974
 - exceptions to statute— chattels or chattel interestsp. 3370, § 1975
 - use upon a use.....p. 3371, § 1976
 - active or special uses.....p. 3371, § 1977
 - when are uses active and when passive.....p. 3371, §§ 1977-1979
 - trusts for married women.....p. 3373, § 1978

Warehousemen.

- liabilities of.....p. 2962, § 1732

Wharfingers.

- liabilities of.....p. 2692, § 1732

